

STATE OF MICHIGAN
COURT OF APPEALS

PAULINE HART,

Plaintiff-Appellant,

v

LEE WHOLESALE SUPPLY, INC.,

Defendant-Appellee.

UNPUBLISHED

September 27, 2012

No. 304465

Oakland Circuit Court

LC No. 2010-111629-NO

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

PER CURIAM.

In this slip-and-fall case involving a door threshold on defendant's premises, plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

This Court reviews a grant of summary disposition "de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

Plaintiff first argues that the trial court erred in rejecting the affidavit of plaintiff's expert witness. We disagree.

"[T]he duty to interpret and apply the law has been allocated to the courts, not to the parties' expert witnesses." *Hottmann v Hottmann*, 226 Mich App 171, 179; 572 NW2d 259 (1997). "Whether a defendant owes any duty to a plaintiff to avoid negligent conduct in a particular circumstance is a question of law for the court to determine." *Hughes v PNG Building Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). The open-and-obvious doctrine applies to the duty element of a premises-liability claim. See *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). The test for whether a condition is open and obvious is objective—the

question is whether a reasonably prudent person would have foreseen the danger. *Id.* at 522-524. A court should ask whether “an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]” *Novotney v Burger King*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

The court was not under any obligation to rely on the affidavit for two reasons. First, the trial court was within its discretion to decide the question of law without essentially adopting the expert affidavit because, as *Hottmann* explains, the duty to interpret and apply the law is for the court, not the parties’ experts. *Hottmann*, 226 Mich App at 179. Second, the expert’s affidavit spoke to whether the threshold was “highly perceptible,” not to whether the danger was discoverable upon casual inspection by the reasonably prudent observer. The latter is the proper standard. *Novotney*, 198 Mich App at 475. Reversal is unwarranted.¹

Plaintiff next argues that the trial court erred in finding the condition open and obvious. Again, we disagree.

The general rule is that a possessor of land owes an invitee a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). This duty, however, “does not generally encompass removal of open and obvious dangers: ‘[W]here the dangers . . . 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*, 464 Mich at 516, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). “[I]t is important for courts in deciding summary disposition motions by premises possessors in ‘open and obvious’ cases to

¹ Although, in light of our analysis, we need not reach this further issue concerning admissibility, we note that MRE 702 states:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

No specialized knowledge was necessary for the factfinder to determine whether the allegedly dangerous condition was open and obvious because that question could be determined by looking at the photographs of the threshold in question and applying the objective standard. The unpublished case cited by plaintiff to argue that MRE 702 is inapplicable to a motion for summary disposition is not binding upon this Court. See *Tillman v Great Lakes Truck Center, Inc*, 277 Mich App 47, 49; 742 NW2d 622 (2007).

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*, 464 Mich at 523-524. A court should ask whether “an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]” *Novotney*, 198 Mich App at 475.

The photographs in the record show a color contrast between the concrete area in front of the threshold and the carpet on the other side. There was also a doormat in front of the threshold providing a visual indicator for the condition, and the threshold was a lighter gray than the doormat and the carpet. The photographs show that a reasonably prudent person would have been aware of the allegedly dangerous condition upon casual inspection. The trial court properly granted summary disposition to defendant with respect to this issue.

Plaintiff next argues that the threshold had special aspects rendering it unreasonably dangerous and that, therefore, the trial court should not have dismissed the case based on the open-and-obvious doctrine. We disagree once again.

The critical question when it comes to special aspects is

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, i.e., whether the “special aspect” of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Lugo*, 464 Mich at 517-518.]

The *Lugo* case provides two illustrations of conditions that would differentiate normal open-and-obvious conditions from unreasonably dangerous ones. *Id.* at 518. The first example is a commercial building with only one exit for the general public and where the floor is covered with standing water; the second example is an unguarded 30-foot-deep pit in the middle of a parking lot. *Id.* Both are open and obvious, yet both are examples of conditions with special aspects that cause them to be unreasonably dangerous despite their open-and-obvious nature. *Id.* The examples offered by the Supreme Court set up two main categories of factual conditions potentially creating special aspects: effectively unavoidable dangers and avoidable dangers that present substantial risk of death or severe injury.

This case is not like the examples offered by the Supreme Court in *Lugo*. The threshold at issue was not unavoidable. The threshold likewise did not present a substantial risk of death or severe injury. This Court has held that normal trip-and-fall accidents do not lead to a finding of an unreasonably dangerous condition. In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 2; 649 NW2d 392 (2002), a person injured from a slip-and-fall accident on college dormitory steps brought a premises-liability claim against the college. This Court reasoned: “Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit. . . . Unlike 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.” *Id.* at 7 (internal citation and quotation marks omitted). We find that the trial court properly resolved the special-aspects issue.

Finally, we reject plaintiff's argument that the trial court erred in finding that plaintiff's claim sounded solely in premises liability.

The open-and-obvious doctrine does not apply to ordinary negligence claims. *Laier v Kitchen*, 266 Mich App 482, 490, 502; 702 NW2d 199 (2005). The open-and-obvious doctrine does apply, however, to cases that are factually premises-liability claims regardless of how they are framed in the complaint. See *Milliken v Walton Manor Mobile Home Park*, 234 Mich App 490, 497; 595 NW2d 152 (1999). When determining whether a plaintiff's claim sounds in premises liability or ordinary negligence, rather than relying on the labels attached to the claims by the parties, it is up to the court to examine the substance of the complaint and the theory underlying the action. See, e.g., *Hiner v Mojica*, 271 Mich App 604, 615, 722 NW2d 914 (2006), and *Johnston v City of Livonia*, 177 Mich App 200, 208, 441 NW2d 41 (1989).

In *Laier*, 266 Mich App at 485-486, the decedent was crushed by the bucket of a front-end-loader tractor while helping the defendant repair the tractor on the defendant's premises. In that case, the plaintiff alleged a failure to use due care and caution on the part of the defendant while operating and controlling the tractor. *Id.* at 493. Two judges agreed that, at the very least, this factual scenario might involve "ordinary negligence." *Id.* at 493-494, 502. That is the type of conduct potentially giving rise to an ordinary negligence claim in addition to a premises-liability claim. The facts of this case are distinguishable from that kind of scenario. This was a simple trip-and-fall case that was based on a condition of the land and sounded solely in premises liability. See *Kachudas v Invaders Self Auto Wash*, 486 Mich 913, 913-914; 781 NW2d 806 (2010). Reversal is not warranted.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray