STATE OF MICHIGAN

COURT OF APPEALS

CATHY S. SHATTUCK and DANIEL P. SHATTUCK, Plaintiffs-Appellants, v HOTEL BARONETTE, INC., Defendant-Appellee.	UNPUBLISHED February 10, 2009 No. 281065 Oakland Circuit Court LC No. 2006-079093-NO

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's granting of defendant's motion for summary disposition in this premises liability case. We affirm.

Plaintiff's[1] claim arises from a November 29, 2003 stay at the Hotel Baronette in Novi, Michigan, during which she broke her wrist after she slipped and fell climbing out of her hotel room's bathtub. Plaintiff brought a negligence suit on a premises liability theory, alleging that defendant breached its duty to plaintiff as an invitee by negligently installing a hard tile step next to an extra-deep bathtub. Plaintiff's complaint alleged that she slipped on the hard tile step abutting the exterior of the bathtub. However, during her deposition testimony plaintiff could not state with certainty whether she slipped on the interior of the bathtub, or the tile step on the exterior of the bathtub. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff failed to create a genuine issue of material fact as to causation, and alternatively that any wet, slippery surface near or inside of the bathtub constituted an open and obvious danger. The trial court granted defendant's motion on both grounds. On appeal plaintiff contends that the danger presented by either the interior of the bathtub or the exterior step was not an open and obvious hazard, and even if the danger was open and obvious, special aspects of the bathtub and tile floor made the hazard unreasonably dangerous. In addition, plaintiff argues there was sufficient evidence presented to the trial court to create a genuine issue of material fact regarding causation.

[1] Because Daniel Shattuck's interest in this case is derivative of that of his wife, Cathy Shattuck's case, the use of the singular word "plaintiff" will refer to Cathy Shattuck only.

We review de novo a trial court's decision on a motion for summary disposition. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). When reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 551-552. A moving party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See *Lugo v Ameritech Corp*, 464 Mich 512, 520; 629 NW2d 384 (2001). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *Campbell v Kovich*, 273 Mich App 227, 229-230; 731 NW2d 112 (2006). The existence of a disputed fact must be established by admissible evidence as opposed to a mere possibility that the claim might be supported by evidence at trial. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Our review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

In a negligence action a plaintiff must prove "(1) that defendant owed [plaintiff] a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). The duty an owner or occupier of land owes to a guest is dependent on the status of that guest. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). One who enters another's land on invitation for a commercial purpose where the essence of the relationship is a pecuniary interest on the part of a landowner is considered an invitee. *Id*. at 596-597, 604-605. Generally, "a premises possessor owes 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." *Lugo, supra* at 516. "However, this duty does not generally encompass removal of open and obvious dangers." *Id*. An open and obvious danger is a danger and risk presented by that danger that an "average user of ordinary intelligence [would] have been able to discover…upon casual inspection." *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This test is objective, and we look "not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in [plaintiff's] position would foresee the danger." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Only if special aspects of a condition make an open and obvious risk unreasonably dangerous does the premises possessor have a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517.

Although plaintiff's complaint alleges she slipped on the hard "glazed" tile step on the exterior of the bathtub, during deposition testimony plaintiff offered conflicting testimony as to the surface on which she slipped. Plaintiff first stated that she slipped on the exterior step, then, when asked what caused her to fall, she stated "[t]he tub was slippery, the floor was slippery, the step was slippery." She also stated "I don't know if it was [the exterior step] or if it was the step inside the tub that caused [the fall]." Regardless whether plaintiff slipped on the floor, the exterior step, or the interior step, we find that all three surfaces posed open and obvious dangers without special aspects.

Plaintiff testified that when she was entering the bathtub, the floor, the exterior step and the interior of the bathtub were dry and not slippery. When plaintiff finished bathing she pulled the plug on the bathtub's drain. She did not wait for the water to fully empty before exiting the tub, and she did not dry off before stepping out of the bathtub. Plaintiff further testified that she was aware the exterior step was constructed of hard tile and that it did not have a non-slip surface on it; yet despite this awareness, she did not place a towel on the exterior step or floor surrounding the bathtub to absorb water and help protect her from slipping. Instead, plaintiff stepped out of the bathtub with wet feet and with water still on her body. Wet hard tile and a wet interior bathtub step, each present an open and obvious hazard. Plaintiff acknowledged this hazard when she admitted during her testimony that stepping on a hard "glazed" tile surface with a wet foot increases one's chances of slipping. An "average user of ordinary intelligence [would] have been able to discover…upon casual inspection" the risk posed by hard wet tile or the wet interior of a bathtub. *Novotney*, *supra* at 475. In addition, "a reasonable person in [plaintiff's] position would foresee the danger" posed by stepping out of a bathtub of water with wet feet onto a hard tile step or floor, or a hard interior bathtub step in a wet bathtub without waiting for the bathtub to fully drain or drying oneself off, or placing a towel or other apparatus in place to absorb the water. *Hughes*, *supra* at 11. No genuine issue of material fact existed on the issue whether the alleged dangerous conditions were open or obvious.

Plaintiff also did not present evidence to create a genuine issue of fact as to whether the hard tile surrounding the exterior of the bathtub, and the interior bathtub step had special aspects that served to create an "unreasonably dangerous" condition. *Lugo*, *supra* at 517. In *Lugo*, the Michigan Supreme Court stated that special aspects "might involve" an open and obvious danger that is "effectively unavoidable" or possesses characteristics that "impose an unreasonably high risk of severe harm." *Id*. at 517-518. Here, plaintiff could have avoided any slippery surface she was about to encounter as she finished bathing by simply waiting for the tub to drain, drying her feet off before exiting the bathtub, or placing a towel on the step next to the bathtub to absorb water and provide a non-slip surface to step onto. Furthermore, the risk posed by the slippery surfaces did not pose an unreasonably high risk of severe harm. The *Lugo* Court provided an illustration of such a condition, "consider an unguarded thirty foot deep pit in the middle of a parking lot…this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous…" *Lugo, supra* at 518. In the instant case, while a slippery floor or step presents a danger, unlike a thirty-foot fall, plaintiff only faced a short fall to the ground and "[f]alling [even] several feet to the ground is not the same as falling an extended distance such as into a thirty-foot deep pit." *Corey v Davenport College of Bus*, 251 Mich App 1, 7; 649 NW2d 392 (2002). Accordingly, we conclude on the record before us, the risk did not present an unreasonably high risk of severe harm. Because there were no special aspects making the risks posed by either the hard tiled surface, or the interior bathtub step unreasonably dangerous, these conditions were not removed from the open and obvious doctrine. *Lugo, supra* at 518.

We conclude that any risk posed by the slippery surfaces in the hotel bathroom were open and obvious dangers without any special aspects. Plaintiff's claim was therefore barred, and the trial court properly granted defendant's motion for summary disposition on this basis. See *Lugo, supra* at 520-521. Because we affirm summary disposition on this ground, we need not address

the issue of whether plaintiff presented sufficient evidence to create a genuine issue of material fact with respect to causation.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray