

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

VALEDA DAVIS,)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Civil No. 98-13-P-DMC</i>
)	
UNITED STATES OF AMERICA,)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION ON DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT¹**

Valeda Davis seeks compensatory damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, for injuries suffered when she tripped over a curbstone at the Veterans Administration Hospital in Atlanta, Georgia in March 1996. Complaint ¶¶ 1-3, 7. The United States moves for summary judgment. Motion for Summary Judgment, etc. (“Motion”) (Docket No. 4). For the reasons that follow, the motion is denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R.

¹Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

To facilitate the evaluation of summary judgment motions, the Local Rules of the court require parties to file certain materials with their legal memoranda. Specifically, the moving party must furnish “a separate, short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried.” Loc. R. 56. The opponent of a summary judgment motion must also provide a factual statement with record citations, pointing to contested issues of fact that require trial. *Id.* These statements of material fact are critical to the outcome of the motion. *Pew v. Scopino*, 161 F.R.D. 1, 1 (D. Me. 1995) (“The parties are bound by their [Local Rule 56] Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.”) Consistent with this principle, I have not credited any factual assertions that do not appear in the statements filed pursuant to Rule 56 — wherever else they may happen to appear.

II. Factual Context

Maine resident Valeda Davis was visiting her son Charles at the Veterans Administration Hospital in Atlanta, Georgia (the “Hospital”) on March 16, 1996. Affidavit of Valeda Davis (“Davis Aff.”), Exh. A to the document file accompanying the plaintiff’s Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 14), ¶¶ 1, 3. At about 3 p.m. that day, Davis exited the Hospital through the main doors to the parking area, accompanied by three relatives. *Id.* ¶ 4; Letter dated May 29, 1998 from Peter S. Parsonson, Ph.D., P.E. to David R. Collins (“Parsonson Report”), attached as Exh. B to Declaration of Peter S. Parsonson, Ph.D., P.E. (“Parsonson Decl.”) (Docket No. 9), ¶ 5. Walking straight ahead out of the doors, she passed through a walkway that connects the Hospital to an attached parking garage. Davis Aff. ¶¶ 4-5; Parsonson Report ¶ 6. Once inside the parking garage, Davis proceeded toward a pedestrian aisle, which was painted with white diagonal lines. Davis Aff. ¶¶ 4-5; Parsonson Report ¶ 6; Declaration of Kris Larsen (“Larsen Decl.”), attached as Exh. B to Plaintiff’s SMF, ¶ 4. At no point did Davis turn her head or body. Davis Aff. ¶ 4. Suddenly, she tripped on something and fell into a puddle. *Id.* Davis felt intense pain and screamed. *Id.* While the parties’ terminology differs, there is no disagreement that the object over which Davis fell was determined to be a concrete wheelstop (Davis refers to it as a “cement type curb stone”) at the head of one of the adjacent handicapped-parking spaces in the parking garage. *Id.*; Parsonson Report ¶¶ 6-7.

Davis was taken by ambulance to Crawford-Long Hospital and diagnosed with a broken hip. Davis Aff. ¶ 4; Progress Notes of Mark F. Henry, M.D. (“Progress Notes”), attached as Exh. D to Plaintiff’s SMF. Her treatment included the placement of a screw in her right hip. Progress Notes. Davis spent five days at Crawford-Long Hospital and nine days at the Emory University Hospital.

Davis Aff. ¶ 6. She also was treated by an orthopaedic surgeon in Maine. *Id.* ¶ 10. She is dependent upon a cane or a walker and is still extremely limited in what she can do, especially outside of her home. *Id.* ¶ 11. She still experiences a great deal of pain and discomfort. *Id.* Her right leg is about a quarter-inch shorter than her left. Progress Notes. Before her fall at the Hospital, Davis sustained no prior injuries to her leg or hip. Davis Aff. ¶ 12.

While there is some material disagreement between the parties regarding conditions within the garage, the following, for purposes of the summary-judgment record, is uncontroverted:

The walkway at the entrance to the parking garage is five feet wide, as measured by metal handrails fastened to the walls of the garage. Parsonson Report ¶ 6. Thirteen feet from this entrance, straight ahead, is a five-foot wide box painted on the garage floor with diagonal stripes. *Id.* This box is a standard five-foot-wide aisle required to accommodate the needs of persons using wheelchairs. *Id.* Diagonal white lines are used in the garage to designate areas reserved for pedestrian access. Larsen Decl. ¶ 4.

There is one parking space on each side of the pedestrian aisle. Parsonson Report ¶ 6. Each of these spaces is equipped with a concrete wheelstop. *Id.* ¶ 7. The letters “HC” are painted on the floor of the garage to indicate that both spaces are reserved for handicapped persons. Parsonson Decl. ¶ 6. A straight white line runs through the middle of the white diagonal lines. Larsen Decl. ¶ 4. The prominent diagonal striping of the five-foot-wide pedestrian aisle extends into the parking stall to the right of the aisle. Parsonson Decl. ¶ 6. The wheelstop over which Davis tripped is situated one foot from the edge of the straight white line. *Id.* ¶ 4. Near the wheelstop is a post equipped with signs reading “Reserved Parking” and “Van Accessible.” Parsonson Report ¶ 11. Fifteen feet from the wheelstop, there is an opening in the wall of the garage measuring seventeen

feet by four feet. Parsonson Decl. ¶ 5. This opening, which lets in light, is partially blocked by a concrete pillar. Larsen Decl. ¶ 3.

Parking spaces at the garage are divided by yellow lines on either side of the space. *Id.* ¶ 5. Although it appears that the area where the wheelstop in issue is located once was bordered by yellow lines, those lines have been painted over with white lines. *Id.*; photographs (“Photos”), attached as Exh. C to Plaintiff’s SMF. Generally, wheelstops at the Hospital parking garage are painted yellow. Larsen Decl. ¶ 6. The wheelstop that caused Davis’s fall, on the other hand, was not painted yellow. *Id.*; Photos. Rather, it was similar to the color of the pavement. *Id.* The yellow paint makes wheelstops more visible. Larsen Decl. ¶ 6. There have been no other reported injuries caused by someone tripping over the wheelstop that is the subject of this litigation. Declaration of Jeffery Jones (“Jones Decl.”) (Docket No. 7) ¶ 4.

The parties’ material disputes of fact center on the visibility of the wheelstop. While conceding that the diagonal striping extends from the pedestrian aisle into the adjacent handicapped-parking space, the United States contends that the striping in the parking-stall portion is old and faded, making it readily distinguishable from the newer striping in the pedestrian aisle. Parsonson Decl. ¶ 6. Davis asserts that the diagonal lines on the pedestrian-aisle side are not distinguishable from those on the other side. Larsen Decl. ¶ 4. In fact, she contends, the poor lighting in the garage makes the diagonal lines even more visible. *Id.* Further, Davis states, the presence of the diagonal lines makes the wheelstop over which she fell difficult to see. *Id.*

The United States asserts that on a sunny afternoon at 3 p.m., the seventeen-by-four-foot opening in the wall of the garage provides the wheelstop area with more than adequate illumination. Parsonson Decl. ¶ 5. This level of lighting, it avers, makes the wheelstop area readily visible to a

pedestrian who is watching where he or she is stepping. *Id.* Davis maintains that, although the walkway connecting the Hospital to the garage is well-lit, the parking garage is very poorly lit. Davis Aff. ¶ 5; Larsen Decl. ¶ 3.

Concrete wheelstops have been standard practice in traffic engineering for at least 40 years. Parsonson Decl. ¶ 4. Davis contends, however, that the placement and acceptance of the wheelstop over which she fell was not within acceptable safety standards. Larsen Decl. ¶ 7. According to her, its negligent placement, coupled with the United States's negligent maintenance of the garage, caused her injuries. *Id.* ¶ 8.

III. Discussion

Under the Federal Tort Claims Act, the United States is liable for its employees' negligent acts or omissions to the extent that a private person would be liable under the law of the state where the act or omission occurred. 28 U.S.C. §§ 1346(b)(1), 2674; *Rodriguez v. United States*, 54 F.3d 41, 44 (1st Cir. 1995). As the parties agree, Georgia law thus governs this case. Motion at 3; Opposition to the Defendant, United States of America's, Motion for Summary Judgment ("Opposition") (Docket No. 13) at 2.

The United States's liability, in turn, hinges upon the concept of "premises liability," codified at Ga. Code Ann. § 51-3-1 as follows:

Where an owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries caused by his failure to exercise ordinary care in keeping the premises and approaches safe.

An owner or occupier accordingly is not absolutely liable for any mishap occurring on its property. Rather, "[t]he true ground of liability is the proprietor's superior knowledge of the perilous

instrumentality and the danger therefrom to persons going upon the property,” coupled with the invitee’s lack of knowledge of the same. *Atlanta Gas Light Co. v. Gresham*, 394 S.E.2d 345, 346 (Ga. 1990) (citation and internal quotation marks omitted). A plaintiff’s knowledge of the defect, or his or her “equal means with the defendant of discovering it,” preclude recovery. *Id.* (citation and internal quotation marks omitted).

With these principles in mind, Georgia’s highest court has clarified that an invitee in a slip-and-fall action must show two things: “(1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions or conditions within the control of the owner/occupier.” *Robinson v. Kroger Co.*, 493 S.E.2d 403, 414 (Ga. 1997).

Focusing on the first of the slip-and-fall tests, Davis argues that the United States had knowledge of the allegedly flawed wheelstop configuration in that it “presumably labeled, or hired someone to label, the parking spaces and walkways on the floors of the garage.” Opposition at 3. Further, Davis asserts, “VA employees patrol, maintain, and use the VA parking garage.” *Id.* Davis produces no evidence to buttress either assertion, thus failing to show any “actual” knowledge on the part of the United States.

Under Georgia law, however, there are at least two avenues through which a plaintiff may demonstrate constructive knowledge of an alleged offending condition. First, such knowledge is presumed in cases in which the defendant has built or configured the object at issue. *See, e.g., Kroger*, 493 S.E.2d at 412 (classifying “premises construction or configuration” as a type of distraction “in the control of the owner/occupier”). Alternatively, such knowledge may be evidenced by (i) the defendant’s failure to exercise reasonable care in inspecting the premises, or (ii) the

presence of an employee in the immediate vicinity of the hazardous condition, such that the employee easily could have noticed and corrected it. *See, e.g., Hopkins v. Kmart Corp.*, 502 S.E.2d 476, 478 (Ga. Ct. App. 1998). In the context of summary judgment, the defendant shoulders the initial burden of demonstrating its exercise of reasonable care in inspection. *Id.* If the defendant succeeds in so doing, the burden shifts back to the plaintiff to evidence the length of time for which the condition existed. *Id. See also Newell v. Great Atl. & Pac. Tea Co., Inc.*, 476 S.E.2d 631, 633-34 (Ga. Ct. App. 1996) (defendant's evidence in summary-judgment context fell short of establishing reasonable inspection procedure, obviating need for plaintiff to demonstrate duration of condition).

Davis demonstrates constructive knowledge of the wheelstop configuration on either theory. Her complaint centers on the configuration of a premises — the wheelstop's placement, the garage's lighting and its painted signage. Unlike a banana peel on the floor, a loose bolt within a doorframe or other types of conditions of which even a careful owner may yet be unaware, the conditions of which Davis complains result from conscious design and placement choices. *See, e.g., Davis v. GBR Properties, Inc.*, No. A98A0258, 1998 WL 304910, at *2 (Ga. Ct. App. June 11, 1998) (first prong of test satisfied for summary-judgment purposes because “[t]here can be no question that defendants are charged with knowledge of their own ramp,” built in 1992 when premises converted to doctors' offices); *Robinson v. Western Int'l Hotels Co.*, 318 S.E.2d 235, 238 (Ga. Ct. App. 1984) (hotel made no argument that it lacked knowledge that, as constructed, its key booth presented hazardous condition).

Even as to the alternative grounds of constructive knowledge, the United States's efforts founder. In failing to adduce any evidence of inspection or maintenance programs at the Hospital garage, it leaves the presumption of its constructive knowledge undisturbed.

Shifting to the second of the slip-and-fall tests, the United States asserts that Davis can be found as a matter of law to have failed to exercise due care on the following alternate grounds: (i) that the wheelstop constituted a “static condition” about which Davis is presumed to have equal or superior knowledge, (ii) that Davis strayed from the prescribed pedestrian aisle, thus heightening her duty of due care, and (iii) that in any event the wheelstop should have been clearly visible to any person who was watching where he or she was going. Motion at 4-12.

A “static condition,” in Georgia premises-liability law, “is simply one that does not change.” *See, e.g., Poythress v. Savannah Airport Comm’n*, 494 S.E.2d 76, 79 (Ga. Ct. App. 1997). Such a condition “is not dangerous unless someone fails to observe it and steps into it.” *Id.* (citation and internal quotation marks omitted). An invitee is presumed to have at least the same level of knowledge of a static condition as the owner/occupier — provided that the condition is visible. *Id.* In the instant case, the wheelstop and its environs do indeed constitute a “static” condition. Davis has, however, adduced sufficient evidence to raise a genuine issue of material fact whether that condition was perceptible given the lighting and markings of the garage. The cases upon which the United States relies are distinguishable in that the static objects there were held as a matter of law to have been clearly visible. *See, e.g., Tollman v. Zamani*, 481 S.E.2d 232, 234 (Ga. Ct. App. 1997) (plaintiff admitted it was daylight and nothing obstructed view of block); *Steinberger v. Barwick Pharm., Inc.*, 444 S.E.2d 341, 343 (Ga. Ct. App. 1994) (step down was “open and obvious”; no allegations made of defective lighting); *Hospital Auth. v. Bostic*, 402 S.E.2d 103, 104 (Ga. Ct. App. 1991) (no evidence that plaintiff’s view of sidewalk expansion joints was impaired).

The United States next asserts that Davis strayed from the prescribed pathway, in effect assuming heightened risk. Motion at 9-11. The cases upon which it relies are, however,

distinguishable from the case at bar inasmuch as the plaintiffs there consciously chose to depart from the established pathway. *See, e.g., Farmer v. Wheeler/Kolb Mng't Co.*, 482 S.E.2d 475, 477 (Ga. Ct. App. 1997) (plaintiff “voluntarily departed from the route designated and maintained by the premises owner for her safety and convenience” in that she admitted she tripped over bumper while cutting through parking lot, walking between parked cars); *Gaydos v. Grupe Real Estate Investors*, 440 S.E.2d 545, 547 (Ga. Ct. App. 1994) (plaintiff assumed heightened risk when she took short-cut across lawn rather than using concrete walkway). There is no evidence that Davis voluntarily departed from the pedestrian aisle in the parking garage. Rather, the evidence tends to show the opposite — that Davis walked straight ahead without turning her head or body, in an apparent effort to follow the delineated pathway, stumbling over an object within one foot of its outer edge. Thus, the summary-judgment record does not support a finding as a matter of law that Davis consciously chose to assume the heightened risk of departing from the established walkway.

The United States finally contends that, regardless, any person exercising due care should have been able to see the wheelstop. An invitee, it points out, must watch where she puts her feet and use her eyesight to detect hazards or obstructions in her path. Motion at 9. Had she used her eyesight or watched where she was going, the United States reasons, she would not have tripped. *Id.* The force of this argument, at least in the summary-judgment context, is greatly diminished by the *Kroger* case. There, the Georgia Supreme Court held that even a plaintiff’s admitted failure to look where he or she was going would not in itself suffice to entitle a defendant to summary judgment. *Kroger*, 493 S.E.2d at 405. Rather, the court cautioned, summary judgment should issue “only when the evidence is plain, palpable, and undisputed” that a plaintiff failed to exercise ordinary care. *Id.* at 414. There is no such palpable evidence in this case. Davis has made no admission that

she was not watching where she was going. Further, she has produced sufficient evidence to raise a genuine issue of material fact whether the design, signage and lighting of the Hospital garage were such that a reasonable person, even in the exercise of due care, might have overlooked the concrete wheelstop. This is precisely the type of case that, under Georgia law, a trier of fact must decide.

IV. Conclusion

For the foregoing reasons, the defendant's summary judgment motion is **DENIED**.

Dated at Portland, Maine, this 5th day of October, 1998.

David M. Cohen
United States Magistrate Judge