STATE OF MICHIGAN

COURT OF APPEALS

PHYLLIS ANDERSON and ROBERT ANDERSON,

Plaintiffs-Appellants,

v

McLAREN REGIONAL MEDICAL CENTER,

Defendant-Appellee,

and

AXIOM REAL ESTATE MANAGEMENT, INC.,

Defendant-Cross Plaintiff,

and

GERALD MANSOUR and GEORGE MANSOUR d/b/a OAK CREEK ASSOCIATES,

Defendants-Cross Defendants.

UNPUBLISHED
April 9, 1999

No. 206286
Genesee Circuit Court
LC No. 96-045683 NO

Before: Markman, P.J., and Jansen and J.B.Sullivan,* J.J.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendant McLaren Regional Medical Center. We affirm.

Plaintiff Phyllis Anderson was injured when she tripped and fell over the metal threshold of one of the exterior doorways to the building in which McLaren's weight management clinic was located. In her complaint, she alleged that the threshold was not in conformity with state law and various building

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

codes and that the hallway leading to the doorway was dimly lit. Plaintiff claimed that defendant was liable for negligent maintenance or repair of the doorway.

We initially respond to McLaren's argument that, under the terms of its lease with the building landlord, it was not responsible for maintenance and repair of the exterior doors. Since it did not have possession and control of the exterior doors, McLaren argues it was not liable for plaintiff's injuries. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Although this issue was not addressed by the trial court on defendant's motion for summary disposition, it was raised as an affirmative defense. Thus, the issue was preserved for appellate review. *Wechsler v Wayne Co Rd Comm*, 215 Mich App 579, 585-586 n 3; 546 NW2d 690 (1996). However, review of this issue requires a review of documents that are not part of the lower court record. Because we find the grounds upon which the trial court based its decision sufficient, we decline to review this issue.

The trial court granted summary disposition in favor of McLaren on the finding that the doorway threshold was open and obvious. We agree. An owner or occupier of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitee will not discover or protect themselves against. *Butler v Ramco-Gershenson*, 214 Mich App 521, 532; 542 NW2d 912 (1995). Plaintiff's argument that the fact that the threshold violated a statute or building code rendered the condition unusual does not negate the fact that the threshold was not hidden. Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). An expert's measurements are irrelevant in determining whether a condition is open and obvious since the test is whether an ordinary person would see the condition upon casual inspection. *Id.*

Doorway thresholds are an everyday occurrence that people encounter. A reasonably prudent person will look where she is going, will observe the threshold and will take appropriate care for her own safety. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). The overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary doorways foolproof. *Id.*

Plaintiff has specifically claimed that the threshold violated regulations prescribing barrier free design. Barrier free design is defined by the state construction code, MCL 125.1502(1)(c): MSA 5.2949(2)(1)(c), as design which eliminates the type of barriers and hindrances that deter handicappers from having access and free mobility. Plaintiff has not made any claim that she is handicapped and, consequently, her injury was not the harm the code was intended to prevent. *Zeni v Anderson*, 397 Mich 117, 138; 243 NW2d 270 (1976). Plaintiff has failed to identify the specific sections of the other codes McLaren allegedly violated. Regardless, although a code violation may be evidence of negligence, it is insufficient to impose a legal duty cognizable in negligence. *Summers v City of Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994).

Accordingly, plaintiff is unable to establish that McLaren was under a duty to install a different type of threshold, or that if such a threshold had been installed, it would have prevented her fall. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 479; 531 NW2d 715 (1995).

Plaintiff also alleged that McLaren was negligent in failing to keep the hallway leading from the door adequately illuminated. However, plaintiff stated in her deposition that, had it not been for her heal catching on the metal threshold, she would have negotiated the doorway without any problem upon leaving the building. Since a plaintiff's deposition testimony is binding in the absence of proper explanation, even though it contradicts allegations in the complaint, plaintiff cannot claim that she fell because of inadequate lighting in the hallway. *Henderson v Sprout Bros, Inc*, 176 Mich App 661, 670; 440 NW2d 629 (1989).

Finally, plaintiff claims that the alleged code violation constituted a nuisance for which defendant was liable. We disagree. A defendant is liable for a nuisance where (1) the defendant created the nuisance, (2) the defendant owned or controlled the land from which the nuisance arose, or (3) the defendant employed another person to do work from which the defendant knew a nuisance would likely arise. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 191; 540 NW2d 297 (1995). None of these conditions is present here. Moreover, because the exterior doorway and its threshold do not constitute a nuisance at all times and under all circumstances, regardless of location or surroundings, there is no nuisance per se. *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152-153; 422 NW2d 205 (1988).

Accordingly, the trial court did not err in granting summary disposition in favor of McLaren and dismissing plaintiff's negligence and nuisance claims.

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan