STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH BECKER,

Plaintiff-Appellant,

v

PATRICIA GLAISTER, TROY BRAMAN, and BRAMAN CONSTRUCTION, INC.,

Defendants-Appellees.

UNPUBLISHED
January 22, 2009

No. 281481
Clinton Circuit Court
LC No. 06-010053-NO

Before: Murray, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right the October 12, 2007, order granting summary disposition to defendant Patricia Glaister and the October 15, 2007, order granting summary disposition to defendants Troy Braman and Braman Construction, Inc. We affirm.

This case arises out of injuries plaintiff sustained when she slipped and fell while visiting plaintiff's house, which was under construction and for which Troy Braman's company, Braman Construction, was the general contractor. Plaintiff, a medical receptionist, testified that Glaister, who had hired plaintiff as a decorating consultant, called plaintiff on April 5, 2004, requesting plaintiff to deliver carpet samples to the house. When plaintiff arrived at the house around 5:30 p.m., it was still daylight. Upon her arrival, plaintiff noticed that the front door was nailed shut and that standing water and construction debris blocked the entrance to the walkout basement. Thus, plaintiff elected to enter the house by walking up a ramp, approximately one foot in width, leading to the laundry room. Plaintiff dropped off the samples and while walking down the ramp, fell and injured her rotator cuffs and knees. Plaintiff testified that she decided to use the ramp, which was covered with dry dirt and did not have a railing,[1] despite her misgivings because Glaister was "very adamant" that the samples be delivered that night. Glaister, who was not present because she was attending class at a nearby community college, denied that she asked plaintiff to deliver carpet samples that night or that she paid plaintiff, who was her friend.

[1] Although Troy Braman testified that a support beam for a sump pump line and a stud wall near the ramp could be used for support, he admitted that no handrail was constructed because the ramp was designed only for use by construction workers.

On appeal, plaintiff first argues that there is a genuine issue of material fact concerning whether special aspects of the ramp rendered the risk of harm unreasonably dangerous and unavoidable thereby precluding application of the open and obvious doctrine. We disagree. This Court reviews de novo an appeal from an order granting a motion for summary disposition brought pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition 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. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when reasonable minds could differ after drawing reasonable inferences from the record. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing this issue, the Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence and construe them in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

To establish premises liability, a plaintiff must prove the following: "(1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages." *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Where a condition on the land is open and obvious, a premises possessor owes no duty to an invitee[2] unless special aspects exist making the condition unreasonably dangerous. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-617; 537 NW2d 185 (1995). Two types of open and obvious conditions may render a condition unreasonably dangerous: unavoidable conditions and those creating a severe risk of harm. *Lugo v Ameritech Corp*, 464 Mich 512, 518-519; 629 NW2d 384 (2001). *Lugo* provides two examples illustrating these conditions. First, a commercial building with its only exit for the general public covered in standing water would be an unavoidable condition because a customer wishing to leave the store must depart through the standing water. *Id*. Second, a 30-foot deep hole in a parking lot would create a severe risk of harm because although one could avoid the condition, it would present a uniquely high likelihood of severe injury or even death absent remedial measures. *Id*.

At the outset, we note that plaintiff does not challenge whether the conditions causing her fall were open and obvious. Rather, plaintiff asserts the ramp was unreasonably dangerous because the ramp was too narrow, was slippery due to the presence of dry dirt, and was unsafe because it lacked handrails. However, even viewing the facts in the light most favorable to plaintiff, none of these conditions was unreasonably dangerous. On the contrary, these conditions are similar to other types of conditions that, while potentially causing one to slip and fall, are not unreasonably dangerous. For example, this Court has found that an icy stairway

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[2] We note that Glaister maintains that even if there were a commercial relationship, plaintiff's status at the time of her fall was one of licensee because any commercial relationship extended only to plaintiff's assistance at the home furnishing store. However, no evidence in the record supports this assertion. Thus, given plaintiff's and Glaister's contrary assertions regarding whether any commercial relationship existed, a genuine issue of fact exists on this point. Regardless, assuming without deciding that plaintiff is an invitee as she claims, her claim still fails.

elevated only a couple of feet did not create the severe risk of harm envisioned by *Lugo* because "'[u]nlike falling an extended distance, it cannot be expected that a typical person [falling a distance of several feet] would suffer severe injury' or a substantial risk of death." *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 6-7; 649 NW2d 392 (2002), quoting *Lugo*, *supra* at 518, 520.

Here, plaintiff testified she fell approximately four feet. The ramp was nearly one foot in width with dry dirt on the surface. These conditions are akin to the icy stairs of *Corey* rather than the 30-feet deep pit of *Lugo*. Moreover, while the ramp contained no handrails, the absence of a handrail on a construction ramp, which was *at most* four feet high, is hardly a unique condition of unreasonable risk. *Lugo*, *supra* at 519. We note that while plaintiff injured her rotator cuffs and knees as a consequence of the fall, the risk posed by the conditions must be considered *a priori*, i.e., without examining a plaintiff's injuries in hindsight. *Id.* at 518-519 n 2. Thus, plaintiff's injuries are not relevant to our conclusion. Consequently, plaintiff has failed to demonstrate that the ramp contained special aspects creating an unreasonable risk of harm.

Plaintiff relies upon her expert's conclusion that the ramp contained special aspects that were unreasonably dangerous and that the conditions causing plaintiff's fall violated the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq*. This reliance, however, is unavailing. First, despite the expert's repeated conclusions that the conditions constituted special aspects rendering the ramp unreasonably dangerous, whether special aspects exist is a legal conclusion, and "[t]he opinion of an expert does not extend to legal conclusions." *Maiden*, *supra* at 130 n 11. Only after a condition is deemed a special aspect may the factual determination of whether the aspect was unreasonably dangerous be made. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003); *Woodbury v Bruckner*, 248 Mich App 684, 694; 650 NW2d 343 (2001). Moreover, "if an open and obvious condition lacks some type of special aspect regarding the likelihood or severity of harm that it presents, it is not unreasonably dangerous." *Lugo*, *supra* at 525. Consequently, because the conditions at issue are not special aspects as a matter of law, the expert's opinion that they are unreasonably dangerous is irrelevant.

Second, plaintiff's reliance on MIOSHA standards is misplaced. While plaintiff is correct that a violation of statute may create a rebuttable presumption of negligence, *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 720-721; 737 NW2d 179 (2007), plaintiff did not premise her negligence claim on a violation of statute. Rather, plaintiff alleges MIOSHA violations to support her common law theory of negligence – specifically, that special aspects existed. In any event, even when premising a negligence claim on violation of MIOSHA standards, MIOSHA does not create a statutory duty in favor of third parties in premises liability cases because "MIOSHA and the regulations enacted under MIOSHA apply only to the relationship between employers and employees . . . ." *Id*. at 721. Consequently, as the ramp was in place for Braman Construction's workers, the alleged violation of MIOSHA does not support plaintiff's action. In light of this, even if the ramp were defective as plaintiff's expert opined,

this conclusion fails to create a genuine issue of material fact regarding the existence of special aspects.[3]

Plaintiff also cites *O'Donnell* and *Woodbury*, in which this Court found that despite an open and obvious condition, special aspects existed rendering the condition unreasonably dangerous, in support of her argument. Both cases, however, are distinguishable. In *O'Donnell*, this Court found special aspects existed where the plaintiff fell from an upstairs loft while attempting to alight down a partially unguarded narrow staircase. *O'Donnell*, *supra* at 571. Besides the incomplete guardrail, the Court noted the following factors that supported its conclusion:

> an open unguarded area existed between the loft guardrail and the edge of the steps; the stairway was unguarded on the open side opposite the wall; the stair treads were irregularly narrow; the stairs were unusually steep and the risers were of insufficient height; the handrail was an uneven tree branch that did not extend the length of the stairs; the loft had a low ceiling that forced adults to walk in an unnatural manner; and the stairway lacked a light switch at the top of the stairs. [*Id*. at 577.]

Similarly, in *Woodbury*, this Court found special aspects existed where the plaintiff fell "an extended distance" from a rooftop porch lacking guardrails outside her second story apartment. *Woodbury*, *supra* at 694.

Regarding the situation at hand, while the ramp lacked guardrails, a fall from a maximum height of four feet is hardly comparable to falling from an upstairs loft or a second story apartment. Further, plaintiff encountered no lighting problems and provided no testimony that the ramp caused her to walk in an awkward fashion or was unusually steep. Thus, reliance on these cases is not persuasive.

Next, plaintiff contends that because the ramp constituted the only means of ingress and egress into the house, use of the defective ramp was unavoidable rendering her effectively trapped. However, even assuming the ramp constituted the only means of ingress and egress, plaintiff has failed to show the ramp was unavoidable.[4] In making her argument, plaintiff

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[3] While plaintiff asserts the trial court failed to distinguish between the objective nature of the conditions and plaintiff's subjective degree of care, her reliance on the court's finding that the ramp was defective does nothing to support this contention. Indeed, whether the ramp was defective does not account for plaintiff's subjective degree of care. Thus, such conclusive reasoning is of no assistance to plaintiff's case.

[4] Troy Braman testified that a walkout basement permitted an alternative entry to the house. However, after Braman's deposition, plaintiff filed an affidavit claiming that standing water and debris blocked this entrance. It is worth noting that plaintiff's affidavit was filed after plaintiff gave her deposition in which she made no mention of a walkout basement. Regardless, an issue of fact exists concerning whether the walkout basement was a viable means of entry. In any event, because plaintiff's claim fails even if the walkout basement were not a viable means of entry, resolution of this issue is unnecessary.

correctly observes that a court should "focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, *supra* at 524. However, an unreasonably high risk of harm caused by an effectively unavoidable condition "must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies." *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593; 708 NW2d 749 (2005) (citation omitted).

Here, nothing in the record suggests plaintiff, upon observing the ramp, could not have delayed her delivery of carpet samples until another time or simply dropped off the carpet samples in the garage without going up the ramp. Indeed, while plaintiff noted that Glaister sounded desperate and "very adamant" that she deliver the samples, underlying plaintiff's decision to make the delivery was because, as plaintiff described, "I'm just the type of person, when somebody asks me to do something, I try to follow through with it." Such an idiosyncrasy is insufficient to render plaintiff effectively trapped in this situation. *Id*. Moreover, this case differs markedly from *Lugo's* example of a store customer facing a pool of standing water at the only exit. The difference is that, here, plaintiff was aware of the danger before entering the house in the first place, and as a consequence had a choice of whether to enter or not. Had plaintiff encountered the ramp only after making the delivery, she may have been effectively trapped, but that is not what happened.

Contrary to plaintiff's argument, *Robertson* is unhelpful to her cause. In *Robertson*, the plaintiff slipped on ice in a gas station parking lot while walking toward the station's convenience store to purchase windshield washer fluid. *Id*. at 591. In finding the open and obvious doctrine inapplicable, this Court rejected the defendant's argument that the condition was not unavoidable because the plaintiff could have gone to a different gas station. Specifically, the Court held that not only was the icy condition effectively unavoidable, but the plaintiff was also effectively trapped because the weather conditions rendered it unsafe for the plaintiff to drive away without windshield washer fluid. *Id*. at 593-594.

In contrast to *Robertson*, plaintiff here was not effectively trapped. Indeed, plaintiff could have decided to make the delivery a different day or drop off the samples in the garage without utilizing the ramp. Further, no evidence in the record shows plaintiff was contractually bound to make any delivery. Rather, her decision was an idiosyncratic one for which, although a kind gesture, she may not now in retrospect decide was a bad idea.[5]

Finally, plaintiff asserts Troy Braman and Braman Construction owed her a duty of care because it was foreseeable she would use the ramp. Even assuming plaintiff's claim is premised solely on ordinary negligence, her argument fails.[6] The elements of negligence are 1) a duty; 2)

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[5] Plaintiff also cites *Wiater v Great Lakes Recovery Ctrs, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2005 (Docket No. 250384). However, we decline to address this unpublished opinion, which is not binding under stare decisis. MCR 7.215(C)(1).

[6] Assuming plaintiff's claim against Troy Braman and Braman Construction is premised upon ordinary negligence rather than premises liability, the open and obvious doctrine is inapplicable. *Laier v Kitchen*, 266 Mich App 482, 490; 702 NW2d 199 (2005).

a breach of that duty; 3) causation; 4) and damages or injuries. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). In determining the existence of a duty, the Court considers not only the foreseeability of the risk, but most importantly the relationship of the parties. *Schultz v Consumers Power Co*, 443 Mich 445, 450; 506 NW2d 175 (1993).[7]

Here, plaintiff failed to establish any relationship between herself and Troy Braman and Braman Construction that would impose a duty. Rather, plaintiff focuses exclusively on whether any danger was foreseeable. However, where there is no relationship between the parties, liability may not be imposed on a defendant, *In re Certified Question*, 479 Mich 498, 507; 740 NW2d 206 (2007), and it is not our responsibility to search for case law to craft plaintiff's argument on this issue, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). While plaintiff cites *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), and *Johnson v A & M Custom Built Homes*, 261 Mich App 719; 683 NW2d 229 (2004), the plaintiffs in those cases had some contractual relationship with the defendants. Similarly, although plaintiff relies on *Schultz*, *supra*, that case involved a special relationship because the defendant was engaged in a unique activity with inherently dangerous properties. Consequently, plaintiff's claim against Troy Braman and Braman Construction fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell

[7] Although the determination of whether contractors owe duties to third parties is premised upon whether "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations," *Fultz v Union-Commerce Associates*, 470 Mich 460, 467; 683 NW2d 587 (2004), plaintiff's claim against Troy Braman and Braman Construction is not based in contract.