

STATE OF MICHIGAN
COURT OF APPEALS

FRANK BURLAK,

Plaintiff-Appellant,

v

LAUTREC LTD., THORNBERRY
APARTMENTS, L.L.C., and THORNBERRY
APARTMENTS OPERATING, L.L.C.,

Defendants-Appellees.

UNPUBLISHED

June 15, 2010

No. 290616

Oakland Circuit Court

LC No. 08-089182-NO

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff tripped and fell over a concrete crack that raised the concrete slab approximately two inches off the roadway. On appeal, plaintiff argues that the trial court should not have granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) because a genuine issue of material fact exists regarding whether the uneven concrete crack was open and obvious and whether special aspects existed. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. A court reviews the motion by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Id.* Additionally, this Court considers only that evidence which was properly presented to the trial court in deciding the motion. *Peña v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. A genuine issue regarding a material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In a premises liability action, the plaintiff must prove that: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty caused

the plaintiff's injuries; and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). In general, a premises possessor owes a duty of reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). But, this duty does not generally encompass removal of dangers that are open and obvious. *Id.*

The test for whether a hazard is "open and obvious" is objective. *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002). "The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection?" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This means the test is not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. *Kennedy*, 274 Mich App at 713. Michigan courts have generally held that accidents involving commonly occurring defects, such as differing floor levels and steps, are not actionable unless there is something unusual about the uneven floor or steps. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-615; 537 NW2d 185 (1995).

In looking at the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether the uneven concrete crack in the roadway was open and obvious. Plaintiff admitted that he could see the uneven concrete crack, and he walked by this location at least one hundred times to get his mail from the apartment mailbox. This accident occurred in the middle of the afternoon, and plaintiff stated nothing distracted him while he was walking to his mailbox. This was a typical uneven concrete crack in the middle of the roadway, and there was nothing unusual or different about this uneven crack that would cause a reasonable person not to expect it. A reasonable person would have been able to see the uneven concrete crack, and, indeed, plaintiff did. It was open and obvious.

Furthermore, special aspects regarding the uneven concrete crack did not exist to preclude the application of the open and obvious doctrine. The special aspects of a risk must be more than merely imaginable or based only on a plaintiff's own idiosyncrasies. *Id.* at 518 n 2.

In looking at the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether special aspects existed regarding the uneven concrete crack in the roadway. Because plaintiff could have chosen to walk around the uneven concrete crack or watched where he stepped, the uneven concrete crack was not effectively unavoidable. Therefore, the record provided does not raise a question of fact regarding whether the uneven concrete crack was open and obvious, or whether special aspects existed.

Plaintiff further argues that the statutory duty imposed by MCL 554.139 precludes the application of the open and obvious doctrine in this case. We disagree. Although not properly preserved below, this issue involves statutory interpretation that is a question of law. *Auto-Owners Ins Co v Dep't of Treasury*, 226 Mich App 618, 621; 575 NW2d 770 (1997). This Court may review questions of law if the facts necessary for resolution of the issue are presented. *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007). Questions of law are reviewed de novo on appeal. *Allison*, 481 Mich at 424.

MCL 554.139 provides:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

A defendant cannot use the open and obvious doctrine to avoid liability when he has a statutory duty pursuant to MCL 554.139(1)(a) or (b) to maintain the premises. *Allison*, 481 Mich at 425 n 2. These statutory duties that arise from the existence of the lease are in addition to the common law duty. *Id.* at 425. Because a breach of MCL 554.139 would be considered a breach of the lease, any remedy for the breach of the lease terms pursuant to MCL 554.139 would be a contract remedy. *Allison*, 481 Mich at 425-426. Thus, MCL 554.139 does not preclude the common law duties of a premises owner, but rather, provides additional protection for tenants.

MCL 554.139(1)(a) imposes a duty on the landlord to ensure that “the premises and all common areas are fit for the use intended by the parties.” Defendants admit that the private roadway at issue in this case was designed to be both a sidewalk for tenants and a roadway for driving vehicles. Further, defendants admit that the roadway constitutes a “common area” for the purposes of determining duty under MCL 554.139(1)(a). Thus, the only remaining question is whether the roadway in this case was fit for the use intended by the parties. The intended use of a sidewalk is for walking, and, employing a similar logic, the intended use of a roadway is for driving a vehicle. See *Benton v Dart Properties, Inc*, 270 Mich App 437, 444; 715 NW2d 335 (2006). The roadway at issue here runs from east to west, and consists of two concrete slabs that lay parallel to each other in sections. Together, these sectional concrete slabs form a typical looking concrete roadway. The photographs reveal that the uneven concrete crack in the roadway is in the middle of the roadway, where the concrete slabs meet. In looking at the photographs, it appears that the uneven concrete crack has been formed from the deterioration of a small portion of the edge of the concrete slabs, which also resulted in an approximately two-inch variance between the concrete slabs. However, the overall surface of the roadway appears to be in good repair, with no major cracks or potholes, so, it is suitable for both walking and driving. Because tenants are able to both walk and drive on the concrete slabs forming the roadway, it is fit for its intended use. Thus, defendants have not breached their duty to plaintiff under MCL 554.139(1)(a).

MCL 554.139(1)(b) imposes a duty on the landlord “[t]o keep the premises in reasonable repair . . .” Our Supreme Court has distinguished “the premises” from “all common areas” and held that MCL 554.139(1)(b) applies only to the former. See *Allison*, 481 Mich at 431-432. “Premises” is defined as “‘a tract of land including its buildings’ or ‘a building or part of a building together with its grounds or other appurtenances[.]’” *Id.* at 432, quoting *Random House Webster’s College Dictionary* (1997). The *Allison* Court found that parking lots are not part of the premises, but rather, only a “common area.” *Id.* at 435. Likewise, a roadway used for walking and driving is not part of the premises because it is a common area of the property that

the landlord retains control of and is shared by two or more of the tenants. *Id.* at 427. Because MCL 554.139(1)(b) only imposes a duty on landlords to keep the premises in reasonable repair, and not the common areas, it is inapplicable to the roadway in this case. *Allison*, 481 Mich at 435. Thus, defendants had no duty to plaintiff pursuant to MCL 554.139(1)(b). We conclude the record does not raise a material question of fact regarding whether defendants' breached the duties imposed by MCL 554.139.

We affirm. As the prevailing parties, defendants may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Alton T. Davis