STATE OF MICHIGAN

COURT OF APPEALS

HELENA NAPIERALA,

Plaintiff-Appellant,

v

TG & DP, INCORPORATED and ATHENEUM HOTEL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
January 27, 2004

No. 242260
Wayne Circuit Court
LC No. 01-110549-NO

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants in this slip and fall case. We affirm.

On appeal, plaintiff argues that the deposition testimony of plaintiff and an eyewitness sufficed to create a genuine issue of material fact regarding whether (1) the step or incline at defendants' hotel on which she fell was "open and obvious," and (2) whether the step or incline had "special aspects" rendering it not protected under the "open and obvious" doctrine. We disagree.

Defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), and the trial judge granted the motion, "pursuant to MCR 2.116(C)(8) and (C)(10) for the reasons stated on the record." No further explanation of the ruling appears in the record. However, at the hearing on defendants' motion, the court considered evidence beyond the pleadings, specifically an affidavit and depositions. When it is unclear under which subrule the court granted summary disposition, and "it appears that the court looked beyond the pleadings in making its determination, this Court will consider the motion granted pursuant to MCR 2.116(C)(10)." *DeHart v Joe Lunghammer Chevrolet, Inc*, 239 Mich App 181, 184; 607 NW2d 417 (1999). Therefore, we review the trial court's grant of summary disposition under MCR 2.116(C)(10). A grant of summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim; the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76-77; 597 NW2d 517 (1999).

In *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), the Michigan Supreme Court, in the context of a slip and fall injury, recently summarized this state's general rule of owner/occupier nonliability for injuries resulting from "open and obvious" hazards, as well as the "special aspects" exception to the rule. "[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* at 517. Hazards are "open and obvious" if they are " 'known to the invitee or . . . so obvious that the invitee might reasonably be expected to discover them.' " *Id.* at 516, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). The Court further stated that "only those special aspects [of a hazard or condition] that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra* at 519. By way of illustration, the Court gave the following examples of situations in which the "special aspects" exception would apply:

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [*Id.* at 518.]

Plaintiff contends that there is a genuine issue of material fact regarding whether the hazardous condition of the step/incline was "open and obvious." She further argues that even if the condition was, as a matter of law, "open and obvious," there is a genuine issue of material fact regarding whether the condition possessed "special aspects" so as to remove it from the general rule of nonliability.

The hazardous condition of the step or incline in the Atheneum Hotel was open and obvious. Whether a defect could be found to be open and obvious is initially a question of law for the trial court. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119; 492 NW2d 761 (1992). The Michigan Supreme Court has stated that "[t]he danger of tripping and falling on a step is generally open and obvious." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Just because a particular plaintiff fails to see a step does not mean it is not open and obvious. *Id.* at 621. The question is "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).

The color photographs of the transition area between the hotel lobby and the banquet room into which plaintiff fell show a readily observable contrast between the floor of the lobby,

the black threshold area, and the carpeted floor of the banquet room. One in plaintiff's position, as she moved across the threshold, might reasonably be expected to see this contrast and transition. Plaintiff testified that she was aware that one needs some type of separation between carpeting and another type of floor surface, or that one must "put something over it" to avoid having a "trip point." She even acknowledges that there are such dividers between floor surfaces in her own home, though she stated they were "flat." Most damaging to plaintiff's claim is her admission that she did not look at the step/incline. The fact that a particular plaintiff did not look, and therefore did not see, a particular step or incline that is readily observable, does not make it dangerous. See *Bertrand, supra,* 449 Mich 621.

Plaintiff argues that even if the danger presented by the step or incline is open and obvious, this is not fatal to her case because she produced sufficient evidence to create a genuine issue of material fact regarding whether the step or incline has special aspects rendering it unreasonably dangerous. She claims that the "[s]pecial aspects to this particular step were that it was slanted, and monotone in color with the lobby." However, an examination of Michigan precedent shows that the trial court was correct in holding that, as a matter of law, the step or incline was not unreasonably dangerous.

The Supreme Court, in *Lugo, supra,* stated that "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Lugo, supra*, 464 Mich 519. It cannot be reasonably said that the danger presented by stepping on the inclined surface between the hotel lobby and the banquet room (a one-half inch vertical drop over a distance of 1 ¼ inches) is comparable to the danger represented by an "unguarded thirty foot deep pit in the middle of a parking lot," or being forced to walk through standing water, the examples of "unreasonably dangerous" conditions given by the Court in *Lugo, supra,* 464 Mich 518. In addition, defendant produced unrebutted evidence from the design architect that the step or incline "complied with American National Standard Institute Standards, American Disability Act standards, and applicable building codes for changes between two surfaces." This evidence would appear to indicate that the incline was not unreasonably dangerous. Furthermore, the Court has specifically rejected an argument very similar to plaintiff's. In *Maurer v Oakland Co Parks and Recreation Dep't*, 449 Mich 606; 537 NW2d 185 (1995), a case consolidated with *Bertrand v Alan Ford, Inc,* the plaintiff argued that a concrete step was dangerous in part because the defendant had failed to mark it with a color contrasting with the surrounding concrete. The Court stated, "We hold that the plaintiff has failed to establish anything unusual about the step that would take it out of the rule of *Garret* and *Boyle*."[1] *Id.* at 621.

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[1] "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. The construction is not negligent unless, by its character, location or surrounding conditions, a reasonably prudent person would not be likely to expect a step or see it." *Garret v WS Butterfield Theatres*, 261 Mich 262, 263-264; 246 NW 57 (1933). This part of the opinion was quoted in *Boyle v Preketes*, 262 Mich 629, 635; 247 NW 763 (1933).

There was no genuine issue of material fact regarding whether the step or incline on which plaintiff fell was an "open and obvious" hazard. Nor was there a genuine issue of material fact regarding whether the step or incline had "special aspects" rendering it unreasonably dangerous. The trial court therefore did not err in granting defendants' motion for summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage