STATE OF MICHIGAN

COURT OF APPEALS

AUDREY J. LANE and RICHARD LANE,

Plaintiffs-Appellants,

v

MCDONALD'S CORP., EKREM BARDAH, INC., and EKREM BARDAH OF FENTON, INC.,

Defendants-Appellees,

and

MCDONALD'S RESTAURANTS OF MICHIGAN, INC.,

Defendant.

UNPUBLISHED
November 25, 2003

No. 242466
Genesee Circuit Court
LC No. 01-070343

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's grant of summary disposition to defendants[1] in this trip and fall premises liability case. We affirm.

I

Plaintiffs argue that defendant McDonald's Corporation, the owner and lessor[2] of the premises in question, was improperly dismissed, because McDonald's retained possession and some control of the premises. We disagree.

We review de novo the circuit court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 120. "Where the proffered evidence fails to establish a genuine issue

[1] McDonald's Restaurants of Michigan was dismissed below and is not a party to this appeal.

[2] Defendant McDonald's Corporation leased the premises involved to the Bardah defendants.

regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.* This Court noted in *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001):

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, and only if, all of the following are true: the possessor (a) knows, or by the exercise of reasonable care would discover, the condition, and should realize that it involves an unreasonable risk of harm to such invitees; (b) should expect that they well not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect them against the danger.

"A claim of premises liability is conditioned on the presence of both possession and control of the premises." *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999).

Plaintiffs did not establish that McDonald's Corporation retained both possession and control of the premises at the time of plaintiff's fall. The lease agreement provides that Ekram Bardha of Fenton, Inc.,[3] has exclusive possession and control of the premises, and that McDonald's has the right to enter and possess the premises only if the tenant vacates or breaches the lease's terms. No evidence was presented that Ekram Bardha of Fenton, Inc., had vacated the premises or breached the lease at the time of plaintiff's accident. Accordingly, the circuit court properly dismissed the premises liability claim against McDonald's Corporation.

II

Plaintiff next argues that the circuit court reversibly erred by granting summary disposition where there was an issue of material fact regarding whether insufficient lighting caused the hazard to be open and obvious or, in the alternative, caused the open and obvious condition to become unreasonably dangerous. We disagree.

"The test for an open and obvious danger is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000). Generally, steps are considered open and obvious:

> [B]ecause 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. . . . 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. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become

[3] In the lower court records, defendant's name is spelled "Ekrem Bardah." Defendant signed the lease as Ekram Bardha, and that appears to be the proper spelling.

> questions for the jury to decide. . . [*Bertrand v Alan Ford, Inc,* 449 Mich 606, 616-617; 537 NW2d 185 (1995).]

The Court in *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 517-519; 629 NW2d 384 (2001), stated:

> [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.
>
> . . . . [*O*]*nly 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.* [Citations omitted, emphasis added.]

In the instant case, Richard Lane testified that it was "pretty dark" on the morning in question, September 26, 1998, when he and plaintiff arrived at the McDonald's. He also testified that he had no trouble walking into the restaurant; that he just "sailed right in." Plaintiff testified that it was dark outside when she tripped and that she did not see the curb she tripped on, where the parking lot met the sidewalk from which patrons enter the McDonald's, because it was dark. She testified that the lights inside the McDonald's were on, that she did not think that any of the building's outside lights were on except maybe "some like tubing lights up at the top," and that the restaurant's inside lights somewhat illuminated the sidewalk that was just outside the McDonald's door her husband had gone in and she was going to go in, but did not illuminate as far as the curb.[4]

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[4] Plaintiff further testified:

> *Q.* I just want to understand your testimony. You don't believe that you saw that curbing as you approached it that morning?
>
> *A.* Well, everything was happening so fast that that might be why I missed it and fell. Is that an answer? I have to go back and explain what happened.
>
> * * *
>
> *Q.* You're walking toward the sidewalk in the parking lot. Did anything interfere with your ability to walk across that driveway that morning?
>
> *A.* Well, as I started to tell you earlier, as I started from the car and got into the driveway, a car peeled in, and I turned to see what was—you know, to see this

(continued…)

Defendants submitted below an affidavit of Gene Litwin, a safety consultant with expertise in building design and lighting, and photographs Litwin took at the McDonald's in question. Litwin's affidavit stated:

> 2. On October 5, 2001 I traveled to the McDonald's restaurant . . . at issue in this litigation.
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> 3. I took numerous photographs during the timeframe of 5:30 a.m. to 6:05 a.m., October 5, 2001, of the restaurant parking lot, sidewalks, entryways and lighting fixtures, these are attached as Exhibit 4 to Defendants' motion for summary disposition.
>
> 4. The photographs of the parking lot in question are where the alleged incident occurred as are the light meter readings.
>
> 5. These photographs, taken during the same period of the morning and in the same period of the year, accurately depict the lighting conditions at the time Plaintiff alleges she fell.
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> 6. The illuminating Engineering Society of North America (IESNA) recommends walkway lighting of 0.2-foot candles.
>
> 7. The lighting present during the timeframe of which I took light meter readings never dropped below 1 foot candle, significantly above the recommended illumination for a person to walk safely. . .
>
> 8. In addition, light meter readings were taken while the exterior lights were turned off, and even these readings exceeded the recommended illumination promulgated by the IESNA never dropping below 1-foot candle of illumination.
>
> 9. The pathway that the Plaintiff was taking had adequate illumination, with our [sic or] without exterior lights being on, to allow a person to be able to see where they were going.

The circuit court dismissed the claim on the basis that plaintiffs presented no evidence to rebut defendant's expert's affidavit maintaining that the lighting, with or without the restaurant's exterior lights being on, exceeded the level recommended by IESNA.

Plaintiffs cite one published case, *Abke*, *supra*, in support of their argument that the inadequate lighting constituted a special aspect of the curb step plaintiff tripped on. In *Abke*, the plaintiff went to the defendant's retail store to buy hay. The store did not have enough hay on hand, so the plaintiff went to a nearby supply barn of the defendant's. The defendant met the

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(…continued)

> car. And it startled me, and I kept – but I did avoid the car, and I kept walking, and the next thing I knew I had fallen. I hit something and it must have been the curb.

plaintiff at the barn and led the plaintiff down a hallway and through a sliding door. After closing the door, the plaintiff turned and fell off a loading dock into a truck bay and sustained severe injuries. The plaintiff brought suit and the jury found in his favor. The defendant appealed, arguing that he should have been granted judgment notwithstanding the verdict or a new trial because the loading dock truck bay that the plaintiff fell into was open and obvious as a matter of law and did not pose an unreasonable risk of harm. *Id.* at 351. This Court disagreed:

> Plaintiff testified that the loading dock area in which he fell was dark and that he could only see defendant's silhouette as defendant walked away from him just before the accident. He further testified that only one of the lights in the loading dock area was illuminated. Accordingly, plaintiff argues, a question of fact existed regarding whether the truck bay was readily apparent upon casual inspection. Conversely, defendant argues that no question of fact existed with respect to the open and obvious character of the danger because (1) the same power circuit controlled all three lights on the wall on which plaintiff saw a light, if one was illuminated, all three must have been illuminated, (2) plaintiff's own expert testified that these three lights satisfactorily illuminated the loading dock area, and (3) defendant testified that nearly all the loading dock lights were on that day. However, merely because one switch controlled all three lights does not necessarily mean that all three lights were illuminated at the time of the accident. For example, one or more bulbs might have burned out. Moreover, plaintiff specifically testified that the area was dark. Accordingly, because a factual discrepancy concerning the visibility of the truck bay existed, we conclude that the trial court properly denied defendant's motions . . .
>
> Moreover, even if the condition that caused plaintiff's fall had been open and obvious, the trial court would still have been obligated to deny defendant's motions if there existed a question of fact regarding whether the condition was unreasonably dangerous. Our review of the record leads us to conclude that a question of fact existed regarding whether awareness of the location of the truck bay would have eliminated the risk of falling. The edge of the truck bay was located only eight inches from the sliding door that plaintiff closed before his fall. In order to close the door, which was approximately ten feet wide, a person would have to pull it toward the truck bay. Plaintiff testified that the door was quite heavy and required two hands to close. Accordingly, it is possible that the momentum required to close the door would propel one over the edge of the truck bay. Hence, even if the danger presented by the truck bay had been open and obvious, there was a question of fact regarding whether the bay's proximity to the sliding door created an unreasonably dangerous condition. [*Abke, supra* at 362-364.]

We conclude that *Abke* is distinguishable from the instant case. In this case, defendant's expert's affidavit stated that he took light meter readings while the McDonald's restaurant's exterior lights were turned off, i.e., while the lighting was as plaintiffs allege, and even those

readings exceeded the recommended illumination level promulgated by IESNA.[5] Given defendant's expert's affidavit, and that plaintiffs did not rebut the affidavit, there was no genuine issue of fact regarding whether on the morning in question, inadequate lighting at the McDonald's constituted a special aspect of the curb/step such that an unreasonable risk of harm to plaintiff was created. We further conclude that while inadequate lighting might contribute to special aspects in a case such as *Abke, supra,* here, the adequacy or inadequacy of the lighting was apparent, as was the possibility that the sidewalk was separated from the parking lot by a curb, rather than a ramp, and the danger did not pose an unreasonable risk of harm. We find no error.

Affirmed.

/s/ William D. Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White

[5] Defendant's expert took the photographs submitted below on October 5, 2001, and plaintiff fell on September 26, 1998. However, the expert also took the photographs between 5:30 to 6:00 a.m., an hour to half hour earlier than when Richard Lane testified that he and plaintiff arrived at the McDonald's. We note that U.S. Naval Observatory data indicates that on September 26, 1998, twilight began at 6:58 a.m., and sunrise at 7:26 a.m. On October 5, 2001, twilight began at 7:08 a.m., and sunrise at 7:37 a.m. See http://aa.usno.navy.mil.