STATE OF MICHIGAN

COURT OF APPEALS

FOREST WOLFROM and CHARLOTTE WOLFROM, Plaintiffs-Appellants, v HILLCREST MEMORIAL GARDENS ASSOCIATION, Defendant-Appellee.	UNPUBLISHED February 12, 2002 No. 204746 Shiawassee Circuit Court LC No. 96-060280-NO ON REMAND

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

This case is on remand from the Supreme Court for reconsideration in light of *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). We again reverse the trial court's grant of summary disposition in favor of defendant under MCR 2.116(C)(10) and remand for further proceedings.[1]

This is a premises liability case arising out of an incident in which plaintiff Forest Wolfrom[2] fell when exiting defendant's office on July 27, 1995. As plaintiff exited defendant's office, he did not realize or recognize that there was one step from the office floor to the ground level and, failing to anticipate the step, fell as he walked out of the office level, and injured his left knee. The step and the ground floor level were both made of concrete and painted the same gray color. Plaintiffs' primary allegation in their complaint was that because the step and ground level were painted the same color, the step was indistinguishable from the floor and constituted a dangerous condition. Defendant countered that the step presented an open and obvious condition. The trial court agreed with defendant, and granted summary disposition in its favor.

We review de novo the trial court's ruling regarding the motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "In reviewing the grant of

[1] On remand, Judge Griffin has been assigned to replace former Court of Appeals Judge Barbara B. MacKenzie. Judge MacKenzie dissented in the prior opinion.

[2] Use of plaintiff in the singular will refer to Forest Wolfrom because Charlotte Wolfrom's claims are wholly derivative.

summary disposition under MCR 2.116(C)(10), we assess the substantively admissible evidence in the light most favorable to the party opposing the motion." *Woodbury v Bruckner (On Remand),* ___ Mich App ___; ___ NW2d ___ (Docket No. 204411, issued 12/14/2001), slip op, p 1.

In our previous opinion, we ruled, relying on the Supreme Court's decision in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), that there was a question of fact with regard to whether the danger was open and obvious, and if it was open and obvious, whether the risk of harm remained unreasonable. Now, we must reconsider this ruling in light of *Lugo.* We find nothing in *Lugo* that compels a different result, and we again reverse and remand.

In *Lugo, supra,* p 516, the Supreme Court, in discussing the open and obvious doctrine in premises liability cases, first noted the general rule that premises owners owe a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. This duty, however, does not usually encompass the removal of an open and obvious danger. *Id.* Thus, where the danger is open and obvious or is known to the invitee, an invitor owes no duty to protect or warn the invitee unless the invitor should anticipate the harm despite knowledge of it by the invitee. *Id.*

> In sum, the general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, 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.
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> [W]ith regard to open and obvious dangers, 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, 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. [*Id.*, pp 517-518.]

Therefore, the Court concluded that "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.,* p 519.

The Court's holding in *Lugo* clearly presupposes that the danger is open and obvious. As we stated in our prior opinion, it is not at all clear, and cannot be determined as a matter of law, that the danger in this case is even open and obvious based on the condition of the step itself. We continue to believe that there is a question of fact regarding whether the step is an open and obvious danger and that the trial court erred in holding that it was as a matter of law. "Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover any danger upon casual inspection." *Weakley v Dearborn Hgts,*

240 Mich App 382, 385; 612 NW2d 428 (2000)[3]; see also *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997); *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). This test is an objective one and the court must determine whether a reasonable person in the plaintiff's position would foresee the danger, and not whether the plaintiff should have known that the condition was dangerous. *Hughes, supra,* p 11.

As stated in our previous opinion, the evidence is uncontroverted that the step and the ground level were painted the same gray color. Plaintiff testified at his deposition that he fell because he did not see the step as he exited because the step was the same color as the ground level. Plaintiff's expert, Judith Keiser (an architectural engineer), averred in her report that there is a 5 ¼ inch change in elevation from the door threshold to the ground level. Keiser stated that the step and ground level were painted the same monotone color. Keiser specifically stated:

> It is extremely difficult to notice changes in level when a monotone of color of stepping surfaces occurs when descending steps as Plaintiff was because of the sight angle. A person ascending a step will much more easily detect the step even with the monotone of color due to the sight angle which enables said person to see the vertical riser portion of the step which is completely hidden when descending a step.

Based on plaintiff's deposition testimony, plaintiff's expert's report, and the inherent character of the step itself, we conclude that there is a material factual dispute regarding whether the step constituted an open and obvious danger.

Moreover, we believe that there is also a question of fact regarding whether there is a "special aspect" of the step (assuming that it is an open an obvious condition) "that differentiate[s] the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo, supra,* p 517. The character of the step and the ground level, being painted the same monotone gray color that made it difficult to distinguish especially when descending the step, is sufficient to create a material factual dispute regarding whether there is a special aspect to the step. Indeed, Keiser stated in her report that the monotone of color completely hides the vertical riser portion of the step upon descent.

Accordingly, there are questions of fact with regard to whether the step presented an open and obvious danger and whether there are special aspects of the step that differentiates the risk from a typical open and obvious risk so as to create an unreasonable risk of harm. The trial court's order granting summary disposition in favor of defendant is reversed.

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[3] This rule was not affected by the Supreme Court's order remanding the case for reconsideration, *Weakley v Dearborn Hgts,* 463 Mich 143; 615 NW2d 702 (2000), or by the opinion on remand, *Weakley v Dearborn Hgts (On Remand),* 246 Mich App 322, 328, n 3; 632 NW2d 177 (2001).

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.