STATE OF MICHIGAN

COURT OF APPEALS

RICHARD FORCELLI,

Plaintiff-Appellant,

v

PRINCETON ENTERPRISES, L.L.C,

Defendant-Appellee.

UNPUBLISHED
May 12, 2005

No. 251305
Oakland Circuit Court
LC No. 02-044854-NO

Before: Judges O'Connell, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this trip and fall action. We reverse and remand.

Plaintiff first asserts that the trial court erred in failing to find that the open and obvious doctrine does not apply to a landlord's duty under MCL 554.139 to "keep the premises in reasonable repair" because that duty is statutorily imposed. We agree.

In *Woodbury v Bruckner* 467 Mich 922; 658 NW2d 482 (2002) the Michigan Supreme Court, specifically referencing MCL 554.139, stated, "The open and obvious doctrine cannot be used to avoid a specific statutory duty." *Id*., citing *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002). Therefore, the trial court incorrectly concluded that the open and obvious doctrine precluded recovery to plaintiff.

Defendant argues that the statutory duty has been modified by the terms of the lease as permitted under MCL 554.139(2). Defendant relies on an exculpatory clause in the lease agreement signed by the parties for this assertion. However, MCL 554.633 states that a lease agreement cannot contain a provision that "[e]xculpates the lessor from liability for the lessor's failure to perform, or negligent performance of, a duty imposed by law." Also, this Court has previously determined that exculpatory clauses in residential leases are void as against public policy. *Feldman v Stein Bldg & Lumber Co*, 6 Mich App 180, 186; 148 NW2d 554 (1967), overruled on other grounds by *Grossman v Lambrect*, 54 Mich App 641; 221 NW2d 424 (1974).

In its opinion, the trial court failed to consider, either expressly or by implication, whether there was a breach of the statutory duty to keep the premises in reasonable repair. Having failed to consider the applicability of MCL 554.139, the court committed error. The order granting defendant's motion for summary disposition is, therefore, reversed, and plaintiff's

claim is remanded for a determination of whether there are factual issues regarding whether defendant breached its statutory duty under MCL 554.139(1)(b).

Because the duty to warn and the statutory duty to repair are distinct, and MCL 554.139 governs only the duty to repair, the open and obvious doctrine will only be considered to determine if defendant has breached its common law duty to warn plaintiff of defective conditions. *Calef v West*, 252 Mich App 443, 454; 652 NW2d 496 (2002).

The facts of the present case are very similar to those in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), because, like the pothole that the Court found to be open and obvious in *Lugo*, the deterioration of the expansion joint is a common occurrence. The test is an objective test requiring a determination of whether an "invitee might reasonably be expected to discover [the danger]." *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992). Using this objective standard, it is clear that plaintiff should have seen the defect. A reasonable person in plaintiff's position who had just walked up the ramp without incident, and who had walked the same ramp on a daily basis, should have been aware of the defect. See *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). Therefore, the trial court correctly concluded there is no genuine issue of material fact regarding whether the defect was open and obvious.

Last, we consider whether there is a genuine issue of material fact regarding the special aspects of the expansion joint that makes it unreasonably dangerous despite the obviousness. We conclude that there is not.

Again, we will consider the "special aspects" argument only as it relates to plaintiff's claims for failure to warn because MCL 554.139 applies to the duty to repair. The open and obvious doctrine will preclude recovery to a plaintiff for a defendant's failure to warn unless he can establish that there were special aspects, or "unique circumstances surrounding the area in issue [that] made the situation unreasonably dangerous." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "It is the aggregate of factors that the trial court must analyze to determine if there are special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *O'Donnell*, *supra* at 578. The Michigan Supreme Court has described unreasonable dangers as those that are unavoidable or that result in death or serious injury, such as falling into an unguarded, thirty-foot pit. *Lugo*, *supra* at 518.

Plaintiff presented evidence that it was dark and raining on the night of the incident and that he specifically looked before walking down the ramp to choose the safest route. He did not take the stairs because he feared being a crime victim and found them to be "eerie." However, plaintiff provided no evidence beyond his mere assertions that the stairway was not safe. "[A]n adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4).

Plaintiff also stated that the incline of the ramp, combined with the rain and darkness, made it impossible to see the defects because the ramp appeared one color of gray and the defects were filled with water. Additionally, his expert stated that it would be more difficult to see the defects on a downward incline and that vision "plays an important role" in one's ability to control his center of gravity.

Arguably, falling forward, down a declining ramp, poses a more severe risk of injury than simply falling on flat pavement; however, it does not rise to the level of severe injury that would remove it from the open and obvious doctrine as contemplated in *Lugo.* Also, the risk does not rise to the level of severe harm recognized as unreasonably dangerous by this Court, such as falling down a flight of stairs, *O'Donnell, supra* at 577-578, or falling nine feet from the top of a building, *Woodbury v Bruckner (On Remand),* 248 Mich App 684, 694; 650 NW2d 343 (2001). Therefore, there is no issue of fact regarding whether the defect was unreasonably dangerous.

In conclusion, the trial court erroneously granted defendant's motion for summary judgment because the open and obvious doctrine does not apply to statutorily imposed duties and the court failed to consider whether defendant had breached its duties under MCL 554.139. We, therefore, remand for a determination of whether there is an issue of fact regarding whether defendant breached its statutory duties. There exists, however, no genuine issue of fact regarding whether defendant had a duty to warn plaintiff of the defect, and summary disposition was proper in that regard.

Affirmed in part and reversed in part. We remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Michael J. Talbot