

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-383

Filed: 4 February 2020

Mecklenburg County, No. 17 CVS 21740

LOUANN NOVACK, Plaintiff,

v.

EDWARD KOSCIUSZKO, Defendant.

Appeal by plaintiff from order entered 14 November 2018 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 October 2019.

*Hunter & Everage, by Kaitlyn B. Copeland, for plaintiff-appellant.*

*Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Gerald A. Stein, and Peter J. Bigham, Jr., for defendant-appellee*

ZACHARY, Judge.

Plaintiff Louann Novack commenced a negligence action against Defendant Edward Kosciuszko after injuring herself at Defendant's home. The superior court granted summary judgment in favor of Defendant. Plaintiff argues on appeal that material issues of fact exist as to whether Defendant was negligent in maintaining his premises. Upon careful review, we affirm.

### **Background**

At around 2:00 p.m. on 30 May 2016, Plaintiff attended a party hosted by Defendant. After arriving, Plaintiff made her way to a covered patio area in Defendant's backyard, sat down, and conversed with another guest for 10 to 20 minutes. Next to where Plaintiff was sitting was a six and one-half inch step down to a lower level of the patio. When Plaintiff rose from her seat and began walking, she almost instantly fell from the higher level of the patio. Plaintiff landed badly on her wrist, which required surgery to repair.

Plaintiff subsequently filed a negligence action against Defendant. In her complaint, Plaintiff asserted that Defendant's outdoor patio area had an "unmarked concrete step that connected the two levels of the patio," and because it was the same color as the patio, it was "impossible to distinguish that a step was in fact present." Plaintiff also alleged that Defendant had warned other party guests of the potentially hazardous step, and that Defendant had previously considered either repainting the step a different color, or erecting a railing next to it.

Defendant filed a motion for summary judgment, which came on for hearing before the Honorable Lisa C. Bell on 4 October 2018. Judge Bell entered an order granting Defendant's motion for summary judgment. Plaintiff timely appealed.

### **Discussion**

*Opinion of the Court*

Plaintiff argues on appeal that the trial court erred in granting summary judgment “because there are multiple issues of material fact that are in dispute.” In support of this argument, Plaintiff asserts that (1) “[t]he step leading off Defendant’s grill area, causing Plaintiff’s injury, was not open or obvious given the step’s character, location or surrounding conditions”; (2) “Defendant had knowledge of the dangerous condition and failed to correct said condition”; and (3) Plaintiff was not contributorily negligent as a matter of law.

“If the trial court grants summary judgment, the decision should be affirmed on appeal if there is any ground to support the decision.” *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017). “Appeals arising from summary judgment orders are decided using a de novo standard of review.” *Midrex Techs., Inc. v. N.C. Dep’t of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016). “Under the *de novo* standard of review, the Court considers the matter anew and freely substitutes its own judgment for that of the lower court.” *Id.* (quotation marks and brackets omitted).

Summary judgment is properly entered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). “[T]he evidence presented to the trial court must be admissible at trial . . . and must be

*Opinion of the Court*

viewed in a light most favorable to the non-moving party.” *Patmore v. Town of Chapel Hill*, 233 N.C. App. 133, 136, 757 S.E.2d 302, 304, *disc. review denied*, 367 N.C. 519, 758 S.E.2d 874 (2014). Where a defendant has moved for summary judgment of a negligence claim, the

plaintiff must establish a prima facie case . . . by showing: (1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff’s injury; and (3) a person of ordinary prudence should have foreseen that plaintiff’s injury was probable under the circumstances.

*Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

Landowners in particular have a nondelegable duty “to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.” *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) (eliminating the distinction between licensees and invitees), *reh’g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). However, “there is no duty to warn a lawful visitor of a hazard obvious to any ordinarily intelligent person using her eyes in an ordinary manner[.]” *Dowless v. Kroger Co.*, 148 N.C. App. 168, 171, 557 S.E.2d 607, 609 (2001) (brackets and internal quotation marks omitted); *accord Burnham v. S&L Sawmill, Inc.*, 229 N.C. App. 334, 340, 749 S.E.2d 75, 80, *disc. review denied*, 367 N.C. 281, 752 S.E.2d 474 (2013).

*Opinion of the Court*

The duty to warn a lawful visitor depends upon the obviousness of the hazard or condition. When determining whether a condition is obvious *vel non*, “the facts must be viewed in their totality to determine if there are factors which make the existence of a defect . . . a breach of the defendant’s duty and less than ‘obvious’ to the plaintiff.” *Pulley v. Rex Hosp.*, 326 N.C. 701, 706, 392 S.E.2d 380, 384 (1990) (assessing the obviousness of an alleged sidewalk defect, and noting that “[s]uch factors may include the nature of the defect in the sidewalk, the lighting at the time of the accident, and whether any other reasonably foreseeable conditions existed which might have distracted the attention of one walking on the sidewalk”).

It is difficult to establish that a step is not “open and obvious” for purposes of maintaining a negligence action. *See Reese v. Piedmont, Inc.*, 240 N.C. 391, 397, 82 S.E.2d 365, 369 (1954) (“The step was obvious. [The plaintiff] had eyes to see. Her safe passage from the entrance of the rest room to the toilet is an indubitable fact.”); *Frendlich v. Vaughan’s Foods*, 64 N.C. App. 332, 337, 307 S.E.2d 412, 415 (1983) (holding that summary judgment was proper because “the mere presence of a double step is insufficient to constitute negligence, absent some special circumstance, such as poor construction of the step, poor lighting, or a diversion of attention created by defendant”); *cf. Mulford v. Hotel Co.*, 213 N.C. 603, 606, 197 S.E.169, 171 (1938) (holding that a prima facie case had been established where the step was in a dimly lit room, and the plaintiff had just come from a well-illuminated room so that her eyes

*Opinion of the Court*

had not adjusted to the darkness). Ordinarily, in the absence of some unusual condition, the mere existence of a step on an owner's land does not breach the duty owed to a guest. *See Benton v. Building Co.*, 223 N.C. 809, 813, 28 S.E.2d 491, 493 (1944). This is because “[d]ifferent floor levels in private and public buildings, connected by steps, are so common that *the possibility of their presence* is anticipated by prudent persons.” *Harrison v. Williams*, 260 N.C. 392, 395, 132 S.E.2d 869, 871 (1963) (emphasis added).

Guests are expected to adhere to a basic level of caution, because “[a] reasonable person should be observant to avoid injury from a known and obvious danger.” *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 546, 459 S.E.2d 23, 27 (1995) (affirming summary judgment in favor of a hotel owner after the plaintiff stepped on a tack accidentally left behind by a vacuum cleaner); *cf. Kelly v. Regency Ctrs. Corp.*, 203 N.C. App. 339, 342, 691 S.E.2d 92, 95 (2010) (“In a case dealing with a plaintiff’s injury from slipping and falling the basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, [the] plaintiff failed to keep a proper lookout for her own safety.” (brackets and internal quotation marks omitted)). Therefore, where a plaintiff has slipped and incurred an injury on another’s premises, “the pivotal issue . . . is not [the] defendant’s knowledge of the condition, but is [the] plaintiff’s knowledge.” *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000), *aff’d*, 353 N.C. 445, 545 S.E.2d 210 (2001)

*Opinion of the Court*

(affirming summary judgment in favor of a homeowner where a party guest slipped on snow and ice after walking across the outdoor walkway in darkness while wearing high-heeled shoes); *see also Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 92, 555 S.E.2d 303, 308 (2001) (“[T]he use of steps is negligent only when by the steps’ character, location or surrounding conditions, a reasonably prudent person would not be likely to see the step or expect it.”).

The facts of the instant case are analogous to those of *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E.2d 461 (1959), in which a plaintiff fell and injured herself after exiting a store owned by the defendant. The *Garner* Court characterized her fall as being from “an ordinary concrete sidewalk.” *Id.* at 153, 108 S.E.2d at 463. The plaintiff in *Garner* claimed that she was “looking down where [she] was going and the entrance looked just like it went into the sidewalk all in one, the slope that goes down. [She] was not aware that there was a drop-off at the end of the slope, not that much.” *Id.* In holding that the trial court should have entered a judgment of nonsuit, our Supreme Court reasoned that

the weather was clear, the entryway [leading out of the store] was not crowded, only a few persons were passing on the sidewalk, and the plaintiff was not carrying bundles of merchandise. In the absence of some unusual condition, the mere fact that the entryway and sidewalk sloped, and that there was a drop-off of varying height at the sidewalk, did not constitute negligence.

*Opinion of the Court*

*Id.* at 159, 108 S.E.2d at 467. The *Garner* Court also reviewed the case law of other jurisdictions, and determined that a prima facie case of negligence is more difficult to establish where the plaintiff has fallen from an outdoor step. *See id.* at 159, 108 S.E.2d at 468 (“In all of these cases the drop-off was *inside a building*, the lighting conditions were poor, and there was a similarity in color, design or material of the floor levels.” (emphasis added)).

Here, the facts tend to show that Plaintiff was not distracted when she fell. The fall occurred around 2:00 p.m. and the weather was clear. Plaintiff was not carrying anything in her hands, and she was not preoccupied by conversation with anyone. Moreover, Plaintiff was not simply wandering around the backyard when she fell—she had been sitting *next to the step* for about 10 to 20 minutes talking with another guest at the party. In short, nothing was obstructing her view just before she fell, and the presence of the step should have become apparent in the time she spent sitting next to it.

Plaintiff asserts that because the levels separated by the step are made of the same tan-colored concrete, the step was hazardous and potentially dangerous to guests, but this does not alter our analysis. Where plaintiffs argue that the premises amounted to an “optical illusion,” courts must still consider the plaintiff’s surroundings and how a person of ordinary caution and prudence would traverse the area. *Cf. id.* at 159, 108 S.E.2d at 467 (“[T]he mere fact that a step up or down, or a

*Opinion of the Court*

flight of steps up or down, is maintained at the entrance or exit of a building is no evidence of negligence, *if the step is in good repair and in plain view.*” (emphasis added)).

Plaintiff’s statements further indicate that she was engrossed with Defendant’s backyard: “It’s a beautiful area *and your eyes are really drawn to this whole area* out here. It’s gorgeous with the pool and everything, so I just got up to leave, and that’s when I fell.” (Emphasis added). She also testified that she had not been drinking at the time of her fall, so her attentiveness to her environment was not impaired. Thus, Plaintiff’s failure to account for the possibility of a backyard patio having different levels, and her inability to notice a step in plain view on a clear day, after sitting next to the step for 10 to 20 minutes, demonstrated a lack of reasonable caution that prudent guests are presumed to employ.

Finally, Plaintiff alleged that the unmarked step was known by Defendant to be hazardous. Plaintiff presented an affidavit averring that Defendant made a comment about his concern that the step might lead to injury, but Plaintiff did not refute Defendant’s deposition testimony that he had entertained “a lot of young people” and hosted “numerous parties,” and “never” felt the need to warn anyone of the step. Regardless, this has no bearing on whether the step was, in fact, either obvious or dangerous. Plaintiff’s evidence that Defendant’s backyard was beautiful to look at is not comparable to cases where the view of a step was obscured by poor

*Opinion of the Court*

lighting or a defective construction. Because there was nothing unusual about the patio and the step would have been open and obvious to a reasonably cautious guest, we can only conclude that Defendant was not negligent in maintaining his premises.<sup>1</sup>

**Conclusion**

There is no evidence of any uncommon design or unusual construction of the step from which Plaintiff fell. By contrast, even viewed in the light most favorable to Plaintiff, there is ample evidence to suggest that that the outdoor step was open and obvious. Therefore, Defendant was entitled to judgment as a matter of law, and we affirm the trial court's order granting summary judgment in favor of Defendant.

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).

---

<sup>1</sup> We need not address Plaintiff's argument that she was not contributorily negligent. "Contributory negligence is defined as negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Daisy v. Yost*, 250 N.C. App. 530, 532, 794 S.E.2d 364, 366 (2016) (internal quotation marks omitted). Because contributory negligence is predicated upon the existence of the defendant's negligence, and because we conclude that, in the present case, Defendant was not negligent in maintaining his premises, Plaintiff's argument is inapt.