STATE OF MICHIGAN

COURT OF APPEALS

DONALD C. KNOLL and ANN M. KNOLL,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 16, 2004

No. 245387
Genesee Circuit Court
LC No. 01-071633-NO

Before: Jansen, P.J. and Markey and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a trial court order granting defendant's motion for summary disposition. We affirm.

Plaintiff Donald Knoll,[1] owner of American Made Textiles, distributed shirts, jackets, and other items. On November 8, 2000, plaintiff Donald Knoll was at defendant General Motors' Plant 36 in Flint, Michigan, sizing individuals for jackets with a UAW logo. Plaintiff left the plant at nighttime carrying four or five jackets, and tripped and fell from a step/curb. Plaintiff's hip was fractured as a result of the fall.

Plaintiffs contend that summary disposition was improper. We disagree. On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). When

[1] Because Ann Knoll's claim is a derivative claim, the singular term "plaintiff" will be used in this opinion to refer to Donald Knoll.

deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *J & J Farmer Leasing, Inc v Citizens Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 239069, issued February 12, 2004) slip op p 3. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allstate Ins Co v State*, 259 Mich App 705, 709-710; ___ NW2d ___.

Plaintiff contends that he was an invitee onto defendant's property, while defendant argues that he was a licensee. A licensee is a person privileged to enter the land of another by the possessor's consent. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). The duty to adult licensees is only to warn them of any hidden dangers about which the owner knows or has reason to know, if the licensee does not know or have reason to know of the dangers involved, and to refrain from wanton and willful misconduct. *Id*. The owner owes no duty of inspection, nor any duty to prepare the premises for the safety of the licensee. *Id.*; *Burnett v Bruner*, 247 Mich App 365, 370-371; 636 NW2d 773 (2001). That the defective condition is obvious is usually sufficient to apprise an adult licensee of the full extent of the risk involved. *DeBoard v Fairwood Villas Condominium Ass'n*, 193 Mich App 240, 242-243; 483 NW2d 422 (1992).

An invitee is a person who enters the land of another on an invitation that carries with it an implication that reasonable care has been used to prepare the premises and make them safe. *Stitt, supra* at 596-597. The invitee's presence on the defendant's premises must be for a commercial purpose, and the essence of the relationship is a pecuniary interest on the part of the landowner. *Id.* at 604-605; *Stanley v Town Square Cooperative*, 203 Mich App 143, 147; 512 NW2d 51 (1993). Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitor must warn of hidden defects, but is not required to eliminate or warn of open and obvious dangers unless he should anticipate the harm despite the invitee's knowledge of it. *Lugo*, *supra*; *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495, 498; 595 NW2d 152 (1999).

The trial court did not address whether or not plaintiff was an invitee because it found, regardless, the condition causing plaintiff's injury was an open obvious condition with no special aspects creating an unreasonable risk of harm. Upon a de novo review, we find that summary disposition was proper as the step/curb causing plaintiff's injuries was an open and obvious condition without any special aspect creating an unreasonable risk of harm.[2]

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[2] We also note that it appears plaintiff was a licensee on defendant's property rather than an invitee because the essence of the relationship resulting in plaintiff; being on defendant's premises was not the pecuniary interest of defendant. See *Stitt, supra* at 604-605; *Stanley, supra* at 147. Plaintiff was at Plant 46 to size UAW members for UAW purposes. The pecuniary interest was that of plaintiff.

Plaintiffs contend that because the step/curb was poorly lit and was the same color as the ground it was not an open and obvious danger. We disagree.

"The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000) quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The Michigan Supreme Court has stated, "the 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). Generally, steps are considered open and obvious:

> Because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps and will take appropriate care for his own safety. . . . However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. . . [*Bertrand, supra* at 616-617.]

Our Supreme Court has also stated that "ordinary steps cannot be considered to present an unreasonably dangerous risk of harm." *Lugo, supra* at 525, n 6. Just because a particular plaintiff fails to see a step does not mean it is not open and obvious. *Bertrand, supra* at 621. Steps are encountered as an everyday occurrence. The hazardous condition of the step or incline at defendant's plant was open and obvious.

The color photographs of the area in question indicate that the step and the ground below it were the same color or were at least similar in color. However, one in plaintiff's position, who has walked the step before, might reasonably be expected to see this contrast and transition. [3] The fact that a particular plaintiff falls when negotiating a particular, readily observable, step does not make it dangerous, and, in particular, when it is at least the third time the plaintiff has crossed the same path. See *Bertrand, supra* at 621. The trial court correctly found that reasonable minds could not differ on whether any danger posed by the step/curb was open and obvious. *Novotney, supra* at 474-475. We find that any danger posed by the step, even if it were dimly lit and a similar color to the ground below, was open and obvious to the average user with ordinary intelligence. See *id*.

Plaintiff further contends that even if the condition of the stairway was open and obvious, it still presented an unreasonable risk of harm. We disagree.

As discussed, hereinbefore, the danger of tripping and falling on steps is generally open and obvious and a failure to warn theory cannot establish liability. *Bertrand, supra* at 614.

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[3] We note that plaintiff claims he was looking ahead while carrying five or six jackets and talking to an individual behind him, when he tripped over the step/curb.

Indeed, people are expected to exercise reasonable care for their own safety; therefore, landowners are not required to make their premises "foolproof." *Bertrand, supra* at 616-617. But the unique character, location, or conditions surrounding steps have the potential to make them unreasonably dangerous. *Id*. at 617.

In *Lugo, supra* at 517-519, our Supreme Court provided the following with regard to open and obvious conditions:

> With regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. . . . [O]nly 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. [Citations and footnotes omitted.]

Basically, special aspects are those conditions that create a high risk of harm or severity of harm if not avoided. *Lugo, supra* at 518-519. The *Lugo* Court provided two scenarios to demonstrate when a condition could be considered unavoidable or unreasonably dangerous. *Id*. at 518-519. The *Lugo* Court noted that in the following situation the open and obvious doctrine would not apply because the condition would be essentially unavoidable:

> [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. [*Id*. at 518.]

Lugo, supra, next discussed the special aspects of a thirty foot unguarded and unmarked pit in a parking lot as posing an unreasonable risk of severe harm as:

> 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*.]

Lugo has clearly established a high standard for determining what constitutes a special aspect. Without the existence of a special aspect, an action premised on a typical open and obvious condition will be barred by the open and obvious danger doctrine. *Id*. at 519-520.

In the instant case, plaintiff suggests that the lack of proper illumination and the similar color of the step/curb to the ground was a condition surrounding the step that created an

unreasonable risk of harm. Applying the principles established in *Bertrand, supra*, and *Lugo, supra*, we do not find that the danger in the instant case was unavoidable or that it presented a uniquely high likelihood of severe harm or death. Plaintiff has failed to present any evidence that even if the area were dimly lit and the step and the ground below it were similar colors, the area was an unavoidable risk. Unlike the example in *Lugo, supra*, plaintiff was not trapped inside defendant's arena so that he was effectively forced to traverse the dimly lit path. Plaintiff could have used the handicap ramp and easily avoided the step he now claims posed an unreasonable risk of harm. Plaintiff had traveled the same path earlier on his way into the plant, and had used the same entrance on another occasion when he visited the plant a week earlier and would be aware of the handicap ramp as an exit option.

Additionally, plaintiff has failed to offer any evidence that the condition of the step was so unreasonably dangerous that it posed a likelihood of severe injury or death.[4] Plaintiff does not argue that the step was defective in any way and it is undisputed that he was aware of its existence, as he had gone over the step earlier. More importantly, the risk of harm in this case does not rise to the degree of harm discussed in *Lugo, supra*. Indeed, there is a difference in the potential for harm in tripping on a step and falling into a thirty foot hole in a parking lot. Thus, we find that no reasonable juror could conclude that the darkness surrounding the step and the similar color in the lighting were such unique circumstances that the step posed an unreasonable risk of harm.

Plaintiff failed to demonstrate the existence of any special aspects that made the condition, causing him to fall, unreasonably dangerous in spite of its open and obvious nature. Had plaintiff simply watched his step, any risk of harm would have been obviated. *Spagnuolo v Rudds # 2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997). Consequently, we conclude that plaintiff's premises liability claim is barred by the open and obvious danger doctrine. Upon a de novo review, we find that summary disposition was properly granted in favor of defendant.

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[4] We note plaintiff did present an affidavit from Steven Ziemba, a licensed engineer, who indicated that the coloring of the concrete step and the concrete below, with the lighting conditions, made the step hidden from view. Zimeba's affidavit further provided that the step unreasonable and dangerous and would not be an open and obvious danger. Defendant contends that there are evidentiary problems with using this affidavit. We do not agree with defendant, as we are to take the documentary evidence in favor of plaintiff when reviewing an appeal from a grant of summary disposition. However, the affidavit does not provide support for plaintiff's position because it does not address that plaintiff was an individual who had made the step without any problem earlier in the day and, apparently, on at least one other occasion. Moreover, the affidavit does not provide support or opinion as to whether the step was unavoidable or posed a substantial risk of death or severe injury. Thus, reviewing the evidence in a light most favorable to plaintiff, we do not believe that the affidavit raises a question of fact for a jury.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Hilda R. Gage