

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

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MARY MALEC,

Plaintiff-Appellant,

v

LIVONIA MALL MERCHANTS  
ASSOCIATION, INC., d/b/a LIVONIA MALL,  
LIVONIA MALL MANAGEMENT, L.L.C., d/b/a  
LIVONIA MALL, and LIVONIA MALL, L.L.C.,  
d/b/a LIVONIA MALL,

Defendants-Appellees.

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UNPUBLISHED  
October 14, 2010

No. 292989  
Wayne Circuit Court  
LC No. 07-709691-NO

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition. We affirm.

This action arises out of injuries sustained by plaintiff when she fell in the parking lot of Livonia Mall over a depression in the asphalt that was at least 15 feet long, seven inches wide and three to four inches deep. The depression ran between two telephones poles and had apparently been excavated and then refilled to some extent with asphalt. On appeal, she argues that this defect was not open and obvious. We disagree.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews "a motion under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Moreover, the Court considers only "what was properly presented to the trial court before its decision on the motion." *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition "is appropriate 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.

“In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff's injuries, and (4) that the plaintiff suffered damages.” *Kennedy v Great Atl & Pac Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Different standards of care are owed depending on plaintiff's relationship to the land. *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003). In this case, plaintiff was a business invitee:

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 Court of Appeals correctly recognized that invitee status is commonly afforded to persons entering upon the property of another for business purposes. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

However, this standard has limits. “A premises possessor is generally not required to protect an invitee from open and obvious dangers.” *Kennedy*, 274 Mich App at 713. The test for open and obvious is an objective one:

The test to determine if a danger is open and obvious is whether “an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]” Because the test is objective, this Court looks not to whether a particular plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his or her position would have foreseen the danger. [*Id.*, citing *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).]

Plaintiff argues that under this objective test, the depression was not open and obvious. She argues that because of an optical illusion effect, the depression appeared to be a grey line on the cement. Further, the objective nature of this optical illusion is evidenced by the testimony of her son, John Malec, who also saw the depression, but believed it to be a grey line. Plaintiff also argues that because John, a reasonable person, also did not see the depression, and because Dr. Terence W. Campbell opined that the generic person would not have seen the depression, it is not open and obvious under the objective test. We disagree.

Under the objective test, the parking lot depression was open and obvious. In *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), the Court held that a pothole in a parking lot, “is open and obvious and, thus, cannot form the basis of liability against a premises possessor. The condition does not involve an especially high likelihood of injury. Indeed, an ‘ordinarily prudent’ person, would typically be able to see the pothole and avoid it.” *Id.* at 520. Though, in this case, the defect was a “depression,” and not a pothole, per se, the two are similar. Indeed, regardless of cause, both are merely imperfections in pavement, a typical occurrence. Moreover, this depression was at least 15 feet long, seven inches wide, and three to four inches deep, quite a sizable depression, perhaps more easily recognized than a pothole.

Likewise, in *Kennedy*, the plaintiff fell after stepping on crushed grapes on the floor of a grocery store. The Court held, “[the] plaintiff's own deposition testimony establishes that he would have noticed the potentially hazardous condition had he been paying attention. The

plaintiff failed to raise a genuine issue of fact concerning whether the grape residue on which he slipped was open and obvious.” *Kennedy*, 274 Mich App at 714. Similarly, in this case, plaintiff testified that the depression “blended in with the parking lot.” After plaintiff fell, she looked around to see what she had tripped on, and “noticed that there was a big—you know, in the pavement, it looked like somebody was digging for something, you know.”

Thus, as in *Kennedy*, although plaintiff did not see the defect before sustaining an injury, the defect was ultimately discoverable. “[W]here 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 Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A defendant does not owe a duty to an invitee when the defect was unnoticed, but not undiscoverable. “[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.” *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). As the pothole was open and obvious in *Lugo*, and the grapes were open and obvious in *Kennedy*, so too is the depression at issue here.

Though plaintiff argues, “Dr. Campbell’s affidavit states that any generic person unfamiliar with the area would have been stricken by the same optical illusion [as struck plaintiff],” this is not what Dr. Campbell actually stated. In his affidavit, Dr. Campbell concluded, “[t]he manner in which figure and ground merged imperceptivity with each other amounted to an optical illusion for *Ms. Malec*.” (Emphasis added.) In *Novotney*, the plaintiff slipped and fell on an unmarked change in elevation on a parking lot surface. *Novotney*, 198 Mich App at 475-476. At the trial, a safety expert testified that the change should have been marked with paint. *Id.* at 475. However, the Court held, “the question is . . . whether the ramp was noticeable in its existing condition. Nowhere in his affidavit does the expert opine that the ramp was not noticeable by the ordinary user.” *Id.* at 475-476. Likewise, here, plaintiff misstates the content of Dr. Campbell’s affidavit. Rather, his affidavit only supports plaintiff’s testimony that she herself did not see the depression, and not that the depression could not be seen.

Plaintiff also cites *Bialick v Megan Mary, Inc*, 286 Mich App 359; 780 NW2d 599 (2009), arguing that, under *Bialick*, plaintiff’s perception that the depression was not open and obvious must be given weight when determining whether the open and obvious doctrine applies. However, that case does not benefit plaintiff. In *Bialick*, the plaintiff slipped and fell on an unmarked pool of water in a gas station convenience store. *Id.*, at 360. The defendant argued, and the trial court found, that “wet tiles on a misty day are open and obvious.” *Id.*, at 361 n 1. This Court held that there was a genuine question of fact regarding whether the wet floor was open and obvious, and rejected the idea that the drizzly weather outside should have served as a warning to the plaintiff. *Id.*, at 364. Further, in a footnote, the Court stated that while the open and obvious test is objective, the observations made by the plaintiff “are relevant to the court’s determination whether there was a hazard.” *Id.* at 364 n 2.

The trial court’s ruling in this case does not contradict *Bialick*. Indeed, the trial court did consider the observations and testimony of plaintiff, her son, and Dr. Campbell: “[T]he Court accepts that the depression amounted to an optical illusion for [plaintiff]. However, the test to

determine whether a danger is open and obvious is an objective test that is unrelated to the actual perceptions of a particular plaintiff.” The court’s decision to consider, but ultimately not be swayed by, the testimony of plaintiff is not evidence that her testimony was ignored, or that the open and obvious test was improperly applied.

Plaintiff next argues that the open and obvious doctrine should not apply because special aspects rendered the trench unreasonably dangerous. We disagree.

In the event that a defect is open and obvious, there may still be premises liability if the defect is unreasonably dangerous due to “special aspects” “that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm.” *Lugo*, 464 Mich at 517-518. In *Lugo*, the Court cited standing water near the only exit of a building, or a 30-foot pit in a parking lot as examples of defects having “special aspects.” The standing water has special aspects, and is unreasonably dangerous, because it represents an unavoidable defect, and the 30-foot pit because, though open and obvious, it represents a significant risk of death or severe injury. *Id.* “In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Id.* at 518-519.

Plaintiff argues that the depression in the parking lot had special aspects rendering it unreasonably dangerous. Plaintiff contends that the depression was both unavoidable, as it was allegedly over 100 feet long, and severely dangerous, as evidenced by the injuries she sustained. She also notes that these special aspects are compounded and foreseeable because customers often carry packages in the parking lot. We disagree.

First, the depression was not unavoidable. Indeed, the plaintiff did not see the depression while entering the store because she took a different route. Plaintiff testified, “[w]hen we came back out [of the store], we took another route, because we went out that door, and we came back the side door.” Further, plaintiff’s son testified that he did not walk over the depression while entering the store, because on the way out, “[they] were exiting the store at another exit.” Therefore, not only was the depression avoidable to customers using the parking lot generally, but also to customers parked in the place where plaintiff’s car had been.

Second, the depression did not represent significant risk of death or injury. In a footnote, the *Lugo* Court advised, “[i]t would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm.” *Lugo*, 464 Mich at 519. Rather, the defect must contain “special aspects” causing it to be unreasonably dangerous, independent of plaintiff’s particular circumstances. In addition, the *Lugo* Court made clear that its example of a 30-foot pit in a parking lot is unreasonably dangerous not because it is a pit, but because it is 30 feet deep:

However, typical open and obvious dangers (such as ordinary potholes in a parking lot) do not get [sic] rise to these special aspects. Using a common pothole as an example, the condition is open and obvious and, thus, cannot form the basis of liability against a premises possessor. The condition does not involve an especially high likelihood of injury. Indeed, an “ordinarily prudent” person . . . would typically be able to see the pothole and avoid it. Further, there is little risk

of severe harm. Unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury. [*Id.* at 520.]

Thus, even if carrying packages, an ordinarily prudent shopper could detect the depression upon casual examination of the parking lot. In this case, the depression was three to four inches deep, not 30 feet deep, and is therefore more like a pothole than a deep pit. Typical imperfections and potholes in parking lots do not present severe risks of harm. Consequently, this depression does not have special aspects.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Patrick M. Meter