STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. MOORE,

Plaintiff-Appellant,

v

VARSITY LINCOLN-MERCURY, INC.,

Defendant-Appellee.

UNPUBLISHED
July 23, 2002

No. 232320
Oakland Circuit Court
LC No. 00-020921-NO

Before: Talbot, P.J, and Cooper and D.P. Ryan*, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from an order granting summary disposition to defendant, apparently under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff tripped and fell while looking at automobiles at defendant's business. He alleged that he walked up a ramp approach to the showroom, but instead of entering the showroom, he proceeded across a concrete apron in front of the building so that he could look at cars displayed on it. He then noticed a car parked on the ramp and when he went to look at it, he fell on a step down to the adjacent sidewalk. Plaintiff's theory was that he was distracted by the displayed cars and forgot that he had ascended the ramp, and that the uniform color of the apron and the sidewalk, along with the placement of the cars and a barely visible yellow safety strip, made it difficult to see the step. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that the step was an open and obvious condition. The trial court agreed.

This Court's reviews de novo a decision regarding a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. In deciding a motion brought under this subrule, the trial court considers the documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

* Circuit judge, sitting on the Court of Appeals by assignment.

Generally, the owner or possessor of land owes a duty to its invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp,* 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not generally encompass removal of open and obvious dangers. *Id.* See also *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd,* 466 Mich 11, 18; 643 NW2d 212 (2002), quoting *Bertrand v Alan Ford, Inc,* 449 Mich 606, 609, 610-611; 537 NW2d 185 (1995). Instead, the landowner is only required to protect an invitee from open and obvious dangers when "special aspects" of the condition make it unreasonably dangerous. *Lugo, supra* at 517. Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection. *Joyce v Rubin,* 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

The danger of tripping and falling on a step is generally open and obvious, *Bertrand, supra* at 614, and we are satisfied that the trial court did not err in concluding as a matter of law that the step on which plaintiff fell was open and obvious. Taking as true plaintiff's contention that the safety strip was nearly invisible, a comparison of the height of the apron to the height of the ramp made the differing levels immediately apparent, as the trial court noted. Plaintiff emphasizes the uniform color of the unmarked concrete. In the companion case to *Bertrand, Maurer v Oakland Co Parks & Recreation Dep't,* however, our Supreme Court reversed this Court's conclusion that there was a question of fact whether a series of concrete steps unmarked with contrasting paint was an open and obvious danger. 449 Mich at 618-621. As in *Maurer,* merely because plaintiff failed to notice the step did not mean that he established that there was anything unusual about it that would take it out of the general rule that dangers associated with steps are open and obvious. See also *Lugo, supra* at 521-522.

Plaintiff argues that even if the step was an open and obvious danger, the configuration of the apron and sidewalk, combined with the positioning of the displayed cars, posed an unreasonable risk of harm. In *Lugo, supra* at 517, the Court held that a landowner is not required to protect an invitee from an open and obvious danger unless "special aspects" of the condition make it unreasonably dangerous. Special aspects that serve to remove a condition from the open and obvious doctrine are those conditions that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id.* at 519. By way of illustration, the *Lugo* Court cited unavoidable standing water and an unguarded thirty-foot pit in a parking lot. *Id.* at 518. In this case, plaintiff did not show any aspect of the step that would rise to the level of a "special aspect" as characterized in *Lugo.* Accordingly, the trial court did not err in ruling as a matter of law that his claim was barred by the open and obvious danger doctrine.

Additionally, the *Lugo* Court expressly disapproved of any open and obvious danger analysis that focuses on whether the plaintiff was paying attention to where he or she was walking. *Lugo, supra* at 523-524. Although the trial court in this case noted plaintiff's inattention, summary disposition was nevertheless proper in light of the court's additional specific consideration of the objective nature of the step. *Id.*

Affirmed.

/s/ Michael J. Talbot
/s/ Jessica R. Cooper
/s/ Daniel P. Ryan