STATE OF MICHIGAN

COURT OF APPEALS

MARK ENGLER and VICTORIA ENGLER,

Plaintiffs-Appellants,

v

MARKS MANAGEMENT CORPORATION, d/b/a MCDONALD'S OF CADILLAC,

Defendant-Appellee.

UNPUBLISHED
October 23, 2007

No. 275728
Wexford Circuit Court
LC No. 06-019369-NO

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Victoria Engler and her daughter went to defendant's restaurant to eat lunch. They entered the restaurant through the north door. Two different floor surfaces, floor tile and a metal grate, met several feet inside the door. Engler's daughter negotiated the area without incident. Engler tripped on the gap between the tile and the grate and fell to the floor, sustaining injuries.

Plaintiffs filed suit alleging that Engler was on defendant's premises as a business invitee, and that defendant negligently failed to inspect the premises for dangerous conditions, to warn of the dangerous condition on the property, and to take reasonable steps to repair dangerous conditions on the property. Mark Engler sought damages for loss of consortium.[1]

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it owed no duty to Engler because the condition was open and obvious, and presented no special aspects that made it unreasonably dangerous in spite of its open and obvious nature. Defendant

[1] Plaintiffs also named Terry Would, acting manager of defendant's restaurant on the date the incident occurred, as a defendant. Would was dismissed as a party as a result of lack of service of process.

asserted that the tile/grate area was plainly visible to even a casual observer, and noted that Engler admitted in her deposition that she observed the grate before she fell.

In response, plaintiffs argued that a question of fact existed as to whether the dangerous condition was open and obvious. Plaintiffs acknowledged that Engler testified that she observed the tile/grate area before she fell, but emphasized that she also stated that she did not observe anything unusual about the area. Plaintiffs attached the affidavit of Theodore Dziurman, P.E., a safety expert, who opined that the area was unsafe and not readily visible upon casual inspection.

The trial court granted defendant's motion, finding that no question of fact existed as to whether the condition was open and obvious, and that no special aspects made the condition unreasonably dangerous. The trial court also determined that whether a condition is open and obvious is not a proper question for expert opinion.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

We affirm. Engler entered defendant's restaurant and observed the tile/grate area. Photographs demonstrate that the gap between the grate and the tile is clearly visible. No evidence established that the area was obscured by poor lighting or any other obstacle. Engler asserted that she did not see the gap between the grate and the tile; however, because the test to determine whether a danger is open and obvious is objective, we look not to whether a particular plaintiff knew or should have known of the hazardous condition, but to whether a reasonable person in the plaintiff's position would have foreseen the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

Plaintiffs failed to raise a genuine issue of fact as to whether the gap between the grate and the tile was open and obvious. Engler would have noticed the gap had she been watching where she was walking. See *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999).

The trial court properly determined as a matter of law that the hazard posed by the gap between the grate and the tile was open and obvious. Plaintiffs' expert opined otherwise; however, his opinion did not create an issue of fact because the duty to interpret and apply the law is a function allocated to the court, not to an expert witness. *Reeves v K-Mart Corp*, 229 Mich App 466, 476; 582 NW2d 841 (1998).

Furthermore, plaintiffs did not establish the existence of special aspects that made the gap between the grate and the tile unreasonably dangerous in spite of its open and obvious nature. The area was not unavoidable; Engler could have stepped around or over the gap. Moreover, falling to the floor does not present a sufficiently severe risk of injury to constitute a special aspect under *Lugo, supra*. See *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 6-7; 649 NW2d 392 (2002) (risk of falling down ice-covered steps does not constitute a special aspect). Had Engler simply watched her step, any risk of harm would have been obviated. *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997).

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis