STATE OF MICHIGAN

COURT OF APPEALS

COLIN BIELBY, Plaintiff-Appellant,	UNPUBLISHED February 24, 2011
v	No. 295564 Saginaw Circuit Court
SAGINAW PLAZA GROUP, LLC, d/b/a HOWARD JOHNSON PLAZA HOTEL & CONVENTION CENTER, Defendant-Appellee.	LC No. 08-002410-NO

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition in favor of defendant in this personal injury action. Because the trial court erred when it found that plaintiff's claim was precluded by application of the open and obvious danger doctrine, we reverse in part and remand for further proceedings.

Plaintiff's injury occurred while he and his sister, Tania Bielby, were hotel guests at defendant's hotel in Saginaw on March 19, 2006. According to plaintiff's deposition testimony, at approximately 9:00 a.m. he took a shower in his bathtub in the hotel room. After showering, he decided to turn up the hot water and then, with his forearms against the back wall, leaned away from the showerhead to allow the hot water to fall on his lower back.[1] As he did so, the mat that lay on the bottom of the tub[2] slid out from underneath him and he fell forward.

[1] According to plaintiff, he had previously been injured in an automobile accident as a child and this later led to degenerative back problems. Plaintiff had surgery in the early 1990s and had begun receiving social security disability benefits in 1995.

[2] Plaintiff's complaint asserted that the mat was the type that is attached to the bottom of the tub with an adhesive. Defendant affirmed that this was the case in its answer to the complaint and defense counsel confirmed this fact during the hearing below, stating that the mat was designed to be permanently affixed to the bottom of the tub to provide a non-skid surface.

According to plaintiff, it felt like the whole bottom of the tub was coming loose. He testified that he was approximately a foot from the back of the tub. He also testified that, before he began to shower, he looked at the mat and put his foot on it to make sure it was steady. He noticed that the mat appeared moldy, but that it did not seem to be loose. However, he did not check the mat to see if it was glued down.

Plaintiff filed suit alleging negligence, the violation of statutory duties under MCL 125.470 and MCL 125.491, and a violation of the Michigan Consumer Protection Act (MCPA). Defendant subsequently moved for summary disposition. As to plaintiff's negligence claim, defendant argued that there was no evidence that defendant had notice of the dangerous condition and that plaintiff's claim should be dismissed because the danger was open and obvious. Defendant also argued that plaintiff could not show that defendant violated either the above statutes or the MCPA. Following a hearing, the trial court issued a written opinion. It found that MCL 125.470, MCL 125.491, and the MCPA were inapplicable to the instant case. As to plaintiff's negligence claim, it held that the danger presented by the mat was open and obvious. Plaintiff appeals.

A trial court's decision to grant summary disposition is reviewed de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "In deciding a motion pursuant to subrule (C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on the land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Under the open and obvious danger doctrine, however, where the invitee knows of the danger, or where it is so obvious that a reasonable invitee should discover the condition, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious when "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Furthermore, "[b]ecause the test is objective, this Court 'looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce*, 249 Mich App at 238-239, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

Here, we first note that defendant disputed below plaintiff's factual assertion that the mat slipped out from under plaintiff. In support of its motion for summary disposition, defendant presented an affidavit by James Scarbrough, an employee at the hotel, who averred that he was summoned to perform a room check on March 19, 2006, after receiving a report of a man falling in a bathroom. He further asserted that he checked the mat in the bathtub and that it was secured to the bathtub. He also stated that he spoke with Tania Bielby, who told him that plaintiff was

not in the shower when he fell, but that his back went out while he was washing up in the bathroom and that he fell over into the bathtub. In support of plaintiff's position, plaintiff presented his own deposition testimony and that of his sister. Tania Bielby testified that, as plaintiff showered, she heard a "big thump" and, after unsuccessfully trying to contact plaintiff, went into the bathroom to find plaintiff lying in a fetal position in the tub sobbing, with the bathmat "puckered" or "crumpled" by his feet. Plaintiff also presented an affidavit from Tony Bradford, who averred that he received a call on March 19, 2006, from Tania Bielby to come to her room. He went into the bathroom and saw plaintiff "lying in the bathtub with the bathmat curled up at the bottom of his feet."

Recognizing that for purposes of summary disposition a reviewing court is to take facts in the light most favorable to the non-moving party, we take plaintiff's assertion as true; i.e., that a bath mat that was ostensibly affixed permanently to the bottom of a bathtub separated from the tub and caused plaintiff to fall. Given these facts, we find that the trial court erred in holding that the danger posed by the mat, and the risk of the injury suffered by plaintiff, was open and obvious. Were defendant's assertion true, that the mat did not become loose, but rather that plaintiff slipped on the mat because the non-skid surface was insufficient to prevent it, we would likely find defendant's position to have merit. One could make a colorable claim that an average person would recognize the continued danger of slipping on the wet, possibly soapy, surface, even on one that is slip-resistant. However, we do not agree with the trial court that an average person would recognize upon casual inspection the danger actually presented here; that a mat that appeared to be permanently affixed would move out from under the person if he leaned against the back of the shower.

Nor do we agree with the trial court's apparent justification for its decision that plaintiff was acting somehow irregularly as he leaned against the shower wall. The court's finding that plaintiff subjected the mat to "enormous lateral forces" has no support in the record. We also do not find plaintiff's actions to be so outside the norm of those who shower as to constitute a case where, in the trial court's words, "the tub/shower is being used for a purpose and in a manner for which it was not designed or intended." Moreover, the trial court erred in its reliance on what it determined to be plaintiff's comparative negligence. This is not the proper focus when deciding whether defendant owed plaintiff a duty.

Defendant argues that, in the alternative, we should find that plaintiff presented no evidence that defendant knew, or should have known, about the danger. See *Hampton v Waste Mgmt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). We disagree. Plaintiff testified that, when he inspected the mat, it appeared moldy. This testimony raises a reasonable inference that the mat had not been inspected or cleaned for an appreciable time before plaintiff's fall. While defendant states on appeal that hotel cleaning staff had accessed, inspected and cleaned the room on a regular basis and never reported a problem, defendant presents no substantive evidence that would support a finding that staff regularly inspected the mat to make sure it remained securely fastened to the floor of the tub, or even made a casual inspection of its condition. "Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Banks v Exxon Mobil Corp*, 477 Mich 983, 983-984; 725 NW2d 455 (2007), citing *Kroll v Katz*, 374 Mich 364, 372; 132 NW2d 27 (1965). Moreover, "[g]enerally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is

a question of fact, and not a question of law." *Banks*, 477 Mich at 984. Thus, we find that a reasonable jury could conclude that the defective condition existed for a length of time such that defendant should have discovered this dangerous condition had it in fact inspected. In addition, that the mat had not previously slipped out from under a guest's feet, even if true, is not dispositive.[3]

Plaintiff next maintains that the trial court erred when it ruled that MCL 125.470 and MCL 125.491 are inapplicable to the instant case. Questions involving statutory interpretation present questions of law subject to review de novo. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 773 NW2d 243 (2009); *Booker v Shannon*, 285 Mich App 573, 575; 776 NW2d 411 (2009). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treas*, 270 Mich App 539, 544; 716 NW2d 598 (2006). "The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a 'term of art' with a unique legal meaning." *People v Flick*, 487 Mich 1, 10-11; 790 NW2d 295 (2010) (internal citations omitted).

MCL 125.470 provides:

> Water-closets and sinks. In all 2 family dwellings and multiple dwellings the floor or other surface beneath and around water-closets and sinks shall be maintained in good order and repair and if of wood shall be kept well painted with light colored paint.[4]

MCL 125.491 provides:

> Plumbing fixtures. In all dwellings, plumbing fixtures shall be so arranged and maintained as to prevent the wetting of the supporting or surrounding framework which may cause an insanitary condition. The space beneath such fixtures shall be accessible and shall not be so enclosed as to prevent ventilation sufficient to maintain dry and sanitary conditions. The floor and wall surfaces beneath and adjacent to all plumbing fixtures shall be maintained in a sound and sanitary

---

[3] 2 "[I]t would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v Vanderlinde*, 165 Mich 464, 468; 131 NW 165 (1911).

[4] While we are cognizant that the definition of "water closet" varies depending on both historical and geographical context, given the requirements for the construction of water-closets outlined in MCL 125.492, we find its usage in MCL 125.470 to comport with the common definition of a flush toilet.

> condition. The health officer, or such other appropriate public official as the mayor may designate, may order plumbing fixtures to be supported by metal brackets, and the space beneath left entirely open, when it is indicated that the woodwork has become damp and insanitary and cannot be properly maintained. Defective and insanitary plumbing fixtures, which cannot be repaired, shall be replaced by approved fixtures.

Plaintiff argues on appeal that these statutes created a separate duty, apart from the common duty owed by landowners generally, that required defendant to maintain the shower floor, and thus the bath mat, in good repair. See e.g., *Benton v Dart Props Inc*, 270 Mich App 437; 715 NW2d 335 (2006) (discussing whether the defendant breached its duties under MCL 554.139, which would render defendant liable to plaintiff even if the ice on the sidewalk was open and obvious). We concur with plaintiff that defendant's premises falls within the definition of a "dwelling under the statute." See MCL 125.402(4). We disagree, however, with plaintiff's analysis of this statutory language and find that these provisions did not create a separate duty to maintain the floor of the shower or bathtub.

Plaintiff argues that MCL 125.491 applies to the instant case "as a shower head is a plumbing fixture and the bottom of a bathtub is a floor surface adjacent to a plumbing fixture." The statute does not itself define "fixture." However, this term has been defined by our Supreme Court. "[T]he term 'fixture' necessarily implies something having a possible existence apart from realty, but which may, by annexation, be assimilated into realty." *Kent Storage Co v Grand Rapids Lumber Co*, 239 Mich 161, 164; 214 NW 111 (1927). "Property is a fixture if the following three criteria exist: '[First], annexation to the realty, either actual or constructive; second, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and third, intention to make the article a permanent accession to the freehold.'" *Wayne Co v Britton Trust*, 454 Mich 608, 615; 563 NW2d 674 (1997), quoting *Morris v Alexander*, 208 Mich 387, 390-391; 175 NW 264 (1919).

Under the terms of this test, the one piece bathtub and shower surround in the instant case is clearly itself a fixture, not a floor or wall surface adjacent to one. In addition, we concur with defendant's analysis that the language of the statute, when taken as a whole, evidences an intent to require placement of fixtures and maintenance of them and the surrounding areas to prevent damp or unsanitary conditions. Thus, even to the extent this provision could be said to apply to the bathtub and surround here, it is not relevant to deciding whether defendant owed a duty to plaintiff, because plaintiff has not asserted that he was injured due to the tub's unsanitary condition. His injury was not the harm the statute was intended to prevent. See *Zeni v Anderson*, 397 Mich 117, 138; 243 NW2d 270 (1976).

As to MCL 125.470, plaintiff asserts that this provision applies because the bathtub was located within several feet of the sink. However, the floor of an ordinary bathtub, or of the one piece tub and shower surround in the instant case is not, contrary to plaintiff's contention, "a floor or other surface beneath and around" the sink. Rather, as noted above, it is another "fixture" in the bathroom.

Plaintiff also argues that the trial court erred when it found that the Michigan Consumer Protection Act (MCPA) inapplicable, because defendant did not provide plaintiff with "promised

benefits" in violation of MCL 445.903(1)(y).[5] In support of his argument, plaintiff relies on *Mikos v Chrysler Corp*, 158 Mich App 781; 404 NW2d 783 (1987), in which this Court held that a breach of an implied warranty of merchantability in a transaction involving the sale of goods constitutes a violation of the MCPA. *Id*. at 782-783. According to the *Mikos* Court, an implied warranty was a benefit promised by law and, from the consumer's standpoint, "it is just as much a promised benefit as if the merchant itself made the promise." *Id*. at 784. Accordingly, it concluded that breach of an implied warranty constitutes a "failure to provide the promised benefits" under MCL 445.903(1)(y) and, thus, actionable under the MCPA. *Id*. at 784-785. Plaintiff seeks to expand this holding to his own claim and maintains that this Court should find that "the failure to provide the benefits promised by law" by defendant in the instant case constitutes a violation of the MCPA. However, even to the extent we would find the rationale in *Mikos* applicable in other contexts, this does not help plaintiff. The "benefit promised by law" plaintiff seeks to invoke are the standards outlined in MCL 125.470 and MCL 125.491. As discussed above, these have no application to the instant case. Thus, because plaintiff's MCPA claim is wholly premised on a violation of these inapplicable standards, the trial court did not err when it dismissed this claim.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro

---

[5] MCL 445.903 provides in pertinent part:

> (1) Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful and are defined as follows:
>
> * * *
>
> (y) Gross discrepancies between the oral representations of the seller and the written agreement covering the same transaction or failure of the other party to the transaction to provide the promised benefits.