STATE OF MICHIGAN

COURT OF APPEALS

FRANCESCA THOMAS,

Plaintiff-Appellant,

v

CITY OF WARREN,

Defendant,

and

KANE REAL ESTATE INVESTMENTS 2 LLC,

Defendant-Appellee.

UNPUBLISHED
February 9, 2023

No. 361529
Macomb Circuit Court
LC No. 2020-003316-NO

Before: M. J. KELLY, P.J., and BOONSTRA and SWARTZLE, JJ.

PER CURIAM.

Plaintiff, Francesca Thomas, appeals as of right the trial court order granting defendant, Kane Real Estate Investments 2 LLC, summary disposition under MCR 2.116(C)(10). Because there are genuine issues of material fact with regard to whether the hazardous condition on Kane Real Estate's property was open and obvious, we reverse.

I. BASIC FACTS

In June 2020, Thomas visited the home of her longtime friend, Arkeshia Barnes.[1] Barnes was renting the premises from Kane Real Estate Investments 2, LLC. When she arrived, Thomas

[1] There is some discrepancy as to the dates in question. Thomas testified that she arrived on June 20, 2020, at approximately 8:00 p.m. when it was light out, and that she left at midnight. Based on Thomas's testimony, it would seem that she left the home on June 21, 2020; however, Barnes testified that after Thomas left Thomas texted her a photograph of her injured toe and that the time stamp for the text was 12:38 a.m. on June 20, 2020. Therefore, it seems likely that Thomas arrived on June 19, 2020, and that she was injured on June 20, 2020, as she was leaving Barnes' residence.

parked on the street and walked across the grass to reach Barnes' residence. She left Barnes' residence at approximately midnight. Rather than traverse the grass in the dark, Thomas walked down Barnes' paved driveway and, as she reached the sidewalk, she stubbed her left "big toe" on a raised section of pavement. The record reflects that the driveway was approximately 2" lower than the sidewalk. Thomas agreed that the vertical height differential—also referred to as a "lip"—was "clear and obvious" in daylight, but she testified that she had been unable to see it before or after she stubbed her toe because it was too dark.

On September 18, 2020, Thomas filed suit against Kane Real Estate Investments 2, LLC and against the City of Warren. The claim against the City was resolved. Subsequently, Kane Real Estate Investments 2, LLC moved for partial summary disposition on Thomas's claims for violation of MCL 554.139(1), gross negligence and willful and wanton misconduct, and nuisance. The court granted that motion.

Kane Real Estate Investments 2, LLC then moved for summary disposition on Thomas's premises liability claim, arguing that the claim should be dismissed because the allegedly hazardous condition was open and obvious and lacked any special aspects. In support, Kane Real Estate Investments 2, LLC highlighted testimony from witnesses who stated that they could see the height differential if they looked for it and could avoid it by simply stepping over it. In response, Thomas maintained that the condition could be seen in daylight, but that it could not be seen in the dark. She argued that because it was dark and the area where she injured herself was inadequately lit, there was a question of fact with regard to whether the hazard was open and obvious. Following oral argument, the trial court granted Kane Real Estate Investments 2, LLC's second motion for summary disposition under MCR 2.116(C)(10).

II. SUMMARY DISPOSITION

Thomas argues that the trial court erred by granting summary disposition to Kane Real Estate Investments 2, LLC. A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). On a de-novo review, the issue is reviewed independently, with no deference given to the lower court. *Bowman v Walker*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 355561); slip op at 2. When reviewing a motion brought 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." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). The motion "may only be granted when there is no genuine issue of material fact." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks, citation, and alteration omitted). "It is well settled that the circuit court may not weigh the evidence or make determinations of credibility when deciding a motion for summary disposition." *Patrick*, 322 Mich App at 605 (quotation marks, citation, and alteration omitted). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Id.*

B. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012) (quotation marks and citation omitted). "[A] premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee 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). That duty does not, however, extend to a hazardous condition that is open and obvious, unless "special aspects of that condition make even an open and obvious risk unreasonably dangerous . . . ." *Id*. at 516-517. "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." *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). "This is an *objective standard*, calling for an examination of the objective nature of the condition of the premises at issue." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (quotation marks and citation omitted).

Thomas argues that the 2-inch height vertical differential was not discoverable upon casual inspection at the time that she encountered it. Specifically, in her deposition, she testified that as she was leaving Barnes' residence she could see the driveway and the cement; however, she could not see the 2-inch lip because it was too dark. Thomas presented evidence that, at the time of the incident, she was paying attention to where she was walking; she described walking "straight" down the driveway and noted that she was "looking down the driveway" while she walked. Finally, Thomas stated that there is not a streetlight near the location where she was injured, nor was there other lighting in the area. Although there is evidence that there was a streetlight on the left side of the house and that there were garden lights around the shrubs on the property, there is no testimony or other documentary evidence indicating that the light illuminated the area where Thomas stumbled. Having considered the evidence regarding the darkness, the lack of adequate lighting, and the affect of both on the visibility of the 2-inch lip before and after Thomas stubbed her toe, we conclude that there is a genuine question of material fact with regard to whether the allegedly hazardous condition was open and obvious at the time of the incident. See *Abke v Vandenberg*, 239 Mich App 359, 362; 608 NW2d 73 (2000) (determining that whether an alleged hazard is open and obvious is affected by the lighting conditions in the area and that a motion for directed verdict or judgment notwithstanding the verdict is inappropriate if there are questions of fact regarding whether the area where the plaintiff fell was dark or whether it was adequately lit). See also *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 127-128; 492 NW2d 761 (1992) (stating that the lack of adequate lighting rendered a danger that might otherwise have been open and obvious a hidden danger for which the plaintiff was neither aware of nor had reason to anticipate).[2]

[2] Kane Real Estate Investments 2, LLC contends that *Abke* and *Knight* are factually distinguishable because the conditions encountered in those cases were more dangerous than the mere 2-inch lip

Kane Real Estate Investments 2, LLC had not directed this Court to any evidence refuting Thomas's testimony that it was dark, her evidence that the area was not adequately lit, and that she could not see the 2-inch lip before or after her injury because it was too dark. Instead, Kane Real Estate Investments 2, LLC, points to Thomas's testimony that she could see the sidewalk and the cement. The ability to see general features of the area, such as the driveway and the cement, however, does not mean that every detail of the driveway and the cement was apparent in the dark.

Next, Kane Real Estate Investments 2, LLC directs this Court to testimony that a City of Warren engineering technician testified that he examined the area where Thomas stumbled and that, in his opinion, the 2-inch lip was "readily observable" and "obvious to see." However, the engineer also testified that he did have an opinion as to whether the lip would be visible around midnight because he did not know if there was public lighting or house lighting. He added that the appropriateness of the nearby street lighting was not part of his examination. Thus, the engineer's testimony does not allow for a reasonable inference that the lighting conditions were adequate or that the allegedly hazardous condition would have been visible upon casual inspection at night. Similarly, Kane Real Estate Investments 2, LLC points out that both Timothy Kane and Julie Kane, the property managers, testified that they had no difficulty seeing the lip when they were at the property. However, there is nothing on the record indicating that either Timothy or Julie Kane could readily observe the lip when it was dark outside. Thus, like the engineer's testimony, their testimony creates no factual question with regard to whether the condition would be visible upon casual inspection at night and whether the lighting conditions in the area were adequate to illuminate the hazard.

Kane Real Estate Investments 2, LLC also notes that Barnes testified that she had no trouble seeing the condition of the driveway, including the 2-inch lip where it intersected with the sidewalk. Yet, Barnes also testified that she took a nighttime photograph of her driveway from the porch. She indicated that she could not see the lip from the porch, but acknowledged that she could see a "line" in the area. The photograph does, in fact, depict a dark line in the area where the driveway appears to intersect with the sidewalk. The exact nature of the line, however, is unclear. Moreover, Thomas opined that, based upon her experience taking photographs at night, the flash had been used when the photograph was taken. Accordingly, although this evidence would support a finding that the lip would be visible upon causal inspection in the dark, it does not directly refute Thomas's testimony that it was too dark to see the 2-inch lip before or after she stubbed her toe on it. Thus, as the evidence must be viewed in the light most favorable to Thomas, the non-moving party, there is a genuine question of material fact with regard to the visibility level of the allegedly hazardous condition. The trial court, therefore, erred by summarily dismissing Thomas's premises liability claim.

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that Thomas stubbed her toe on in this case. However, neither case turned on the level of danger posed by the hazard. Moreover, given that the evidence in this case indicates that a ¾ inch rise in a sidewalk would pose a tripping hazard, the fact that there is a 2-inch vertical height differential between the driveway and the sidewalk allows for an inference that is a more significant variation is the pavement height than one would normally be expected to encounter.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Thomas may tax costs as the prevailing party. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Brock A. Swartzle

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BOONSTRA, J. (dissenting).

I respectfully dissent. I would affirm the trial court's well-reasoned opinion granting defendant's[1] motion for summary disposition under MCR 2.116(C)(10), on the ground that the alleged hazard was open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The parties agree, as plaintiff admitted in her deposition testimony, that the lip on which she stubbed her toe–where the driveway meets the sidewalk—is clearly visible during the daytime.[2] However, plaintiff argues that the lip's open-and-obvious nature was obviated by

[1] By "defendant," I mean defendant Kane Real Estate Investments 2 LLC, which owned and leased the single-family residence in the city of Warren that plaintiff was visiting at the time of the incident in question.

[2] Plaintiff testified that she arrived at the residence in question at approximately 8:00 p.m. on the evening of June 20, 2020, and that it was light out at that time. The tenant whom plaintiff was visiting testified, by contrast, that plaintiff arrived "late in the evening, maybe nine, eight, nine, it

nightfall and by what she now contends was inadequate lighting as of the time she departed the home around midnight on June 20, 2020. In that regard, plaintiff acknowledges that a landlord "doesn't have to supply lighting," but contends that a landlord is obliged to do so if it does not fix an otherwise-obvious hazard.

In that regard, I am compelled to note that, although the claimed inadequate lighting of the area has become the centerpiece of plaintiff's claim, plaintiff's complaint contains not one iota of allegation of any inadequacy of lighting. Moreover, and while I agree that the parties could have done more to develop the record—one way or another—as to the degree to which the various, available sources of lighting illuminated the area in question, the record reflects that those available sources of illumination included (a) a streetlight on the property in question; (b) an available front porch light and side porch light; and (c) shrubbery lighting; and (d) lighting on the garage. The record further reflects—and plaintiff agrees—that although defendant supplied various sources of lighting for the use of its tenant and the tenant's social guests (including plaintiff), neither plaintiff nor the tenant turned on the porch light when plaintiff departed the residence around midnight on the date in question.[3]

As the trial court noted, Michigan courts have held that the danger of tripping on uneven pavement or steps is generally an open and obvious one, absent special aspects. See, e.g., *Betrand v Alan Ford, Inc*, 449 Mich 606, 616; 537 NW2d 185 (1995) (describing uneven pavement as an "everyday occurrence"); *Weakley v City of Dearborn Hts*, 240 Mich App 382, 385; 612 NW2d 428 (2000) (noting that "steps and differing floor levels, such as . . . uneven pavement . . . are not ordinarily actionable *unless* unique circumstances surrounding the area in issue made the situation unreasonably dangerous") (citation and quotation marks omitted, emphasis in original). And while this Court has held that, under some circumstances, darkness can preclude the application of the open and obvious doctrine, the cases cited in support of doing so in this case, *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000), and *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 126; 492 NW2d 761 (1992), are distinguishable. *Abke* and *Knight* involved plaintiffs unexpectedly encountering darkened interior rooms with unexpected drop-offs; such a factual situation is far different from a mere common tripping hazard being obscured by typical and expected nighttime darkness. See *Weakley*, 240 Mich App at 385. Moreover, inadequate lighting may itself constitute an open and obvious condition. See *Singerman v Muni Serv Bureau, Inc*, 455

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was late," and that "it was already dark when she arrived." Sunset occurred in Warren, Michigan at 9:14 p.m. on June 20, 2020. See, e.g., http://www.suntoday.org/sunrise-sunset/2020/june/20.html.

[3] The tenant initially testified that plaintiff exited through the front door of the house and traversed a walkway from the front porch to the driveway; she then testified that plaintiff "probably" left via the side door and then traversed the driveway from there. Plaintiff testified that she exited from the side door. Either way, the record reflects that both the front door and the side door were equipped with porch lights, and the garage (which was located behind the side door) was equipped with additional lighting. Regardless of which door plaintiff used to exit the home, the record reflects that no one illuminated the porch light located at that exit; the record remains unclear whether the other porch light, the garage lights, or the shrubbery lighting were illuminated at the time of the incident.

Mich 135, 141l 565 NW2d 383 (1997) (noting that there was "nothing unusual about the inadequate lighting" at issue and that "[t]here was nothing to prevent plaintiff from realizing that the [area] was inadequately lighted").

I would hold that there is similarly nothing unusual about a portion of a residential driveway being dark at nighttime. Moreover, as noted, there was a nearby streetlight and other lighting supplied by defendant, including porchlights that neither plaintiff nor the tenant turned on as plaintiff was leaving the home. The home inspections and tenant checklists provided to the lower court make no mention of any non-functioning exterior lighting. In other words, plaintiff, having perceived that the driveway was dark, could have simply asked (or expected) her friend to turn on the available porchlights or to have otherwise provided illumination of the area; failing that, she could have taken a different route to her car, such as the one she took—across the lawn—upon arriving at the home that day.

Under these circumstances, I would hold that the alleged hazard was open and obvious. The lip of the driveway was open and obvious during the day, and the un-pleaded darkness that plaintiff now contends rendered it undiscoverable upon casual inspection was itself an open and obvious condition. *Lugo*, 464 Mich at 516. I note also that plaintiff, in her own deposition testimony, indicated that she was able to see the pavement of the driveway while walking on it before her fall and that there was nothing blocking her view, and further made very unclear statements regarding whether she was even looking where she was walking. Plaintiff also admitted that she had visited the residence on at least one earlier occasion; in her testimony regarding that earlier visit, she inconsistently asserted both that she walked "on the grass" and that she walked "close to the grass on the driveway" (which would have taken her across the very lip on which she later stubbed her toe). The tenant similarly testified that there was enough light for her to see where she was walking on the night in question. Therefore, I would conclude that plaintiff has not established a genuine issue of material fact that the alleged hazard was not discoverable on casual inspection. *Rubin*, 249 Mich App at 238.

The above is sufficient to warrant affirming the trial court. But I additionally note that while the record shows that both defendant and the tenant were aware of the driveway lip, defendant appears to have provided working outdoor lighting, the operation of which was under the control of the tenant, as is typical with respect to leased single-family residence homes. The lease agreement specifies that the tenant is, in any event, in charge of replacing light bulbs. The tenant admitted in her deposition that she had not turned on the available lighting. To the extent that the lip of the driveway was a dangerous condition on the land, it is difficult to see how it can be shown that defendant breached its duty concerning that hazard when exterior lighting provided by defendant was not used to illuminate it. *Lugo*, 464 Mich at 516. I consequently conclude that plaintiff has failed to demonstrate a genuine issue of material fact concerning any breach of defendant's duty to her.[4] *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012).

[4] The trial court noted that it was undisputed that plaintiff was an invitee. Yet, it is also undisputed that plaintiff was a social guest of the tenant. Generally, social guests are licensees, not invitees.

For these reasons, I respectfully dissent and would affirm the trial court's order granting summary disposition in favor of defendant.

/s/ Mark T. Boonstra

See *Taylor v Laban*, 241 Mich App 449, 453; 616 NW2d 229 (2000). There is indeed caselaw supporting a conclusion that social guests of tenants in institutional settings are invitees when they are injured in common areas over which a landlord retains control. See *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). But it is far from clear to me that the same is necessarily true with regard to a single-family residence, or that a landlord retains sufficient control over the driveway of such a residence (as opposed, for example, to a common parking lot in an apartment complex) such that it can be deemed to be a common area; there was no indication that defendant in this case, for example, controlled who could use the driveway, the number and size of vehicles that could be parked there, the security of the area, or many other factors deemed relevant in *Allison*. *Id.* at 428. Although neither the trial court nor the parties in this case have addressed whether plaintiff properly should be considered an invitee or a licensee, I would encourage them to do so on remand.