STATE OF MICHIGAN

COURT OF APPEALS

AMY DYER,

Plaintiff-Appellant,

and

STEVEN DYER,

Plaintiff,

v

TIMOTHY RUSSELL,

Defendant-Appellee.

UNPUBLISHED
December 18, 2007

No. 273574
Ingham Circuit Court
LC No. 05-000821-NO

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Plaintiff Amy Dyer (plaintiff) appeals as of right from the decision of the circuit court granting defendant's motion for summary disposition in this premises liability case. Plaintiff contends on appeal that the open and obvious doctrine does not apply in the face of a special statutory duty, and that special aspects existed in the case which created an exception to the open and obvious doctrine. We disagree, and affirm.

Plaintiff, a licensed realtor's assistant, went to defendant's home for the purpose of showing the house to potential buyers. While walking down defendant's basement staircase, she slipped and fell. Plaintiff brought suit against defendant on a premises liability (negligence) theory. The trial court granted defendant's later motion for summary disposition, indicating that the owner of a private home placed for sale does not owe a duty to ensure that all building codes are met and that the condition of the stairs was open and obvious.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other

documentary evidence then filed in the action or submitted by the parties, in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Plaintiff first argues on appeal that while the open and obvious doctrine generally eliminates the duty to warn an invitee of a dangerous condition, the doctrine is inapplicable where, as here, a statute or ordinance imposes an independent duty upon a landowner. This Court has stated that a "condition is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

> The open and obvious danger doctrine is commonly applied in products liability and premises liability cases as a limitation on the duty of care owed, often in the context of a duty to warn. . . . In general, there is no obligation to warn someone of dangers that are so obvious and apparent that a person may reasonably be expected to discover them and protect himself or herself. . . . The rationale underlying this doctrine is that there should be no liability for failing to warn someone of a risk or hazard that he appreciated to the same extent as a warning would have provided. . . . Further, invitors are not absolute insurers of the safety of their invitees. [*Laier v Kitchen*, 266 Mich App 482, 487; 702 NW2d 199 (2005) (citations and quotation marks omitted).]

"Thus, courts are required to determine whether a *reasonable person* in the plaintiff's position would foresee the danger, and not whether a particular plaintiff should have foreseen the danger." *Id.* at 498 (emphasis in original). However, the *Laier* Court further stated that "the doctrine does not exonerate a defendant from liability where the claim is one of a statutory duty to maintain and repair the premises." *Id.* at 490.

In *Jones v Enertel*, 467 Mich 266, 269; 650 NW2d 334 (2002), our Supreme Court stated that "[t]he basic duty owed to an invitee by a premises possessor is 'to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.'" *Id.*, citing *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). The Court further stated that an owner's duty to an invitee "does not generally require [him or her] to remove open and obvious conditions because, absent special aspects, such conditions are not unreasonably dangerous precisely because they are open and obvious. However, such reasoning may not be applied to the statutory duty of a municipality to maintain sidewalks on public highways . . . ." *Id.*

Plaintiff does not argue that defendant owed her the same duty that a municipality owes to its residents, but contends that the Michigan Residential Code imposed a statutory duty on defendant, because the Code has been adopted by Lansing, where the house at issue is located. According to plaintiff, the building code precludes defendant from asserting the open and obvious defense because it created a new statutory duty. However, plaintiff does not cite any

cases showing that private owners are responsible under a municipal building code for injuries sustained on their premises due to a danger which would otherwise be classified as open and obvious. Further, it is established that not all building code violations are actionable in a negligence suit. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003); *Summers v Detroit*, 206 Mich App 46, 52; 520 NW2d 356 (1994). Accordingly, in the absence of any authority demonstrating that private owners of residential real estate are liable based on the building code to business invitees, under the circumstances of this case, there is no reasonable basis for imposing liability on defendant for any possible code violation related to the condition of the stairs. The issue becomes, then, whether the condition of the stairs was open and obvious.

Here, according to deposition testimony, the stairs were narrow, steep, and lacked handrails or walls on either side. Plaintiff noted that the stairs appeared dangerous, but chose to use them anyway. Because plaintiff admitted that she hesitated before going down the stairs precisely because they appeared to be dangerous, the condition of the stairs was clearly open and obvious.

Plaintiff next argues that special aspects of the situation should remove our analysis from the open and obvious doctrine. In *Lugo*, our Supreme Court stated that where "special aspects *of a condition* make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk[,]" thus creating an exception to the open and obvious doctrine. *Lugo, supra* at 517 (emphasis added). The Court further stated that in such cases, "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"; "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 517, 519. The Court stated that a situation might be properly thought of as posing an exception to the open and obvious doctrine where the hazard is "effectively unavoidable" and imposes an unreasonable risk of harm, such as standing water surrounding a retail store's only exit, or an unguarded thirty-foot deep pit in the middle of a parking lot. *Id.* at 518.

On this issue, plaintiff appears to initially argue that her position as a realtor's agent—or more specifically, as a licensed assistant to a realtor—is a special aspect. For example, plaintiff contends the stairs were effectively unavoidable because she had some obligation to defendant to descend the basement stairs. This argument seems to be outside the scope of what is contemplated in *Lugo* and its progeny. See, e.g., *Clahassey v Chez Ami, Inc*, 469 Mich 993, 994; 674 NW2d 158 (2004) (indicating that the proper concern in a premises liability claim is the condition of the premises of the defendant, not risks created by other circumstances).

Plaintiff also contends that the steepness of the stairs, coupled with the lack of handrail presented a severe and excessive risk of injury. Given the specific facts in this case, the

likelihood of harm associated with descending the flight of stairs into the basement of the home was not uniquely high, nor was the severity of the potential harm. *Lugo, supra,* at 518-519.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto