STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER KARIM and JENNIFER KARIM, Plaintiffs-Appellants, v SALMAN KONJA and REGINA KONJA, Defendants-Appellees.	UNPUBLISHED October 6, 2011 No. 297985 Oakland Circuit Court LC No. 2009-100352-NO

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM

Plaintiff Christopher Karim agreed to help his mother-in-law, defendant Regina Konja, retrieve a box of Christmas decorations from Konja's attic. Unbeknownst to Karim, the plywood attic floor did not extend all the way to the attic perimeter. Boxes lined the edge of the plywood, obscuring the outer limits of the plywood flooring. As Karim attempted to pick up the box his mother-in-law selected, he stepped onto drywall instead of plywood, and fell through to the garage floor below. Konja successfully moved for summary disposition of Karim's premises liability action on the ground that the hazard in the attic was open and obvious. Because the absence of plywood flooring behind the boxes was not obvious on casual inspection of the attic, we reverse and remand for further proceedings.[1]

[1] As an invited guest who expected no compensation for the gratuitous assistance give to his relative, Karim was a "licensee" in Konja's home. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; ___ NW2d ___ (2000). A landowner has a duty to warn a licensee "of any hidden dangers the owner knows or has reason to know of," but has no affirmative duty to inspect or make safe the premises. *Id.* at 596. Defendants have acquiesced in Karim's self-identification as an invitee and neither party has raised this error. Although we are treating Karim as an invitee on appeal, we would reach the same holding even had the parties treated Karim as a licensee.

I.

While putting up Christmas decorations, Konja determined that a green wreath remained stored in the attic located above the Konjas' garage. She called Christopher Karim, her son-in-law, and requested his help in retrieving the missing wreath. Karim left work "a little early just to go and help her out."[2] He had never before visited the attic, and followed Konja up a folding stairway into the space. When Konja switched on the single light bulb, Karim "was able to stand up straight up there" and noted that the attic "[l]ooked pretty finished." Konja pointed to a box she wanted to inspect in search of the wreath. As Karim approached the box, he heard Konja say "No, don't step there," just as he fell through the floor.

Konja recounted that a carpenter had nailed plywood over one-half to two-thirds of the attic floor, but left the periphery exposed to the drywall garage ceiling. Konja stored "many stuff" in the attic. She placed smaller boxes on the plywood floor and pushed larger ones onto the joists running atop the drywall, keeping all the boxes closely spaced. As Konja searched for the box containing the wreath, Karim trailed directly behind her. When she approached a box sitting at the juncture of the plywood and the drywall, Konja stepped onto the joists but Karim stepped onto the drywall. Konja admitted that someone looking at the box could not have discerned that instead of resting on the plywood, the box straddled the joists. She clarified, "You can't see because it was boxes."

Defendants moved for summary disposition, arguing that they owed Karim no duty to warn or protect him from the attic's "open trusses" because the condition of the attic "was open and obvious, and possessed no special aspects." Without addressing whether the condition was open and obvious, the trial court determined "that summary disposition is appropriate because [p]laintiffs have failed to demonstrate a special aspect of the attic that would make it unusual or unreasonably dangerous."

II.

Plaintiffs challenge the circuit court's summary disposition ruling, which we review de novo. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when

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[2] Plaintiff Jennifer Karim has filed a derivative claim for loss of consortium. For purposes of this opinion, we refer to Christopher Karim as Karim. The Karims sued homeowners Salman and Regina Konja, and we refer to Regina Konja as Konja.

the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

Initially, we hold that the circuit court erred by proceeding to an analysis of whether special aspects of the attic rendered it unreasonably dangerous without first deciding whether the condition of the premises qualified as open and obvious. A "special aspects" analysis is required only if a condition is first determined to be open and obvious. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (holding that premises owners have no duty to protect or warn invitees against open and obvious conditions unless special aspects make that condition unreasonably dangerous).

We further hold that the trial court erred in summarily determining that the condition of Konja's attic was open and obvious. In *Watts v Michigan Multi-King*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293185, issued December 14, 2010), slip op at 3, this Court summarized as follows the legal principles relating to a landowner's duty to invitees:

> A landowner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo[*, 464 Mich at 516]. However, a premises possessor is not generally required to protect an invitee from open and obvious dangers, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Id*.
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> The question of whether a condition is "open and obvious" depends on whether "it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). The test is objective; "the inquiry is whether a reasonable person in the plaintiff's position" would have done so. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). When deciding a summary disposition motion based on the open and obvious danger doctrine, "it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, 464 Mich at 523-524. If genuine issues of material fact exist regarding the condition of the premises and whether the hazard was open and obvious, summary disposition is inappropriate. See *Bragan v Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004).

Viewed in the light most favorable to Karim, the evidence supports that the boxes positioned on the joists obstructed visibility of the danger presented at the point where the plywood ended. When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The key inquiry is whether an average person of ordinary intelligence would discover the danger on casual inspection. See *Watts*, slip op at 3. Thus, the proper question is "not the subjective degree of care used by" Karim or whether he subjectively could or should have

observed the uncovered portion of the attic floor. *Price v Kroger Co of Michigan, Inc*, 284 Mich App 496, 501; 773 NW2d 739 (2009).

A hazard visible only from certain vantage points is not "open and obvious" if the hazard could not be seen by an average person of ordinary intelligence placed in the same position as the plaintiff. In *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997), this Court emphasized the objective focus of an open and obvious danger inquiry: "The test . . . that it is 'reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection,' is an objective one." The plaintiff in *Hughes*, a roofer, stepped onto a small porch overhang that lacked adequate support. The overhang collapsed and the plaintiff fell, sustaining severe injury. *Id*. at 3. This Court framed the correct inquiry as, "not . . . whether plaintiff should have known that the overhang was hazardous, but . . . whether a reasonable person *in his position* would foresee the danger." *Id*. at 11 (emphasis supplied). Similarly, in *Price*, 284 Mich App at 501-502, this Court determined that although a one-inch wire barb protruding from a bin at ankle level was visible to the plaintiff while she lay on the floor after her fall, a genuine issue of material fact existed regarding whether the barb was apparent upon casual inspection. The evidence indicated that the barb was not visible as the plaintiff approached, because the bin blocked her view before she fell.

Here, closely spaced boxes covered the area where the plywood ended, concealing the danger that lay beneath them. Because the evidence gives rise to a factual dispute regarding what a reasonable person in Karim's position should have seen on casual inspection of the attic, a jury must decide whether the hazard was open and obvious. Accordingly, the trial court erred in granting defendants' motion for summary disposition.[3]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher

[3] Had Karim properly sought damages as a licensee, the jury would similarly be required to determine if the placement of the boxes rendered the condition a "hidden danger," of which Konja knew or had reason to know. *Stitt*, 462 Mich at 596.