STATE OF MICHIGAN

COURT OF APPEALS

FAYE MILTON, Plaintiff-Appellant,	UNPUBLISHED December 17, 2015
v	No. 323521 Wayne Circuit Court
JOE RANDAZZO'S FRUIT AND VEGETABLE, INC., Defendant-Appellee.	LC No. 12-015423-NO

Before: SAWYER , P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of an incident that occurred on May 11, 2010 at a grocery store owned by defendant. The facts are largely undisputed. Plaintiff visited the store on a rainy day, and after shopping for roughly five minutes, she asked an employee to direct her to the restroom. To access the restroom, plaintiff had to proceed through an area she described as a "small hallway" or "open area." The restroom was located at the top of two steps at the end of the hallway. According to plaintiff, the hallway was dark, so plaintiff walked slowly, feeling along the wall for a light switch. As she moved forward in the dark, she encountered the steps that led to the restroom. She stepped up and fell. Her complaint does not allege the cause of her fall, but does reference both the inadequate nature of the lighting in the area and alleged "hazards and dangerous conditions, including hazards unknown slippery substances." However, at her deposition, she testified that she tripped over the steps at the end of the hallway, and noticed that the floor was wet when she attempted to rise.

Plaintiff suffered injuries from the fall. She filed suit, alleging that defendant was negligent in failing to maintain safe conditions in the area leading to the restroom. Defendant moved for summary disposition on the ground that plaintiff's claim was barred by the open and obvious doctrine, which motion the trial court granted. Plaintiff then filed a motion for reconsideration, arguing that there was at least a genuine issue of material fact regarding whether the alleged dark condition of the hallway and the alleged slippery condition of the steps were open and obvious. The trial court held in its order denying reconsideration that plaintiff had

failed to identify the cause of her fall, having argued both that she "tripped" on the step and that her feet "slipped," merely speculating that "[i]t must have been a liquid." The trial court further held that the dark condition of the hallway was open and obvious. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

III. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013), citing *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Plaintiff was an invitee, because she visited defendant's store for business purposes. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). A possessor of land is liable to an invitee for injuries when 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 will 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." *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001).

Notwithstanding these duties, a premises possessor has no duty to warn invitees of dangers that are open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious when an "invitee might reasonably be expected to discover them." *Id*. at 516. However, "if special aspects of a condition make even an open and obvious danger unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. In deciding whether there are such special aspects:

> 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*. at 517-518.]

Examples of unreasonable risks of harm include situations in which the risk is effectively unavoidable, or where a danger, though open and obvious, carries a "substantial risk of death or severe injury," such as a thirty-foot deep pit in a parking lot. *Id*. In contrast, a pothole in a parking lot does not impose a duty, because it is open and obvious, and because "unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." *Id*. at 520.

Plaintiff seems to argue that the dark condition of the hallway was not open and obvious. As the trial court pointed out, an average person of ordinary intelligence who conducted a casual inspection of a hallway would notice the darkness. See *Price v Kroger Co of Michigan*, 284 Mich App 496, 499; 733 NW2d 739 (2009) (holding that there is no liability where "an average person of ordinary intelligence [would] discover the danger and the risk it presented on casual inspection[.]" (Citation omitted)). Therefore, the dark condition was open and obvious and defendant owed plaintiff no duty absent special aspects. *Id*. at 517-518.

While not clear from her brief, plaintiff may be endeavoring to argue, notwithstanding that the dark condition of the hallway was open and obvious, that the danger was unavoidable, or that the steps and the slippery condition of the steps made the hallway unreasonably dangerous. As the trial court noted, however, the hallway leading to the restroom was avoidable, because plaintiff could have chosen not to use the restroom, or could have asked an employee to turn on a light before she went inside. *Lugo* expressly held that tripping and falling to the ground, unlike falling a long distance into a pit, does not typically carry a risk of severe injury, meaning an area that poses a risk of such a fall is not unreasonably dangerous. *Lugo*, 464 Mich at 519-20. Regardless of whether plaintiff slipped on water or tripped on a step, plaintiff has presented no issue of material fact regarding whether the dangers she faced were avoidable.

Plaintiff also appears to argue that it was unreasonably dangerous for steps to be present in the hallway leading to the bathroom. However, steps are "an everyday occurrence," and a reasonable person will take "appropriate care for his own safety" when encountering them. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616; 537 NW2d 185 (1995). We thus conclude the trial court did not err in holding that the darkened condition of the hallway, regardless of the presence of steps, was open and obvious.

Further, with regard to the liquid allegedly on the steps, plaintiff has not established that the liquid was a proximate cause of her fall. See *Sanders*, 303 Mich App at 4 ("[i]n a premises liability action, a plaintiff must prove the elements of negligence"). Causation cannot be proven with mere conjecture. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994).

On appeal, plaintiff argues that the slippery condition of the steps caused her fall: "my feet slipped out from under me because the floor and steps had a slippery substance that made me fall face forward." However, appellate review of a motion for summary disposition under MCR 2.116(C)(10) "is limited to the evidence that had been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466,

476; 776 NW2d 398 (2009), citing *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). In her deposition testimony, plaintiff stated that she walked into a step that she could not see because of the darkness, which caused her fall. Although she also made reference to the floor being "slippery," she could not establish that she fell because of a liquid on the steps or floor; rather, she stated that she noticed that the floor was slippery while trying to get up after her fall. Thus, even taking the evidence in the light most favorable to the plaintiff, *Liparoto Constr, Inc*, 284 Mich App at 29, she did not establish a genuine question of material fact regarding whether the liquid allegedly on the steps or floor was the cause of her fall, but merely speculates on appeal that it was the cause.

The trial court did not err in granting summary disposition to defendant on the ground that the hazard was open and obvious.

Affirmed.[1]

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Mark T. Boonstra

[1]In her brief on appeal, plaintiff appears to allege misconduct on the part of the trial court and defense counsel, and violations of the Michigan Professional Rules of Conduct by both attorneys and the trial judge. We have reviewed the record in this case and, as best as this Court can understand plaintiff's claims, find them to be without evidentiary support.