

STATE OF MICHIGAN
COURT OF APPEALS

KAREN SHAY,

Plaintiff-Appellant,

v

333 L.P., L.L.C., d/b/a/ FORT WASHINGTON
GARAGE,

Defendant-Appellee.

UNPUBLISHED
March 13, 2012

No. 302743
Wayne Circuit Court
LC No. 09-018058-NO

Before: STEPHENS, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in this personal injury action. We affirm.

I. DEFENDANT'S SUMMARY DISPOSITION MOTION

Plaintiff argues that, after re-entering defendant's parking garage in mid-afternoon, she was distracted by two of defendant's employees causing her to miss a step and fall. Plaintiff contends that this distraction created a special aspect sufficient to overcome the open and obvious defense. We disagree.

A circuit court's decision on a motion for summary disposition is reviewed de novo by this Court. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). We review a motion "under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). A summary disposition motion under MCR 2.116(C)(10) is properly granted if there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 552.

Generally, a premises owner is liable for physical harm caused to invitees by a dangerous condition on his land that he knows about or could discover through the exercise of reasonable care, and which the owner should realize creates an unreasonable risk of harm to invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, where "the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Lugo v Ameritech Corp*,

Inc, 464 Mich 512, 516; 629 NW2d 384 (2001), quoting *Riddle v McClouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Indeed, the “open and obvious doctrine should not be viewed as some type of ‘exception’ to the duty generally owed invitees, but rather as an integral part of the definition of that duty.” *Id.* A particular condition is open and obvious if an “average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.” *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, “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*, 464 Mich at 517. The “critical question” in such cases 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 . . .” *Id.* at 517-518.

Here, the condition at issue, a step leading to an elevator area, was open and obvious. Plaintiff had observed and traversed the step within two hours of her injury. The pictures provided to the trial judge demonstrated that the step was not steep or irregular and that it had some yellow paint at its edge. Accordingly, the danger here was “known to the invitee,” and defendant had no duty to protect her from the open and obvious condition, unless defendant should have anticipated the harm despite plaintiff’s knowledge. *Lugo*, 464 Mich at 516. Moreover, defendant should not have anticipated the harm despite plaintiff’s knowledge of the condition. Parking garages commonly have steps that customers must traverse in order to enter and exit the structure. In short, the step was a condition that an “average user with ordinary intelligence [would] have been able to discover” upon “casual inspection.” *Joyce*, 249 Mich App at 238.

Even assuming that plaintiff had no knowledge of the step, summary disposition in favor of defendant would still have been appropriate. The open and obvious test is an objective one. This Court has held that when evaluating the open and obvious test it “looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.” *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). An ordinarily prudent person exiting an elevator into a parking structure would foresee that they might have to walk down one, two, or more steps while in the structure and avoid the harm that might occur should they trip. See *Lugo*, 464 Mich at 519.

Plaintiff argues that she was distracted by the two garage employees who asked her whether she had her keys. She makes note that the men were not present when she left the garage, did not wear uniforms and were unknown to her. Plaintiff argues that her fear and distraction “preclude[s] the application of the open and obvious doctrine.” These facts are roughly analogous to those in *Lugo*, where the plaintiff argued that she did not notice or observe a potentially dangerous pothole because she was distracted by cars in a parking lot. *Lugo*, 464 Mich at 522. The *Lugo* Court ruled that the relevant inquiry was whether there was something unusual about the plaintiff’s distraction that would preclude the application of the open and obvious doctrine, concluding that there is nothing unusual about cars parking in a parking lot, and therefore, the open and obvious doctrine applied. *Id.* at 522-523.

Similarly, we hold that a female patron being asked a question by men in a parking garage about keys is “usual,” and not sufficient to warrant preclusion of the open and obvious doctrine. Plaintiff does not testify that the men approached her, raised their voices, held anything that looked like a weapon or did anything other than make an inquiry.

II. PLAINTIFF’S MOTION FOR SUMMARY DISPOSITION

Plaintiff contends that the lower court erred when it denied her motion for summary disposition under MCR 2.116(C)(9), in which she sought to strike the open and obvious defense. We disagree. Plaintiff advances two arguments in support of her MCR 2.116(C)(9) motion, both of which fail for the same fundamental reason: because the open and obvious defense is relevant to whether a plaintiff makes a prima facie case of negligence in the first instance.

A circuit court’s decision on a motion for summary disposition is reviewed de novo by this Court. *Driver*, 490 Mich at 246. MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the basis that the opposing party has failed to state a valid defense. A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant’s pleadings, and all well-pleaded factual allegations are accepted as true. *Allstate Ins Co v Morton*, 254 Mich App 418, 421; 657 NW2d 181 (2002). Summary disposition “is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly deny a plaintiff’s right to recovery.” *Id.*

Plaintiff first argues that MCR 2.111(F)(3) requires a party asserting an affirmative defense to state separately facts supporting that defense. Plaintiff argues that defendant did not adequately state facts supporting the open and obvious defense in its answer.

MCR 2.111(F)(3) applies to affirmative defenses. However, the open and obvious defense is not an affirmative defense. “An affirmative defense is a defense that does not controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff.” *Chmielewski v Xermac, Inc*, 457 Mich 593, 617; 580 NW2d 817 (1998). By contrast, “the ‘no duty to warn of open and obvious danger’ rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case.” *Riddle*, 440 Mich at 95-96; see also *Lugo*, 464 Mich at 516 (“[t]he open and obvious doctrine should not be viewed as some type of ‘exception’ to the duty generally owed invitees, but rather as an integral part of the definition of that duty.”). Accordingly, MCR 2.111(F)(3) does not apply to the open and obvious defense. MCR 2.111(F)(1), which applies to defenses generally, states that a party “may assert as many defenses, legal or equitable or both, as the pleader has against an opposing party. A defense is not waived by being joined with other defenses.” Here, defendant pleaded “[t]hat Plaintiff’s claims are barred and Defendant had no duty to warn or protect because the alleged defect was open and obvious.” Accordingly, defendant’s open and obvious defense was properly pleaded.

Plaintiff next argues that the “[a]pplication of the open and obvious defense as a bar to a Plaintiff’s claim in an open and obvious case must be stricken as contrary to the plain language of the comparative negligence statutes. . . .” Specifically, plaintiff argues that “to the extent that Courts have held that the open and obvious defense goes to the duty element of a Plaintiff’s

prima facie case, those cases mistakenly apply a conduct based analysis in determining the application of the defense” and should be overturned in this case.

However, contrary to plaintiff’s argument, there is no contradiction in Michigan law between the open and obvious doctrine and comparative negligence, and we decline to overturn established precedent as plaintiff invites us to do. The Michigan Supreme Court has made clear that “any comparative negligence by an invitee is irrelevant to whether a premises possessor has breached its duty to that invitee in connection with an open and obvious danger because an invitee’s comparative negligence can only serve to reduce, not eliminate, the extent of liability.” *Lugo*, 464 Mich at 524. In other words, comparative negligence will only come into play after a finding that a defendant was liable, which in turn requires a finding that the defendant owed a duty to a plaintiff as part of that plaintiff’s prima facie case. Because “[t]he open and obvious doctrine should not be viewed as some type of ‘exception’ to the duty generally owed invitees, but rather as an integral part of the definition of that duty,” when a court finds that a hazard was open and obvious, comparative negligence will not be part of the analysis in the first instance, because that plaintiff will fail to make a prima facie case, unless it can show that a special aspect was present. Thus, the comparative negligence statute is irrelevant in this case because when the lower court found that the open and obvious doctrine barred plaintiff’s claims, it found that defendant owed no duty to plaintiff.

III. PLAINTIFF’S MOTION FOR RECONSIDERATION

Plaintiff argues that the lower court erred when it denied her motion to reconsider its rulings in regard to both parties’ motions for summary disposition. We disagree.

We review a lower court’s denial of a motion for reconsideration for an abuse of discretion. *Heyd v Beglinger (In re Beglinger Trust)*, 221 Mich App 273, 279; 561 NW2d 130 (1997). A motion for reconsideration under MCR 2.119(F) requires the moving party to “demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.”

On March 3, 2010, plaintiff intended to depose the two men who she saw prior to her fall: Mr. Patrick Davis and Mr. Rosario Blocker. Defendant had indicated only days earlier that both men were employed by defendant and would be produced. On the day of the deposition, plaintiff alleges that defense counsel informed him that Mr. Blocker was no longer employed by defendant and that they had no knowledge of his whereabouts. Davis, the supervisor of the Fort Washington garage, was deposed. Davis apparently testified that, on the day of the accident, the paint and lighting around the step were adequate. Plaintiff did not ask Davis on the record if he knew where Mr. Blocker could be found. After the initial motion hearing, plaintiff became aware that Mr. Blocker was placed on leave and ultimately left the employ of defendant before he was scheduled to be deposed. After the lower court granted defendant’s motion for summary disposition, the parties located Blocker and the lower court allowed plaintiff to depose him. Blocker testified at his deposition that the lighting and paint were inadequate and that he was terminated for refusing to sign an affidavit to the contrary. Blocker initiated his own, separate, lawsuit for wrongful termination against defendant. It is noteworthy that the suit was filed before Blocker’s deposition and that defendant’s general counsel, who was on notice of the claim by Blocker, was present at the deposition. Plaintiff asked for a discovery sanction against

defendant for failing to disclose the fact that Blocker was no longer an employee and the fact that they had the ability to locate him through his counsel. Plaintiff argues that the discovery violation and the inconsistencies in Blocker's testimony are a basis for sanctions and reconsidering and denying defendant's summary disposition motion.

In order for a court to grant a motion for reconsideration under MCR 2.119(F), the movant must show that new evidence would result in a "different disposition of the motion." Here, Blocker's testimony would not have changed the outcome of the lower court's ruling on defendant's summary disposition motion. Plaintiff testified that her fall occurred in the afternoon. She neither testified at her deposition nor offered a subsequent affidavit asserting that the lighting was a cause of her inability to perceive the step. Instead, she averred that it was the distraction that occasioned her injury. Thus, however egregious the discovery violation may have been, Blocker's testimony regarding the lighting would not have changed the outcome of the original motion because plaintiff herself does not make the causal connection between lighting, demarcation and her fall.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Henry William Saad