

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BEVERLY GALLIHER,

Plaintiff-Appellee,

v

TRINITY HEALTH-MICHIGAN, d/b/a ST.  
JOSEPH MERCY OAKLAND,

Defendant-Appellant.

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UNPUBLISHED

August 2, 2007

No. 267185

Oakland Circuit Court

LC No. 04-061389-NO

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant hospital appeals by leave granted from the trial court order denying defendant's motion for summary disposition under MCR 2.116(C)(10) on plaintiff's personal injury claim for damages based on a theory of premises liability. We affirm.

Plaintiff and her 14-year-old granddaughter, who was treated for an asthma attack at defendant hospital, were returning to their car in defendant's parking lot when plaintiff stepped into a pothole and fell on her side, sustaining injuries requiring treatment. According to both plaintiff and her granddaughter, it was dark, the parking lot was not lighted, and there were shadows from the surrounding hospital buildings. Although they were looking where they were walking, they could not see what was on the ground because it was too dark. Plaintiff's granddaughter testified that, after plaintiff fell, she "got down really, really close" to the ground and was able to see the pothole into which plaintiff stepped.

Plaintiff sued defendant for damages on a premises liability theory, alleging that the pothole was not visible because it was dark outside and the area was inadequately lighted. Defendant moved for summary disposition, arguing that the pothole was open and obvious and that there was sufficient light for plaintiff to have seen the pothole. The circuit court denied defendant's motion for summary disposition, reasoning:

It is true that "potholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." Here, however, Plaintiff presents evidence that the pothole in question was not easily discernible because of the shadows cast by the building. Plaintiff's Exhibit F contains

photographs of the area that reflect shadowing despite the sunny conditions. The only eyewitnesses to the incident were Plaintiff and her granddaughter.

Viewing the evidence in a light most favorable to Plaintiff, the Court finds that the evidence offered by Plaintiff creates a question of fact regarding whether the pothole was open and obvious. There is a question of fact as to whether “an average user with ordinary intelligence [would] have been able to discover the danger [that is, the pothole in the parking lot that was obscured by shadows] and the risk presented upon casual inspection.” The Court notes that Plaintiff and her granddaughter maintain that they did not discover the condition. Defendant does not present evidence to rebut their testimony.”

Defendant applied for leave to appeal, which this Court denied because defendant did not show the need for immediate appellate review. Defendant then applied to our Supreme Court for leave to appeal. The Supreme Court, in lieu of granting leave, remanded this case to this Court for consideration as on leave granted.

Defendant argues that the trial court should have granted summary disposition because the pothole was open and obvious and there was no exception to the defense. Defendant also argues that the evidence that plaintiff submitted establishes that the pothole was an ordinary pothole that should have been discoverable by an average person of ordinary intelligence upon casual inspection. Moreover, defendant maintains that the alleged darkness was insufficient to preclude application of the open and obvious doctrine because plaintiff should have anticipated the pothole as a common condition of a parking lot.

In response, plaintiff presented evidence that it was dark, there was no artificial lighting, and there were shadows falling on the parking lot from the hospital buildings. Plaintiff contends that this evidence creates genuine issues of material fact as to whether the pothole was open and obvious to an average user upon casual observation and precludes the grant of summary disposition.

This Court reviews de novo the grant or denial of summary disposition. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 567; 702 NW2d 539 (2005). Under MCR 2.116(C)(10), summary disposition is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

The possessor of premises has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, if the invitee knows of the danger or, because of the obviousness of the danger the invitee can reasonably be expected to discover it, the premises possessor does not owe a duty to warn or protect the invitee unless the premises possessor should anticipate the harm despite the invitee's knowledge of it. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Thus, “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.” *Lugo, supra* at 517. A condition is

open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002). When analyzing a premises liability claim, "the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff." *Mann v Shusteric Enterprises*, 470 Mich 320, 329; 683 NW2d 573 (2004).

A condition that normally would be discoverable by an average user of ordinary intelligence upon casual inspection may not be open and obvious if the hazard is not discoverable upon casual inspection because of darkness. See *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997); *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000); *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119; 492 NW2d 761 (1992). In this case, the critical issue is whether the absence of natural light and illumination from other lighting sources can cause an otherwise open and obvious condition to be hidden for purposes of premises liability.

Viewed in the light most favorable to plaintiff, the evidence was sufficient to establish a genuine issue of material fact regarding the open and obvious nature of the pothole. Plaintiff presented evidence that a rather large, deep pothole existed in defendant's parking lot, that plaintiff did not see the pothole even though she looked where she was walking, that the pothole could have been seen had there been adequate illumination, whether natural or artificial, and that at the time of the fall it was dark and there was no artificial light in the area. Even though a pothole is typically open and obvious, in light of the testimony of plaintiff and her granddaughter regarding the visibility of the pothole under the lighting conditions as they existed at the time of plaintiff's fall, we agree with the trial court that plaintiff established a question of fact regarding whether the pothole was open and obvious.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O'Connell