STATE OF MICHIGAN

COURT OF APPEALS

WARREN R. BROWN,

Plaintiff-Appellant,

v

MT. PLEASANT HOUSING COMMISSION,

Defendant-Appellee.

UNPUBLISHED
April 14, 1998

No. 201472
Isabella Circuit Court
LC No. 96-009282-NO

Before: Markey, P.J., and M.J. Kelly and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's grant of summary disposition to defendant pursuant to MCR 2.116(C)(10). The trial court found that defendant owed no duty to protect plaintiff, a tenant in defendant's apartment building, from a six to eight inch gap between an elevator floor and a hallway floor because the hazard posed was open and obvious, and the gap did not create a foreseeable risk of unreasonable harm. We reverse and remand.

A court may appropriately grant summary disposition to a moving party when no factual development could justify plaintiff's claim for relief. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). We review a trial court's decision concerning a motion for summary disposition de novo, examining the entire record and construing all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 708-709; 572 NW2d 216 (1997), *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 252; 540 NW2d 748 (1995). A motion pursuant to MCR 2.116(C)(10) may be granted when, except with regard to the amount of damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Henderson, supra.* Stated otherwise, we ask whether a record might be developed that leaves open an issue upon which reasonable minds could differ. *Id.* Critically, the court may not make factual findings or weigh witness credibility in deciding a motion for summary disposition. *Id.*

Plaintiff first argues that the trial court erroneously determined that the gap created by defendant's elevator was open and obvious as a matter of law. Michigan law imposes a duty upon

possessors or owners of land to "exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." *Singerman, supra* at 139. The law suspends the land owner's duty toward invitees such as plaintiff, however, when the unreasonable risk cannot be anticipated or the dangerous condition is "so obvious and apparent that an invitee may be expected to discover [it] himself." *Id*. at 140. A dangerous condition qualifies as open and obvious when an average person of ordinary intelligence would discover the danger upon first glance or casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 473; 499 NW2d 379 (1993).

Because the danger of tripping and falling on a step is generally open and obvious, steps and different floor levels are not ordinarily actionable unless unique circumstances regarding the area in question exist making the situation unreasonably dangerous. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995).

Stated otherwise, "Different floor levels in private and public buildings, connected by steps, are so common that the possibility of their presence is anticipated by prudent persons." *Garrett v Butterfield Theaters*, 261 Mich 262, 263; 246 NW 57 (1933). Reasonably prudent people of ordinary intelligence will survey the course of their travels and discern any steps in their paths, however the steps were created. See also *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358; 561 NW2d 500 (1997). The same reasoning does not apply to the gap created by the elevator, however. Unlike steps or different floor levels, which are stationary and permanent, elevators are constantly moving and their position, even when the doors are open to allow passengers to disembark, is transitory. The momentary reactions that one has to getting off an elevator are not necessarily the same as when one is negotiating steps or differing floor levels, where the condition is usually permanent and thus open and obvious. Here, plaintiff conceded that if he had looked up or down, he likely would have noticed that the elevator had not stopped level with the hallway floor. This does not, however, necessarily constitute an admission or concession that the danger was open and obvious.

We recognize that property owners are not required to make their property "foolproof." *Singerman, supra* at 142 n 3; *Hottmann v Hottmann,* 226 Mich App 171, 176; 572 NW2d 259 (1997). We find, however, that the trial court erred in resolving disputed issues of fact when it determined as a matter of law that the uneven levels between the elevator and the floor constituted an open and obvious danger, visible to an average user of ordinary intelligence upon casual inspection. *Henderson, supra*. Indeed, genuine issues of material fact exist that could justify plaintiff's claim for relief, particularly in light of the extensive repair history for defendant's elevators. *Singerman, supra; Henderson, supra*. Under the circumstances that plaintiff presents in his complaint, we believe that summary disposition is inappropriate at this juncture.

Here, the "unique circumstances" are that plaintiff was injured while disembarking from an elevator, a situation where one would ordinarily *not* expect a step. Indeed, an elevator is a substitute for steps and stairways. It is debatable whether an ordinary user would or could be expected to look for a step at the point of exiting an elevator. An ordinary elevator user may be prudent to remain wary of potentially closing doors, and this might actually preclude a glance at the floor or ceiling to determine whether the elevator has stopped flush with the floor. Second, an ordinary user might be distracted by others getting on and off the elevator. Third, the logistics of this situation place it beyond the average

open and obvious danger case. Although the effect of the elevator's malfunction was to create a step, the step was not a permanent part of the structure. For instance, in *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470; 499 NW2d 379 (1993), the open and obvious danger was a handicap access ramp located at the entrance of a fast-food restaurant. Anyone approaching the door of the restaurant would have had time to see the ramp. Similarly, the sidewalk which was elevated a few inches from the parking lot in *Spanuolo* was a permanent situation, and the plaintiff there proceeded in the face of the known danger. Here, the elevator deposited plaintiff right at the point of danger, which was very nearly the same point where he had been safely deposited hundreds of times before. In this situation, a passenger may arguably be preconditioned to assume continuity. Consequently, we do not consider the risk of harm in this case to be so open and obvious that reasonable minds could not differ as to that conclusion.

Plaintiff next argues that even if the gap represented an open and obvious danger, a genuine issue of fact existed with regard to whether bad lighting and similar carpets in the elevator and adjacent hallway diverted plaintiff's attention from where he was walking, thus transforming the elevator gap into an unreasonably dangerous condition. Plaintiff presented no evidence to support a causal relationship between the lighting and his accident, however. As for the carpets, when a landowner knows or should know that an open and obvious danger poses an unreasonable risk of harm to an invitee, the landowner still owes a duty to take reasonable precautions to protect the invitee from harm. See *Bertrand*, *supra* at 611. The Michigan Supreme Court recently split on the issue of whether the focus of this exception to the open and obvious doctrine should be on whether an obvious risk of harm is unreasonable or on whether an obvious risk of harm is foreseeable, *Singerman*, *supra* at 142-143 (Weaver, J.), 146 (Mallett, C.J.), but it agreed that the foreseeable risk of unreasonable harm exception to the open and obvious doctrine "is narrowly drawn and [should] be applied with restraint," *id.* at 140, 146.

Accepting for purposes of discussion that the carpets were the same,[1] we conclude that the risk created was neither foreseeable to defendant nor unreasonable to plaintiff. An apartment building manager should not be forced to assume that invitees will be so distracted by a building's decor that they will pay no attention to where they are walking and thus injure themselves on the open and obvious obstacles in their path. However, as discussed above, we do not believe that the court could determine, as a matter of law, that the gap created by defendant's elevator did not pose an unreasonable risk of harm to plaintiff; consequently, summary disposition was inappropriate because further factual development could justify plaintiff's claim for relief. *Singerman*, *supra*. at 139.

Finally, plaintiff argues that defendant should have foreseen the type of harm that plaintiff suffered because elevator service records indicated that the elevator had previously skipped floors and stopped between floors. These records did, in fact, illustrate that the elevator had previously skipped and stopped between floors. Indeed, the intermittent nature of the malfunction could arguably have made it more dangerous than if the malfunction occurred with some degree of predictability. It is predictability that justifies foreseeability. Plaintiff also testified in his deposition that he had previously encountered these various elevator malfunctions. This evidence is sufficient to preclude summary disposition as a record may be developed at trial that would leave open an issue upon which reasonable

minds might differ. *Id.* Thus, we conclude that the trial court incorrectly rejected plaintiff's argument that defendant should have foreseen any risk of a malfunctioning elevator causing harm to plaintiff.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael J. Kelly

[1] Photographs attached to defendant's brief on appeal show that the carpeting inside the elevator and in the hallway are solid blue and patterned blue and white, respectively.