STATE OF MICHIGAN

COURT OF APPEALS

IRENE JAROS,

Plaintiff-Appellee,

v

VHS HARPER-HUTZEL HOSPITAL, INC., d/b/a HARPER HOSPITAL,

Defendant-Appellant.

UNPUBLISHED
September 19, 2019

No. 340566
Wayne Circuit Court
LC No. 16-015287-NO

Before: MURRAY, C.J., and STEPHENS and SHAPIRO, JJ.

PER CURIAM.

In this premises liability action, defendant appeals by leave granted the trial court's order denying defendant summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons stated in this opinion, we affirm.

I. BACKGROUND

This cases arises out of plaintiff's trip and fall on June 5, 2015, in the multi-level parking structure of her workplace. In her complaint, plaintiff alleged she tripped as a result of stepping into a "deteriorated section of concrete," which the parties have also referred to as a "pothole." Plaintiff broke her left humerus and injured her left shoulder.

Plaintiff testified at deposition that she parked in the structure for over ten years and had never before fallen. The sides of the parking structure were partially exposed to the outdoors allowing some natural light into the perimeter. On the day of the incident, plaintiff parked in one of the interior spots, i.e., not on the perimeter, around noon. She testified there was little natural light in the interior section of the structure and only one light at the very far end of the structure. She explained that she took five or ten steps from her car before tripping and falling and that "[m]y toe got in—just flipped me. I was walking. I was looking. I'm always looking and I just was down. I hit something that made me fall. I did not see it." Plaintiff testified that she only saw the pothole when she was on the ground after she fell.

Plaintiff's manager notified her sons, who went to the parking lot where they located their mother's car and took two photographs. One photo shows a deteriorated part of the concrete floor. The other is a view looking up the 7th floor ramp from her car. In that photo the overhead lights appear to be on; those lights provide intermittent areas of light with other areas dark. One of her sons returned several days later and took additional photos. He took one photo of the 7th floor ramp looking from a perspective very similar to the one he took on the day of plaintiff's fall. In this photo the overhead lights appear to be off and nearly all of the parking area is darkened. However, there is a light at the end of the ramp consistent with plaintiff's testimony. Plaintiff's son also took three close-up photos of a pothole with a tape measure next to it for scale. The photo of the ramp also shows the same tape measure on the ground showing the location of the pothole.[1]

After plaintiff filed suit and her deposition was taken, defendant moved for summary disposition, primarily arguing that the complaint rested on conjecture and speculation because plaintiff did not know what caused her to fall. Alternatively, even assuming that plaintiff's fall occurred due to a pothole, defendant argued that such condition was open and obvious.

Plaintiff responded that she knew what caused her to fall—a hole in the concrete surface of the parking structure. Photographs taken later show a pothole not far from where she parked in the direction towards the exit consistent with plaintiff's testimony that she tripped after taking 5-10 steps. Further, plaintiff testified that she was watching where she was walking and that she only saw the pothole after she fell. Accordingly, she contended that there were questions of fact whether the condition was open and obvious.

At the motion hearing, the trial court ruled as follows, in pertinent part:

> I do find it's a question of fact. I think it's a lighting situation. That definitely was the part about the open and obvious. I thought, you know, it's not so open and obvious. It's not well lit, at least in the pictures I saw. I think counsel properly explained to the Court that we may not know the exact location, the exact—but we know the area. Pictures were taken. There's no—you have not submitted anything to indicate . . . that's not what the floor looks like; that's not was (sic) the lighting condition is. So for purposes of this motion I think there is a question of fact. I think they owed her a duty. I think they breached that duty, at least for purposes of the motion. So I am going to respectfully deny the motion.

The trial court later issued an opinion and order denying defendant's motion for reconsideration. We granted defendant leave to appeal the trial court's ruling on the open and obvious danger doctrine, but denied leave with respect to the causation issue. *Jaros v VHS Harper-Hutzel Hosp Inc*, unpublished order of the Court of Appeals, issued March 13, 2018 (Docket No. 340566).

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[1] We note that a proper foundation for the admission of the photographs has not yet been established. However, given that both parties rely on the photographs and argue based upon it, we will consider them, as the trial court did.

II. ANALYSIS

Defendant argues that the evidence of inadequate lighting in the parking did not preclude application of the open and obvious danger doctrine. We disagree.[2]

"Possessors of land have a legal duty to exercise reasonable care to protect their invitees from dangerous conditions on the land." *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000) (footnote omitted). But a premises possessor does not owe invitees a duty "to protect or warn of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012) (quotation marks and citations omitted). "A dangerous condition is open and obvious if an average user with ordinary intelligence acting under the same conditions would have been able to discover the danger and the risk presented by the condition upon casual inspection." *Grandberry-Lovette v Garascia*, 303 Mich App 566, 576-577; 844 NW2d 178 (2014) (quotation marks and citation omitted), abrogated on other grounds by *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10 n 1; 890 NW2d 344 (2016).

Potholes are typically discoverable on casual inspection and in many cases there is no question of fact whether that was the case. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 520; 629 NW2d 384 (2001). Indeed, in *Lugo* the plaintiff admitted that she was not looking where she was walking, contrary to the testimony in this case. *Id*. at 514-515. However, we have repeatedly held that a hazard is not open and obvious if an average person would not have been able to discover it upon casual inspection under the circumstances of poor lighting. See *Blackwell v Franchi*, 318 Mich App 573, 577-578; 899 NW2d 415 (2017), remanded on other grounds 502 Mich 918 (2018); *Abke*, 239 Mich App at 362-363; *Knight v Gulf & Western Props, Inc*, 196 Mich App 119, 126; 492 NW2d 761 (1992). In *Blackwell*, the hazard was a drop-off into a mudroom. There was conflicting evidence whether the drop-off was discernible given the fact that the light in the mudroom was turned off. Thus, summary disposition on the basis of the open and obvious doctrine was inappropriate because there was a question of fact whether a person of average intelligence would have discovered the drop-off upon casual inspection. *Blackwell*, 318 Mich App at 576-758.[3]

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[2] We review de novo a trial court's decision to grant summary disposition. See *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). "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." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

[3] Contrary to the dissent's assertion, *Blackwell* does not stand for the proposition that the hazard must be "surrounded by complete darkness." In that case, while the light fixture in the mudroom was turned off, there was testimony that the lights in the adjacent hallway were on. See *Blackwell*, 318 Mich App at 578. In any event, the question is not whether there was complete

The same reasoning applies here. Plaintiff fell when she tripped in a pothole near her parked car. She testified that the parking garage was very poorly illuminated in that area. Plaintiff specifically testified at deposition that the parking lot was "dark" and that there was only one light near the elevator on the "far side" of the lot. She also testified that she was looking where she was walking and that while there is some natural light from the outside of the parking lot, it did not illuminate the interior part of the parking structure where she was parked. A photograph taken by her son later that day shows overhead lighting with a patchwork of light and dark areas. Plaintiff testified, however, that at the time she fell the overhead lights were not on, and in a photograph taken a few days later of the same area, the overhead lights are not on.

Plaintiff argues that a reasonable jury could find her testimony credible and conclude that the overhead lights were not on at the time of the fall and, taking her testimony as true—as we must at this stage—we agree. Moreover, defendant has not offered any evidence to rebut her testimony about the lack of light and the visibility of the pothole. Finally, even if the photograph taken late on the day of her fall depicts the lighting as it existed when she fell, there is still a question of fact whether the pothole was visible on casual inspection. As the trial court noted in denying summary disposition, the area remained "not well lit" and the photo shows a patchwork of lighter and darker areas.

Viewing the evidence in a light most favorable to plaintiff, there is a question of fact about whether a reasonable person would have discovered the pothole upon casual inspection. Ultimately, it is for a jury to evaluate the evidence and to determine whether plaintiff's failure to observe the pothole was reasonable.[4]

Defendant argues that, under *Singerman v Municipal Serv Bureau, Inc*, 455 Mich 135, 142; 565 NW2d 383 (1997), the inadequate lighting is immaterial because it was open and obvious. *Singerman* is inapposite. In that case, the inadequate lighting of a hockey rink was itself the alleged dangerous condition. That risk was open and obvious because "there was nothing to prevent plaintiff from realizing that the rink was inadequately lighted." *Id*. at 144. In this case, the inadequate lighting is not the hazard; rather, it is a factor for the jury to consider in determining whether a reasonable person would have discovered the pothole.

The dissent's reliance on *Knight* is similarly misplaced. In *Knight* the plaintiff fell off a loading dock because it was dark and he could not see where it was. *Knight*, 196 Mich App at 121. The jury found for the plaintiff, and the defendant appealed, arguing that the trial court erred in not instructing the jury on the open and obvious danger doctrine. *Id*. at 122-123. We

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darkness but whether the lack of light affected a reasonable person's ability to discover the hazard on casual inspection.

[4] A premises owner is not the insurer of its invitees, see *Serinto v Borman Food Stores*, 3 Mich App 183, 193; 142 NW2d 32 (1966), and a conclusion that a hazard is not open and obvious does not mean that plaintiff is entitled to recover. As always, defendant is liable in tort only if the jury concludes that it was negligent and that its negligence was a proximate cause of plaintiff's injuries.

held that a trial court "must instruct the jury that there is no duty to warn an invitee of open and obvious defects if the facts at issue could support a jury determination that the complained-of defect was open and obvious." *Id*. at 126. We went on to hold, however, that the instruction was not warranted in that case because the facts did not show an open and obvious condition. *Id*. at 126-127.[5] Thus, not only did we fail to find that the condition was open and obvious as a matter of law, we also concluded that it was not even necessary for the trial court to instruct the jury on the open and obvious doctrine given the evidence presented.

Nonetheless, the dissent asserts that *Knight* favors defendant because in that case the plaintiff was not aware of the loading dock, while in this case the plaintiff had used the parking structure many times and so would have been aware of the existence of potholes. However, even assuming that plaintiff knew that there were potholes in the parking garage, it does not follow *as a matter of law* that the particular pothole causing the accident should have been discovered upon a casual inspection. Again, plaintiff testified that she was looking where she was walking at the time of the fall and that she could not see the pothole that caused her to fall given the low light conditions.

The dissent's reliance on *Abke* is also unpersuasive. *Abke* is similar to *Knight*; it involved a plaintiff who fell off a loading dock. *Abke*, 239 Mich App at 360. He testified that he could not see the drop-off because of darkness. *Id*. at 362. The jury found for the plaintiff, and defendant argued that the hazard was open and obvious as a matter of law. *Id*. at 360-361. Because there was a "factual discrepancy concerning the visibility of the truck bay," we concluded that the trial court correctly denied defendant's motion for a directed verdict and a judgment notwithstanding the verdict. *Id*. at 362-363.

The dissent contends that *Abke* is distinguishable because there is not a factual dispute regarding the lighting condition at the time that plaintiff fell. That is true only in the sense that defendant has not offered evidence contradicting plaintiff's testimony that the area where she fell was dark. However, a question remains whether given the undisputed lighting conditions a

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[5] We also indicated that even if the condition was open and obvious, the defendant had nonetheless had a duty of care to protect the plaintiff due to its knowledge of the inadequate lighting:

> In light of the fact that defendant was aware of the inadequate interior lighting and the inside loading dock, it was for the jury to decide whether defendant should have reasonably anticipated that plaintiff would choose to proceed even when confronted by the obvious danger, and whether defendant took adequate measures to protect plaintiff from harm. [*Knight*, 196 Mich App at 130.]

reasonable person would have discovered the pothole upon a casual inspection. Thus, as in *Abke*, the dangerous condition was not open and obvious as a matter of law.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Douglas B. Shapiro

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Before: MURRAY, C.J., and STEPHENS and SHAPIRO, JJ.

MURRAY, C.J. (*dissenting*).

With all due respect to the majority opinion, I would hold on de novo review that the pothole in the parking structure was an open and obvious danger that relieved defendant of its duty of care as a premises owner. Accordingly, I would reverse the circuit court's order, and remand for entry of an order granting defendant's motion for summary disposition.

I. BACKGROUND

Plaintiff tripped and fell over a pothole while walking in Harper Hospital's parking structure. Employed at the Kresge Eye Institute, plaintiff parked in Harper Hospital's parking structure for the past ten years on an almost daily basis. Around noon on June 5, 2015, plaintiff arrived, and parked her car on the seventh floor of the structure, a floor she usually parked on. Plaintiff had never tripped in the structure before, and had no physical impairments inhibiting her ability to walk or detect her surroundings.

The seventh floor is not the top floor of the structure, with the only sunlight coming in along the partially exposed sides of the structure. Plaintiff parked in one of the internal parking spots, and as depicted in the photograph taken by one of her sons on the day of the accident, sunlight lit much of the parking area near plaintiff's car, though some other areas were shaded:

According to plaintiff, the closest source of unnatural light came from a single light fixture located by the structure's elevator and stairs that were far away from plaintiff's car. After exiting her vehicle, plaintiff proceeded to watch where she stepped as she walked away from her car. After taking 5 to 10 steps toward the elevator and stairs, her toe got caught in something, and she fell. On the ground, plaintiff was then able to observe a previously undetected pothole where her foot was. Prior to tripping, she did not see this pothole.

Plaintiff brought a negligence and premises liability action, and following discovery, defendant sought dismissal under the open and obvious danger doctrine. Plaintiff retorted that the inadequate lighting in the parking structure precluded application of the doctrine, and insisted that the condition was not an open and obvious danger because it was undetectable upon casual observation.

The circuit court agreed with plaintiff's position, holding:

> It's a lighting situation . . . it's not so open and obvious. It's not well lit . . . [Harper Hospital has] not submitted anything to indicate that's not what the floor looks like; that's not [what the] lighting condition [was at the time of the injury].

Accordingly, the court denied defendant's motion for summary disposition, precluding application of the open and obvious danger doctrine. Our Court then granted defendant's

application for leave to appeal, limiting the issue to "whether the alleged inadequate lighting in the parking lot precluded application of the open and obvious danger doctrine."[1]

II. ANALYSIS

"Generally, a premises possessor owes a duty of care 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." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004). However, an open and obvious danger absolves the premises possessor from this duty. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A danger is open and obvious when "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). The condition of the premises to a reasonably prudent person at the time of the alleged injury must be considered in determining whether a danger is open and obvious. *Mann*, 470 Mich at 329. If a condition is open and obvious, a premises possessor is liable for injury only if there were special aspects to the condition. *Hoffner*, 492 Mich at 461. However, a common pothole is an open and obvious danger that typically has no special aspects to it because "the condition does not involve an especially high likelihood of injury." *Lugo*, 464 Mich at 520. Thus, to avoid a grant of summary disposition in the instant case, plaintiff must produce "sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the pothole in defendant's parking structure. *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009) (quotation marks and citation omitted).

Here, considering the evidence–essentially plaintiff's testimony and the photographs taken by her son the day she fell–in a light most favorable to plaintiff, I would hold that the lighting in the parking structure does not preclude application of the open and obvious danger doctrine. And as a result of that conclusion and the undisputed evidence regarding the pothole upon which plaintiff allegedly tripped, I would also hold that the pothole in the parking structure was readily observable upon casual inspection, requiring application of the open and obvious danger doctrine, and relieving defendant of any duty of care.

The absence of quality lighting does not preclude the application of the open and obvious doctrine. The plurality opinion in *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 137; 565 NW2d 383 (1997), is particularly helpful in determining how poor lighting can impact an open and obvious condition. In *Singerman*, the plaintiff was injured when he was hit by a puck during a hockey scrimmage. *Id*. at 137-138. The plaintiff alleged in his complaint that the low light conditions within the rink created a dangerous condition that caused him to not see a puck before it hit him. *Id*. at 141. Three justices in an evenly decided Court concluded that, because the low

[1] *Jaros v VHS Harper-Hutzel Hospital Inc*, unpublished order of the Court of Appeals, entered March 13, 2018 (Docket No. 340566).

light conditions were constant, and readily discernable by a reasonable observer,[2] the low lighting was not uniquely dangerous as a matter of law:

> However, here there was nothing unusual about the inadequate lighting in the hockey rink to cause such a duty to remain. Plaintiff was an adult and an experienced hockey player. The lighting in the rink is alleged to have been consistently inadequate, not subject to unexpected fluctuations or other changes. There was nothing to prevent plaintiff from realizing that the rink was inadequately lighted. Nor was there any chance that he would forget the potentially hazardous condition, because the condition was constantly before him. Finally, plaintiff was not compelled to use the rink for work, or profit, or any other overriding or substantial motivation. He chose to participate in a dangerous sport under conditions that he knew to be dangerous. [*Id*., at 144.]

Two decisions from our Court, *Knight v Gulf & Western Props, Inc*, 196 Mich App 119; 492 NW2d 761 (1992), and *Abke v Vandenberg*, 239 Mich App 359; 608 NW2d 73 (2000), support the conclusion that the lighting in the parking deck did not cause the pothole to become a dangerous or defective condition. In *Knight* we concluded that although the "fact that [the] defendant's vacant warehouse was not adequately lit was both obvious and known to [the] plaintiff," and therefore no duty to warn of the darkness existed, *Knight*, 192 Mich App at 127, because there was no evidence that the plaintiff was aware or had reason to anticipate that there would be an unmarked or protected interior loading deck, the defendant was not entitled to a jury instruction on the open and obvious doctrine. *Id*. at 130. Here, however, it is undisputed factually that plaintiff had parked on this floor many times in the past, and it is undisputed legally that potholes are a common occurrence that should reasonably be foreseen. *Lugo*, 464 Mich at 520.

Likewise, in *Abke* this Court concluded that the trial court had properly denied the defendant's motions for directed verdict and judgment notwithstanding the verdict because there was a factual dispute about the darkness existing when the plaintiff fell into an unguarded truck bay. *Abke*, 239 Mich App at 362-363. Hence, unlike in *Abke*, here there is no factual dispute about the lighting at the time plaintiff fell, and the pothole—unlike the truck bay that was considered to be unreasonably dangerous[3]—is a common condition in parking areas. *Lugo*, 464 Mich at 523 (the Court reasoned that "potholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person," thus, the pothole did not pose an unreasonable risk to the plaintiff because she failed to establish that the readily observable pothole contained special aspects).

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[2] The partial dissent agreed that "the state of the lighting in the Westland Sports Arena would have been obvious to any person in the arena with normal vision." *Id*., at 147 (MALLETT, CJ, concurring in part, dissenting in part).

[3] *Abke*, 239 Mich App at 363.

Finally, in *Blackwell v Franchi*, 318 Mich App 573, 577-578; 899 NW2d 415 (2017),[4] this Court considered the applicability of the open and obvious danger doctrine to a danger surrounded by complete darkness. The *Blackwell* plaintiff fell due to an eight-inch drop-off in elevation between the hallway and the unlit room she was entering. *Id*. at 575. Photographs depicting the drop-off revealed that the danger was challenging to see "even with sufficient lighting." *Id*. at 578. While acknowledging that the room was completely dark, the *Blackwell* Court ruled that in light of the conflicting testimony, it was a question of fact for the jury to decide whether an average person would have been able to readily observe the drop-off due to the lighting condition. *Id*. at 579.

A potential danger is open and obvious when "a reasonable person in his [or her] position would foresee the danger." *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002) (quotation marks and citation omitted). Thus, to determine whether defendant was entitled to summary disposition, the Court must determine whether, in light of the undisputed facts, a reasonable person in plaintiff's position would have foreseen the danger posed by the pothole. *Laier v Kitchen*, 266 Mich App 482, 498; 702 NW2d 199 (2005).

The pothole[5] on which plaintiff tripped is akin to the pothole in *Lugo*, and its lighting condition is dissimilar to the lighting in *Knight*, *Abke*, and *Blackwell*. Unlike in *Blackwell*, the seventh floor of the parking structure is covered in weathered concrete, easily distinguishable even in the lighting conditions on the day plaintiff fell. Further, while there was conflicting evidence that the danger in *Blackwell* was almost invisible, engulfed in utter darkness, here the incident occurred at noon in early June, in a parking structure exposed to natural lighting along the sides, and which also contained an artificial light by the stairs and elevator. While conflicting testimony regarding the visibility of the drop-off existed in *Blackwell*, and conflicting testimony existed regarding the darkness in *Knight*, here the only testimony is plaintiff's, and the pictures of the parking structure, which both parties agree are an accurate depiction of the danger as it was at the time of the injury. There is no factual dispute about the condition of the floor or the level of light at the time plaintiff fell.

Moreover, the danger in *Blackwell* was unexpected; the plaintiff received no warning of the danger, and had no reason to suspect a change in elevation while proceeding to enter the dark room. Here, a reasonable person in plaintiff's position would have anticipated potholes in the parking structure. *Lugo*, 464 Mich at 523. Additionally, it is undisputed that plaintiff parked in this structure on an almost daily basis for the previous 10 years. As in *Singerman*, 455 Mich at

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[4] This Court in *Blackwell* reversed the trial court's grant of summary disposition, and held that it was for the jury to decide whether the danger, an eight-inch drop-off step, was open and obvious due to the fact that the hazard was surrounded by complete darkness. *Blackwell*, 318 Mich App at 579. The Supreme Court remanded for consideration of alternative arguments, leaving the ruling pertaining to visibility undisturbed. *Blackwell v Franchi*, 502 Mich 918, 918-920; 914 NW2d 900 (2018).

[5] Plaintiff testified that the picture of the pothole was taken by her son days after her injury, and was not necessarily the one that allegedly caused her to fall.

137, the danger and prevalent condition of the floor was constantly before plaintiff. A reasonable person in plaintiff's position would have foreseen the danger of potentially tripping on a pothole in the parking structure.

As noted above, in *Lugo*, the Supreme Court held that special aspects may not typically be attributed to open and obvious dangers such as potholes because potholes "do not involve an especially high likelihood of injury." *Lugo*, 464 Mich at 520. The Court reasoned that special aspects to an open and obvious danger may create an unreasonable risk of harm, subjecting the premises possessor to liability for injury. *Id*. Special aspects of a danger entail situationally forcing an individual to face an open and obvious danger, or, where there is an unreasonably high risk of severe harm, because it is unreasonably dangerous to maintain the danger on the premises, even if an individual is capable of avoiding the harm. *Id*. at 518. "[A] floor of a commercial building covered with standing water that blocks the only public exit from the building," or "an unguarded thirty-foot deep pit in the middle of a parking lot," are examples of dangers that fit the special aspect criteria. *Stopczynski v Woodcox*, 258 Mich App 226, 232-233; 671 NW2d 119 (2003). Here, there were no special aspects to the pothole at the time of plaintiff's injury.

For these reasons, I would reverse and remand for entry of summary disposition in defendant's favor.

/s/ Christopher M. Murray