STATE OF MICHIGAN

COURT OF APPEALS

MARCIA HARRIS,

Plaintiff-Appellant,

v

SEARS, ROEBUCK AND CO., a foreign corporation, SCHINDLER ELEVATOR CORPORATION, a foreign corporation,

Defendants-Appellees.

UNPUBLISHED
November 17, 2005

No. 253546
Oakland Circuit Court
LC No. 2003-046838-NO

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant MCR 7.214(E).

Plaintiff sued defendant Sears, Roebuck and Co. (Sears) for failing to exercise reasonable care to protect her from the danger created when the elevator in which she was riding allegedly stopped one to two inches below the level of the floor onto which she exited. Plaintiff also sued defendant Schindler Elevator Corporation (Schindler) for negligent maintenance of the elevator.

At the time of the accident, plaintiff was in a motorized wheelchair. However, plaintiff was not permanently confined to the wheelchair, but typically used it when she was going to have to walk a distance or was fatigued. Plaintiff claimed that she suffered injuries after rolling over the lip created between the elevator and the floor outside the elevator. The trial court concluded that no duty to protect or warn plaintiff arose because the uneven floor was an open and obvious danger.

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the

burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "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 might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).

Plaintiff first argues that there is a genuine issue of material fact as to whether there are special aspects of the condition that would remove it from the open and obvious danger doctrine. Generally, premises possessors owe a duty to protect their invitees from unreasonable risks of harm. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). However, liability does not result from failure to warn of the danger presented by open and obvious conditions. *Id*. Nonetheless, "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 v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001). A risk may be unreasonable because it is unavoidable, or because it carries an unreasonably high risk of severe harm. *Id.* at 518.

Plaintiff argues that the danger presented by the uneven floor was unavoidable. We do not agree. There were ways that plaintiff could have easily avoided the risk presented. For example, plaintiff could have stood up and stepped over the bump given that she was not confined to the wheelchair. Therefore, this risk is distinguishable from the example of the unavoidable risk given in *Lugo*. See *Lugo, supra* at 518.

Plaintiff also argues that while the danger created by the elevator may have been open, there is a question of fact whether it was obvious. However, plaintiff provides no authority for separating the characteristics of "open" and "obvious" within this doctrine, nor does plaintiff address how the two should function as separate elements. Indeed, the test for evaluating whether a danger is open and obvious refers to a condition jointly characterized as "open and obvious." See, e.g., *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995) ("Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection.").

Plaintiff proceeds to argue that the trial court based its decision on a clearly erroneous finding of fact. Specifically, plaintiff argues that the court misstated the deposition testimony of plaintiff when it said that plaintiff testified she could have seen the uneven elevator floor had she looked down. Plaintiff actually stated that she did not know if she could have seen the problem,

although she assumed she could have had she looked.[1] However, this mistake had no impact on the ruling. Whether plaintiff actually saw or thinks she could have seen the lip is not conclusive because the relevant standard is whether "it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection." *Eason, supra* at 264. The evidence presented supports a finding that an average person would have discovered the danger, and therefore this was an open and obvious condition.

Plaintiff further argues that defendants have failed to meet two evidentiary requirements. First, plaintiff argues that defendants failed to produce evidence to support their affirmative defense of the open and obvious danger doctrine. However, plaintiff's own deposition testimony, as well as the testimony of plaintiff's companion, can be used as evidence by the defense. This evidence alone was sufficient to establish defendants' affirmative defense. Second, plaintiff argues that defendants presented no evidence to establish that a person in plaintiff's position (someone in a similar wheelchair who sat at the same distance from the elevator door) could foresee the danger presented by the uneven elevator floor. This argument improperly focuses on the characteristics of plaintiff for defining the characteristics of the applicable reasonable person. In *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004), the Court stated as follows:

> To determine whether a condition is "open and obvious," or whether there are "special aspects" that render even an "open and obvious" condition "unreasonably dangerous," the fact-finder must utilize an objective standard, i.e., a reasonably prudent person standard. That is, in a premises liability action, the fact-finder must consider the "condition of the premises," not the condition of the plaintiff. [Citations omitted.]

Therefore, defendants only had to prove that a reasonable person would have realized the danger, and they have satisfied this burden as a matter of law for purposes of summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

[1] It was plaintiff's companion who stated that she could have seen the uneven levels if she had looked down.