

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN ADAMS,

Plaintiff-Appellant,

v

K-MART CORPORATION,

Defendant-Appellee.

UNPUBLISHED

March 1, 2007

No. 271819

Wayne Circuit Court

LC No. 05-514368-NO

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

In this slip-and-fall case, plaintiff appeals by right from the circuit court's order granting summary disposition to defendant. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

In June 2002, plaintiff parked in defendant's lot and approached the store. As he did so, he encountered a section of curbing and sidewalk with irregular and uneven surfaces, lost his balance, and fell. Plaintiff brought suit alleging negligence. Defendant sought summary disposition on the ground that the condition of the area was open and obvious. The trial court agreed and granted the motion.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.*

The parties do not dispute that plaintiff came to defendant's premises as a business invitee, and thus that defendant's duties to him were of the highest order.

An "invitee" is a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make it safe for the invitee's reception. The landowner has a duty of care, not only to warn the invitee of any known dangers, but to also make the premises safe, which requires the landowner to actually inspect the premises, and depending upon the circumstances, to make any necessary repairs or to warn of any discovered

hazards. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000) (internal punctuation and citations omitted).]

“However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). See also *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999).

In *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), our Supreme Court stated that while the scope of the land possessor’s duty may be limited, “the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care.” *Id.* at 611. Citing with approval 2 Restatement of Torts, 2d, §§ 343, 343A, the *Bertrand* Court stated as follows:

[I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. [*Bertrand, supra* at 611 (emphasis in original).]

Thus, business inviters are not liable to invitees for injuries resulting from open and obvious hazards except where the inviters should expect their invitees to confront hazards that despite their open and obvious nature present special aspects that render them either effectively unavoidable or unreasonably dangerous because the special aspects create an unreasonably high risk of severe harm. *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001).

In this case, plaintiff asserts only that the conditions of which he complains were not open and obvious; he does not assert some special aspect caused him to choose to hazard them even so.

Whether a hazard is open and obvious depends on whether an average user of ordinary intelligence would have been able to discover the danger it presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). In this case, we have examined the photographs of the defective conditions at issue that plaintiff provided and conclude that they do indeed show an open and obvious condition. Uneven walking surfaces do not normally engender liability. “[S]teps and differing floor levels [are] not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous.” *Bertrand, supra* at 614.

In the products liability context, the obviousness of a hazard is a function of “the typical user’s perception and knowledge and whether the relevant condition or feature that creates the danger associated with use is fully apparent, widely known, commonly recognized, and anticipated by the ordinary user or consumer.” *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 392; 491 NW2d 208 (1992). This reasoning applies to premises liability cases as well. *Novotney, supra* at 474.

According to plaintiff, he did not trip over the curb in question; he stepped on it, lost his balance because of its irregularities, then was unable to regain his balance because of the upheaval of the concrete of the adjacent sidewalk. Plaintiff argues that the defects in the curb were not open and obvious because yellow paint obscured them. The photographic exhibits with which plaintiff supports this argument, to our eyes, suggest otherwise. Even where the yellow paint rendered the two differing levels of curbing and the gap between them uniform in color, those differing levels, plus some crumbling at the edges, remain plain to see.

Plaintiff additionally asserts that the obtruding sidewalk pavement was not apparent from his angle of approach. But, again, plaintiff's own photographic exhibits prove otherwise. They consistently show a degree of decay in that walkway that would put a reasonable pedestrian on notice that it was not an entirely reliable surface. And if the full extent of the defect were not apparent as plaintiff approached, by the time he chose to hazard the uneven and crumbled curb, the irregularities in the adjacent sidewalk were wholly apparent.

For these reasons, we agree with the trial court that the defective conditions of which plaintiff makes issue were open and obvious.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder