STATE OF MICHIGAN

COURT OF APPEALS

MABEL MENG,

Plaintiff-Appellant,

v

RONALD WERNER and DELORES WERNER,

Defendants-Appellees.

UNPUBLISHED
August 5, 2010

No. 288677
Oakland Circuit Court
LC No. 2007-084334-NO

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff went to the home of defendant neighbor, Delores Werner, to deliver two jars of homemade jelly. The women proceeded to the backyard area of the home where plaintiff fell on the two-tiered deck in defendants' backyard. Unfortunately, during the fall, plaintiff was cut when her head struck a table. The injury caused her to lose vision in her right eye, and she wears an artificial eye. In her deposition, plaintiff gave various accounts of how the fall occurred. She opined that she "must have tripped on . . . something." She also testified that she did not know what caused her to fall and that there may have been a loose board. However, after plaintiff's counsel interjected and summarized defense counsel's question, plaintiff testified that the "drop off" or the step on the deck caused her to fall. Additionally, plaintiff testified that she could not recall where she was looking at the time of the fall. However, when questioned by her own attorney, plaintiff testified that she was looking at the ground at the time of the fall. Plaintiff asserted that the uniform color of the boards on the deck caused the step to be indistinguishable. However, she then acknowledged that if one looked close, the step could be discerned.

Defendant moved for summary disposition of the claim, asserting that plaintiff could not maintain an action in negligence because the cause of her injury was based on speculation and conjecture. It was also asserted that the condition was open and obvious and that there were no special aspects to the condition. Plaintiff opposed the motion and filed a cross-motion for summary disposition, asserting that the defect that caused her to fall was not open and obvious. In support of her position, plaintiff presented an affidavit from a forensic psychologist, Dr. Terence Campbell. Dr. Campbell opined that plaintiff was unable to identify the lower deck area because of exogenous influences. The trial court granted defendant's motion for summary disposition, concluding that the condition was open and obvious. Plaintiff filed a motion for

reconsideration, asserting that the trial court failed to consider the affidavit of her expert. The trial court denied the motion for reconsideration and expressly stated that the affidavit was not ignored.

On appeal, plaintiff alleges that the trial court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) because a genuine of material fact existed regarding whether the step was open and obvious and whether special aspects existed. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Additionally, this Court only considers evidence that was properly presented to the trial court in deciding the motion. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham*, 480 Mich at 111. "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In a premises liability action, the plaintiff must prove: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty caused the plaintiff's injuries; and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007).

A licensee is a person who enters the land of another through the possessor's consent, such as a social guest. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). In contrast, an invitee is a person who enters the land of another for a commercial purpose and mutual benefit. *Id*. at 604-605. Plaintiff went to defendants' home to give defendant, Delores Werner, two jars of homemade jelly and was given permission by Delores to enter defendants' home for a social visit. Thus, plaintiff was a social guest and her status on defendants' premises was that of a licensee. The duty to a licensee is only to warn the licensee of any hidden dangers the possessor knows or has reason to know of if the licensee does not know or have reason to know of the dangers involved. *Id*. at 596. The premises owner owes no duty of inspection, nor any duty to prepare the premises for the safety of the licensee. *Id*. Social guest licensees typically assume the ordinary risks associated with their visit. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 64; 680 NW2d 50 (2004).

"[A] possessor of land has no obligation to take any steps to safeguard licensees from conditions that are open and obvious." *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). The test to determine if a condition is "open and obvious" is objective. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002). The test is whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon causal inspection[.]'" *Kennedy*, 274 Mich App at 713,

quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test evaluates not whether a particular plaintiff should have known the condition was hazardous, but whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id.*

Michigan courts have generally held that steps are open and obvious. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

> Because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable. However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. [*Id*.]

After examining the record in the light most favorable to plaintiff, there is no genuine issue of material fact regarding whether the step between the top tier and the bottom tier of defendants' two-tiered deck was open and obvious. Plaintiff missed the two-tiered deck step while she was talking with her neighbor. Defendants' only duty to plaintiff as a licensee was to warn plaintiff of known hidden dangers on the premises or to warn plaintiff of dangers they should have known about. The photographs of defendants' two-tiered deck reveal a very typical, two-tiered wooden colored deck. A step between the upper and lower deck levels is a common occurrence in most homeowner's backyards. Plaintiff does not claim the step was hidden in any manner, but rather, she claims that because the upper deck and the lower deck were made out of the same material, the step was difficult to distinguish from the top tier of the deck. In support of that claim, plaintiff offered Dr. Campbell's expert affidavit that stated the step was an "optical illusion" *for plaintiff* and that the step was not open and obvious *as to plaintiff*. However, the test for whether a condition is open and obvious is objective. The question is whether a reasonable person would have foreseen the danger.[1] *Kennedy*, 274 Mich App at 713. In this case, because the step was in the open, on a sunny day, a reasonable person would be able to see the step, and thus, it was open and obvious. Neither the character, location, nor surrounding

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[1] The affidavit offered by plaintiff does not create a genuine issue of material fact because it does not address whether an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. *Kennedy*, 274 Mich App at 713. Plaintiff also alleges that the trial court erred by failing to consider the expert affidavit when ruling on the motion for summary disposition. However, the trial court, in denying plaintiff's motion for reconsideration, noted that it had considered the affidavit when ruling on the dispositive motions. Furthermore, whether a defendant owes a plaintiff a duty of care presents a question of law that is reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The duty to interpret and apply the law is allocated to the courts, not the parties' expert witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179-180; 572 NW2d 259 (1997).

conditions created something unusual about the step that would impose a duty to warn upon defendants. Therefore, the record provided does not raise a question of fact regarding whether the step on defendants' two-tiered deck was open and obvious.

The general rule is that if "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." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). Special aspects may occur when (1) a high likelihood of harm exists, such as a condition that is "effectively unavoidable" or (2) a condition poses an "unreasonably high risk of severe harm." *Id.* at 517-518. In such situations, the premises possessor remains liable to the *invitee* to protect him from the danger. *Id*. However, plaintiff was not an invitee, but rather, was a licensee on defendants' premises. The special aspects of an open and obvious condition on a premises possessor's land are not applicable to persons with licensee status. *See Pippin*, 245 Mich App at 143. Thus, the record provided does not raise a question of fact regarding whether a duty was owed to plaintiff as a result of the alleged special aspects.[2]

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[2] Plaintiff submits that special aspects should be contingent upon the degree of injury suffered. That is, if the injury suffered is greater than what a reasonable person would expect, then special aspects are present. Special aspects address the nature of the condition at issue, not the degree of injury suffered. *Lugo*, 464 Mich at 517. Although we are mindful of the loss suffered by plaintiff, we are bound by the precedent established by the *Lugo* Court.