In the Missouri Court of Appeals
Eastern District
SOUTHERN DIVISION

KATHY CHRISTIAN,	)	No. ED105186
	)	
Plaintiff/Appellant,	)	Appeal from the Circuit Court
	)	of Cape Girardeau County
vs.	)	
	)	Honorable Benjamin F. Lewis
SAINT FRANCIS MEDICAL CENTER,	)	
	)	
Defendant/Respondent.	)	Filed: November 14, 2017

The plaintiff, Kathy Christian, appeals the summary judgment entered by the Circuit Court of Cape Girardeau County in favor of the defendant, St. Francis Medical Center, in this suit involving personal injuries the plaintiff suffered when she fell on the defendant's premises. Given the record before us, we are unable to determine as a matter of law that the curb on which the plaintiff fell is an open and obvious condition. We conclude that, under the circumstances present here, whether the curb was an open and obvious condition is a question of fact for the jury to determine.

Factual and Procedural Background

In September 2012, the plaintiff drove her employer's minivan to the defendant's premises to pick up a client following the client's medical treatment at the hospital. The patient drop-off and pick-up area consisted of a two-way curved drive past the hospital doors. A canopy, or awning, stretched over the drive, supported on the far side of the drive opposite the hospital doors by a wide, wall-like pillar that stood on a traffic island. The curb was not painted

to contrast with the drive. The plaintiff had been to the patient drop-off and pick-up area of the hospital on several occasions, including earlier that day when she transported her client to the hospital. She had, however, always stopped or parked adjacent to the curb to her right, near the hospital doors. She testified in her deposition that she had never noticed the curb or the island on which the pillar stood.

When the plaintiff arrived at the hospital, traffic at the pick-up and drop-off area was heavier than she had encountered on other occasions. As the plaintiff approached the area in the right-hand lane nearer the hospital doors, a valet motioned to her to pull into the left lane, or oncoming traffic lane, and to park at the curb. The plaintiff parked to her left in the hospital driveway, which she had never done before; listened to the valet give instructions about leaving the van with the keys in it for valet parking; and opened the van door. As she exited, the plaintiff stumbled on the adjacent curb, which she maintains she did not see and which the valet did not warn her about, causing her to fall and suffer a compound fracture to her femur.

The trial court granted summary judgment in favor of the defendant without explanation. The plaintiff appeals, claiming the trial court erred in granting the defendant's motion for summary judgment because genuine issues of material fact remain in dispute.

Standard of Review

Summary judgment allows a trial court to enter judgment for the moving party where the party demonstrates a right to judgment as a matter of law based on facts about which there is no genuine dispute. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Our review is essentially *de novo*. *ITT*, 854 S.W.2d at 376. When considering an appeal from summary judgment, we review the record in the light most favorable to the party against whom the court entered judgment. *Id.*

Discussion

When a plaintiff sues a possessor of land for injuries arising out of an unreasonably dangerous condition on that land, the relationship between the possessor of the land and the plaintiff determines the standard of care owed the plaintiff. *Crow v. Kansas City Power & Light Co.*, 174 S.W.3d 523, 534 (Mo. App. W.D. 2005). An "invitee" enters the premises of another with the consent of the possessor for some purpose of benefit or interest to the possessor, or for the mutual benefit of the invitee and the possessor. *Lacy v. Wright*, 199 S.W.3d 780, 783 (Mo. App. E.D. 2006). Here, the parties do not dispute that the plaintiff was the defendant's invitee.

To impose liability on the possessor of the premises, the invitee must show that: 1) a dangerous condition existed on the premises that was not reasonably safe; 2) the possessor knew of the condition, or through the use of ordinary care should have known of it; and 3) the possessor failed to use ordinary care to remove, remedy, or warn of the dangerous condition. *Id.* Accordingly, the possessor of land has the duty to warn of dangerous conditions that an invitee is not likely to discover. *Bruner v. City of St. Louis*, 857 S.W.2d 329, 332 (Mo. App. E.D. 1993). An open and obvious danger dispenses with the duty to warn invitees unless the possessor should anticipate that an invitee will suffer harm despite her constructive knowledge of the condition. *Lacy*, 199 S.W.3d at 783.

The plaintiff asserts the trial court erred in granting summary judgment. Given the record before us, we cannot conclude as a matter of law based on facts about which there is no genuine dispute, that the far curb, which was similar in color to the driveway, was so open and obvious that the defendant could reasonably rely on an invitee to see and appreciate the risk of danger as she exited her vehicle at the direction of the defendant's valet while parking in the oncoming traffic lane amidst congested traffic conditions. *Id.* at 784. In determining whether the curb

constituted a dangerous condition, the jury could consider whether the defendant had reason to expect that the plaintiff would be distracted by the activity in the patient pick-up and drop-off area. *Bruner*, 857 S.W.2d at 333.

Conclusion

Because material questions remain for the jury's determination, the trial court erred in granting summary judgment for the defendant. We reverse the judgment of the trial court, and remand for further proceedings.

Lawrence E. Mooney

LAWRENCE E. MOONEY, JUDGE

JAMES M. DOWD, C.J. and
PHILIP M. HESS, J., concur.