STATE OF MICHIGAN

COURT OF APPEALS

ANDREW JOSEPH LUCAS,

Plaintiff-Appellee,

v

HUNTINGTON BANCSHARES, INCORPORATED,

Defendant-Appellant.

UNPUBLISHED
July 22, 2004

No. 245313
Macomb Circuit Court
LC No. 02-000662-NO

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this premises liability action, defendant appeals by leave granted from the trial court's order denying defendant's motion for summary disposition. We reverse and remand.

In his complaint, plaintiff alleges that he tripped on the lip of a ramp leading to defendant bank, fell on his shoulder, and sustained a rotator cuff injury. Plaintiff seeks relief under theories of negligence and nuisance. Defendant moved for summary disposition of plaintiff's action, but the trial court denied defendant's motion. This appeal by leave granted ensued.

On appeal, defendant argues that the trial court erred in failing to grant summary disposition in favor of defendant because defendant had no duty to warn or protect plaintiff from the alleged defects in the ramp because the lip on the ramp was open and obvious and because plaintiff failed to present a question of fact regarding special aspects. We agree.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

In general, a premises possessor owes invitees a duty to exercise reasonable care to protect them from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo*

v Ameritech Corp, Inc, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty does not extend to dangers that are open and obvious, unless special aspects of an open and obvious condition exist that create an unreasonable risk of harm, in which case the premises possessor has a duty to take reasonable steps to protect invitees from the risk. *Lugo, supra* at 516-517. To determine if a danger is open and obvious, the test is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). With respect to open and obvious dangers, the *Lugo* Court explained that

> 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. [*Lugo, supra* at 517-518.]

The *Lugo* Court characterized two types of special aspects: those where the open and obvious condition is effectively unavoidable and those where the condition presents a substantial risk of death or severe injury. *Id.* at 518. The Court instructed 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." *Id.* at 519.

Here, the trial court determined that the condition in the present case is open and obvious. Neither party disputes that conclusion. Instead, the issue before us is whether the condition of the ramp was such that a factfinder could determine that it has special aspects that would give rise to a duty to protect plaintiff from the condition despite its open and obvious nature. We conclude that it does not.

While plaintiff allegedly suffered a serious injury, the elevated condition of the bottom of the ramp does not present a greater risk of injury than do other types of conditions that might cause a person to trip and fall, such as an uneven sidewalk, a curb, or potholes in a parking lot. *Lugo, supra* at 520-521 (a pothole in a parking lot is typically avoidable and poses little risk of severe harm: "[u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground will suffer severe injury"); *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (falling several feet down an open and obvious condition of ice-coated stairs does not give rise to the sort of severe harm considered in *Lugo*). Although some people might suffer a greater injury than others or than one might anticipate,[1] the condition does not present special aspects that made it

[1] We also note that the trial court stated that "[i]t is clear in this case that the condition of the ramp could result in serious injury; in the case at bar, plaintiff allegedly suffered a torn rotator cuff." The trial court appears to examine the risk posed by the ramp in light of plaintiff's
(continued…)

unreasonably dangerous. In other words, a three-quarters of one inch lip on a ramp does not render it unreasonably dangerous because it cannot be determined to impose a severe risk of harm. Further, from the record it is clear that the condition was not "effectively unavoidable."[2] Thus, defendant is entitled to summary disposition.

Reversed and remanded for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

(…continued)

injuries. However, in *Lugo*, our Supreme Court explained that

> [i]n considering whether a condition presents such a uniquely dangerous potential for severe harm as to constitute a "special aspect" and to avoid barring liability in the ordinary manner of an open and obvious danger, it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori*, that is, before the incident involved in a particular case. It would, for example, be inappropriate to conclude in a retrospective fashion that merely because a particular plaintiff, in fact, suffered harm or even severe harm, that the condition at issue in a case posed a uniquely high risk of severe harm. [*Lugo, supra* at 518 n 2.]

[2] Further, to the extent that the trial court mentioned in its opinion and order that the ramp was not in compliance with the appropriate building code, and where plaintiff relies on building code violations in his appellate brief, we note that violation of a building code is an issue of proximate cause and not an issue of duty. *Corey, supra* at 9 n 1 ("With regard to the building code violation allegation in this case, we note that the absence of a handrail deals with proximate causation. Because a duty did not exist in this case because of the open and obvious condition and the lack of a special aspect, we need not reach this issue."); see also *O'Donnell v Garasic*, 259 Mich App 569, 578-579; 676 NW2d 213 (2003) ("Not all B[uilding] O[fficials] [&] C[ode] A[dministrators International, Inc.] code violations will support a special aspects factor analysis in avoidance of the open and obvious doctrine. The critical inquiry is whether there is something unusual about the [complained of features] because of their character, location, or surrounding conditions that gives rise to an unreasonable risk of harm."). Because there was nothing unusual about the three-quarters of one inch lip on the ramp that presented an unreasonable risk of harm, a building code violation does not support a special aspects factor analysis in avoidance of the open and obvious doctrine.