

STATE OF MICHIGAN
COURT OF APPEALS

JANET BANDERA,

Plaintiff-Appellant,

v

DOLLAR TREE STORES INC,

Defendant-Appellee.

UNPUBLISHED

October 25, 2005

No. 263307

Macomb Circuit Court

LC No. 04-003249-NO

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff suffered injuries when she fell in defendant's parking lot. She was leaving the store carrying a bag when she tripped over a concrete parking blockade near the exit. Photographs indicate that the parking blocks were approximately four inches high and painted yellow. In her deposition, plaintiff stated that she could not see the block because her view was blocked by the bag she carried. She acknowledged that she could have seen the blocks had she not been carrying the bag, but also maintained that the blocks were obscured by the shadow cast by the building.

Defendant moved for summary disposition on the ground that the block over which plaintiff tripped constituted an open and obvious condition. The trial court granted the motion, finding that the dangerous condition was open and obvious, notwithstanding plaintiff's proffered evidence of defendant's subsequent changes to the parking lot and photographic evidence that showed lessened visibility in the area when it was shadowed by the building.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A landowner 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, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, a premises possessor is not generally required to protect an invitee from open and obvious danger. *Id.* The question of whether a condition is “open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection.” *O’Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). “Because the test is objective, this Court ‘looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.’” *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Only when a condition on the land contains “special aspects” that render it unreasonably dangerous despite its open and obvious nature, such as when it is “effectively unavoidable” or presents a “uniquely high likelihood of harm or severity of harm if the risk is not avoided,” does a landowner continue to owe a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517-519; *Joyce, supra* at 240.

We affirm. Plaintiff’s deposition testimony and the photographs support the trial court’s finding that reasonable persons could not disagree that the condition was open and obvious. The concrete blocks are painted to allow a sharp contrast to the parking lot. Plaintiff admitted that she would have seen the blocks had she not been carrying her bag, and that she did not watch where she stepped.¹ It is reasonable to conclude that she would not have been injured had she been watching her step. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999).²

Nor can plaintiff present any “special aspects” that would prevent defendant from relying on the open and obvious doctrine. The fact that plaintiff was carrying her bag when she tripped was not a special aspect of the lot or the parking blocks. The blocks did not cover the entire span in front of the door and could have been avoided had plaintiff seen them. They were not an unusual feature of the lot, and could not reasonably be said to create a “uniquely high likelihood of harm or severity of harm if the risk is not avoided.” *Lugo, supra* at 519.

¹ Plaintiff maintains that the condition was not obvious because the shadows thrown by the building obscured the block. However, even as plaintiff discussed the shadows, she admitted that she did not see the blocks because she did not look down. The photograph attached to plaintiff’s appellate brief showing the shadow obscuring the blocks is not in color, was taken from some distance away, and consists of a poor reproduction. Nevertheless, the block is still visible in the picture.

² The fact that defendant subsequently chose to place an arguably more obvious parking barrier in the lot is not dispositive, as plaintiff contends. Furthermore, the admissibility of the photograph evidence is not obvious under the circumstances. MRE 407.

Affirmed.

/s/ Michael J. Talbot

/s/ Helene N. White

/s/ Kurtis T. Wilder