

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA NETTLE,

Plaintiff-Appellant,

v

KIMCO-CLAWSON 143, INC.,

Defendant-Appellee.

UNPUBLISHED

July 12, 2005

No. 260494

Oakland Circuit Court

LC No. 2004-056308-NO

Before: Cooper, P.J., and Hood and R.S. Gribbs*, JJ.

PER CURIAM.

In this premises liability case, plaintiff Sandra Nettle appeals as of right from the circuit court's orders granting defendant Kimco-Clawson 143, Inc. summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was shopping at a strip mall owned by defendant when she tripped and fell on a sidewalk on the premises. Plaintiff alleged that she caught her toe between two slabs of concrete which differed in height by approximately one-quarter of an inch. The trial court dismissed plaintiff's negligence claim, finding that the condition of the sidewalk was open and obvious and that no special aspects rendered the sidewalk unreasonably dangerous. The trial court also dismissed plaintiff's claim seeking reimbursement from defendant, pursuant to its insurance policy.

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.¹ A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.² "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we

¹ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

² *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). The trial court did not specify the subrule upon which its grant of summary disposition was based. However, as the trial court relied on the documentary evidence submitted, we treat the motion as one under MCR 2.116(C)(10).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists.”³ Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.⁴

I. Open and Obvious Defect

Plaintiff argues that the trial court erred in concluding that the irregularity in the pavement was an open and obvious condition. We disagree.

“[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.”

A special aspect exists when the danger, although open and obvious, is unavoidable or imposes a “uniquely high likelihood of harm or severity of harm.” Pursuant to *Lugo [v Ameritech Corp]*, a court must “focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff” or other idiosyncratic factors related to the particular plaintiff.^[5]

Plaintiff asserts that the uneven condition of the two slabs of concrete was a hidden danger. Plaintiff points to the deposition testimony of defendant’s agents asserting that they repeatedly failed to discover the elevated concrete despite continuous inspections of the property. Based on this evidence, plaintiff arguably created a question of fact that this condition was not open and obvious.

However, plaintiff has not established that, even if the condition was hidden, the sidewalk was so dangerous as to impose liability. This Court and the Michigan Supreme Court have found that differing surface levels, such as steps and uneven pavement, “are ‘not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous.’”⁶ The pictures submitted into evidence show that there are noticeable gaps between the slabs and there are several cracks in the concrete. A review of these pictures clearly shows that none of these conditions appear dangerous in any way. A small, unnoticeable

³ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

⁴ *MacDonald*, *supra* at 332.

⁵ *Bragan v Symanzik*, 263 Mich App 324, 331-332; ___ NW2d ___ (2004), quoting *Lugo v Ameritech Corp*, 464 Mich 512, 517-519, 523-524; 629 NW2d 384 (2001).

⁶ *Weakly v Dearborn Hgts*, 240 Mich App 382, 385; 612 NW2d 428 (2000), remanded on other grounds 463 Mich 980 (2001), quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (emphasis in original).

rise in elevation between two slabs of concrete on a generally imperfect walkway is not an unusual or dangerous condition that would trigger liability. Accordingly, the trial court properly dismissed plaintiff's claim.

II. Insurance

Plaintiff argues that defendant's insurance policy obliged defendant to cover her medical expenses from the fall. We disagree. Defendant was insured under a policy entitled "*Liability Policy*." The policy provides for the payment of medical expenses for a "bodily injury" arising "out of premises or operations for which [defendant is] afforded bodily injury *liability* coverage." Such coverage is available when "the insured becomes legally obligated to pay [damages] by reason of *liability* imposed by law or assumed under an insured contract." The trial court properly determined that defendant was not liable for the plaintiff's injury. Furthermore, plaintiff has not alleged that defendant assumed a contractual duty to pay damages to her. Accordingly, the trial court properly determined that defendant had no duty to pay damages to plaintiff simply because it was insured.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs