STATE OF MICHIGAN

COURT OF APPEALS

JAMES E. FRANKLIN,

Plaintiff-Appellant,

v

DAVID PETERSON and CAROL PETERSON,

Defendants-Appellees.

UNPUBLISHED
August 17, 1999

No. 208964
Oakland Circuit Court
LC No. 97-536409 NO

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants in this premises liability case. We affirm.

This case arises out of a slip and fall that occurred on April 21, 1996 at a home owned by defendants. Plaintiff, a real estate salesperson, was showing defendants' house to potential buyers. While exiting defendants' house, plaintiff fell and broke his foot as he was stepping off a cement slab adjacent to the front porch. Specifically, the cement slab was elevated three inches from the cement sidewalk which led to the driveway. Apparently, plaintiff was waving goodbye to the prospective buyers, was not looking down, and fell off the cement slab.

Plaintiff filed suit, alleging negligence and intentional nuisance. Plaintiff's negligence claim included claims that defendants failed to exercise ordinary care to protect plaintiff from unreasonable risks of injury that were known or should have been known to defendants, failed to maintain the premises in a reasonably safe condition, failed to warn plaintiff of the danger, failed to discover possible dangerous conditions which a reasonable person would have discovered upon inspection, and maintained a hazard because of the change in elevation which is a violation of ordinances of the city of Troy and the State of Michigan. The trial court granted defendants' motion for summary disposition, ruling that the step was open and obvious and not unreasonably dangerous, and that plaintiff failed to show that defendants created or continued a condition knowing that injury was substantially certain to follow because of the condition.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because the trial court relied on materials outside the pleadings, we assume that the trial court granted the motion on the basis of MCR 2.116(C)(10), which tests the factual support for the claim. *Spiek, supra*, pp 337-338. The court is to consider all record evidence, make all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition because the step was not open and obvious and, if it was open and obvious, the step was unreasonably dangerous.

There is no dispute that plaintiff was an invitee on defendants' premises at the time he fell. The landowner owes an invitee a duty to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land that the owner knows or should know that his invitee will not discover, realize, or protect himself against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Invitors may be held liable for an invitee's injury that result from a failure to warn of a hazardous condition or from the negligent maintenance of the premises or defects in the physical structure in the building. *Id.*, p 610. Where a condition is open and obvious, the scope of the invitor's duty may be limited. *Id.* Although there may be no duty to warn of a fully obvious condition, the invitor may still have a duty to protect an invitee against foreseeably dangerous conditions. *Id.*, p 611. Therefore, the open an obvious doctrine does not relieve the invitor of the general duty of reasonable care. *Id.*

> [T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide. [*Id.*]

The Court concluded in *Bertrand, supra*, p 614, that because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, if there are special aspects of the particular steps that make the risk of harm unreasonable, the failure to remedy the dangerous condition may result in a breach of the duty to keep the premises reasonably safe. There must be something unusual or unique about the steps because of their character, location, or surrounding conditions in order for a duty to exercise reasonable care to remain with the invitor. *Id.*, pp 614, 617.

First, we agree with the trial court that the cement slab in question was open and obvious. Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Bldg,*

Inc, 227 Mich App 1, 10; 574 NW2d 691 (1997). Plaintiff testified at his deposition that he did not recall seeing the step before he fell. Similarly, in his affidavit, plaintiff averred that he fell because he did not see or perceive the change in elevation of the cement slab. However, plaintiff admitted at his deposition that there was nothing hidden about the configuration of the cement slab. Finally, plaintiff had entered through the front door and walkway twice on the same day before he fell. A review of the photographs attached to the briefs also confirms that there is nothing about the cement slab that makes any defect to be hidden. Accordingly, defendants had no duty to warn plaintiff about any dangers associated with the fully obvious cement slab because it is reasonable to expect an average person of ordinary intelligence to discover any danger associated with the cement slab upon casual inspection.

Plaintiff next argues that, although the step may be considered open and obvious, there were unusual characteristics about the step which caused it to pose an unreasonable risk of harm. First, plaintiff contends that the step violated the Building Officials and Code Administrators (BOCA) National Building Code requirements (as adopted by the city of Troy and the State of Michigan) relating to steps. Second, plaintiff contends that the step was difficult to see, that he did not perceive any change in elevation, and, thus, it posed an unreasonable risk of harm.

With respect to plaintiff's contention that the step elevation of three inches violated the requirement of the BOCA that the rise should be a minimum of four inches[1], we note that violation of an ordinance or administrative rule and regulation is evidence of negligence, however, such a violation does not go to the question whether there is something unique about the steps that renders them unreasonably dangerous even when the open and obvious danger is perceived. Ultimately, the question is whether there is something unusual about the cement slab because of its character, location, or surrounding conditions. *Bertrand, supra*, p 617. The slab itself is not broken, cracked, or sloped. There is nothing that surrounds the slab so that it is difficult to see. The conditions on the day of plaintiff's accident were dry and sunny. According to another real estate agent who saw plaintiff fall, plaintiff was waving goodbye to two customers, was not looking down, and he simply fell off the cement slab. Thus, plaintiff fell because he was not looking where he was going and not because of the three-inch rise, as opposed to a four-inch rise, of the slab.

Plaintiff's additional contention that the step should have been made more open and obvious is irrelevant to whether the risk associated with the obvious step was unreasonable. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Accordingly, viewing the evidence in a light most favorable to plaintiff, he has failed to establish a genuine issue of material fact regarding whether the step was obvious and whether the step posed an unreasonable risk of harm despite its obviousness. *Bertrand, supra*, p 624.

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition regarding his intentional nuisance claim because the step constituted an intentional nuisance in fact.

Liability for nuisance is predicated upon the existence of a dangerous condition. *Lynd v Chocolay Twp*, 153 Mich App 188, 203; 395 NW2d 281 (1986). A nuisance in fact is a condition which becomes a nuisance by reason of the circumstances and surroundings. *Id.* As discussed above,

the step at issue is not a dangerous condition. Since there is no dangerous condition, there is no nuisance. *Tolbert v US Truck Co*, 179 Mich App 471, 474; 446 NW2d 484 (1989). Further, there are no "circumstances and surroundings" which cause the step to become a nuisance. Therefore, there is no nuisance in fact. *McCracken v Redford Twp Water Dep't*, 176 Mich App 365, 371; 439 NW2d 374 (1989). Because plaintiff failed to establish a genuine issue of fact regarding whether the step constituted an intentional nuisance in fact, the trial court did not err in dismissing plaintiff's intentional nuisance claim.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White

[1] The cement slab in question was built, along with the driveway and sidewalk, in the summer of 1988 by a company hired by defendants. While defendants contended that the applicable 1987 BOCA code did not contain a minimum riser requirement applicable to the steps at issue, defendants abandoned that position at argument.