# S T A T E  O F  M I C H I G A N

# C O U R T  O F  A P P E A L S

NANCY JEAN EMMONS,

Plaintiff-Appellant,

v

HARDEN ACRES, LLC,

Defendant-Appellee.

UNPUBLISHED
July 27, 2004

No. 246996
Montcalm Circuit Court
LC No. 01-000510-NO

Before: Fort Hood, P.J., Donofrio and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant and dismissing plaintiff's complaint. Plaintiff argues the trial court erred when it dismissed her complaint including counts for negligence and breach of MCL 554.139. After reviewing the record, we find that the trial court correctly granted summary disposition on the negligence claims. However, the trial court never properly reached the elements of MCL 554.139 and granted summary disposition on plaintiff's breach of statutory duties claim on an incorrect basis. We affirm in part, reverse in part, and remand.

Plaintiff filed suit seeking recovery for injuries she suffered to her left arm when she slipped and fell down three steps at a home she rented from defendant. The complaint contained counts for negligence and breach of defendant's statutory duties under MCL 554.139 to maintain the premises in a manner fit for the use intended by the parties, to keep the premises in reasonable repair, and to comply with the applicable health and safety laws. Defendant moved for summary disposition arguing that it was not liable to plaintiff because the danger posed by the steps was open and obvious, the steps did not constitute special aspects under *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001), and because there was not a sufficient causal connection between defendant's conduct and plaintiff's injuries.

After entertaining oral argument on the motion, the trial court granted the motion under MCR 2.116(C)(10). We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs,* 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Id.,* 626; MCR 2.116(G)(5);. When reviewing a decision on a motion for summary disposition under

MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand),* 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange,* 461 Mich 1, 5; 597 NW2d 47 (1999).

Plaintiff first argues that the trial court erred in granting summary disposition of her claim that defendant breached its statutory duties under MCL 554.139. MCL 554.139 imposes a statutory obligation upon lessors of residential premises. Plaintiff correctly points out that the open and obvious doctrine cannot be used to avoid a specific statutory duty. *Woodbury v Bruckner,* 467 Mich 922, 922; 658 NW2d 482 (2002); *O'Donnell v Garasic*, 259 Mich App 569, 581-582; 676 NW2d 213 (2004).. See also *Jones v Enertel, Inc,* 467 Mich 266, 170; 650 NW2d 334 (2002). The *O'Donnell* Court recently stated that,

> The open and obvious danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b). [*O'Donnell, supra,* 581.]

After carefully reviewing the record, it does not appear to us that the trial court directly addressed the elements of MCL 554.139 and instead errantly granted summary disposition in favor of defendant based on an application of the open and obvious danger doctrine and a discussion of causation. Accordingly, plaintiff has demonstrated error, and we reverse the trial court's grant of summary disposition regarding plaintiff's second count in her complaint, breach of defendant's statutory duties under MCL 554.139 and remand it to the trial court for further proceedings in accordance with *O'Donnell, supra*.

Plaintiff next argues that the trial court erred in granting summary disposition of her negligence claim when there was evidence that defendant retained control of the premises. According to plaintiff, defendant retained control of the premises because plaintiff was not allowed to make any repairs to the premises without defendant's permission and because after plaintiff's fall, defendant replaced the steps and installed a handrail next to the steps and gutters on the roof over the steps. Plaintiff cites *Lipsitz v Schechter,* 377 Mich 685; 142 NW2d 1 (1966), in support of her argument. In *Lipsitz,* our Supreme Court held that the nature of a landlord's common law duty to a tenant depends on "[t]he element of control." *Id.,* 687. According to *Lipsitz,* a landlord generally does not have a common law duty to keep leased premises in repair because he has surrendered possession of the premises and therefore has no control. *Id.* However, a landlord does have a common-law duty to keep in safe condition any portion of a building over which the landlord has retained control. *Id.,* 687-688.

Plaintiff's reliance on *Lipsitz* is misplaced, however, because as we observed in *Woodbury v Bruckner (On Remand),* 248 Mich App 684, 697; 650 NW2d 343 (2001), the "landlords out of possession" doctrine, under which the landord's common-law duty to a tenant depended on whether the landlord retained control over the premises, was overruled in *Mobil Oil Corp v Thorn,* 401 Mich 306; 258 NW2d 30 (1977). Accordingly, we conclude that contrary to plaintiff's contention, *Lipsitz* does not govern defendant's common-law duty to plaintiff.

Third, plaintiff argues that the trial court erred in granting summary disposition of her negligence claim. According to plaintiff, defendant failed to meet its initial burden establishing that the danger posed by the ice on the steps was open and obvious. Plaintiff further asserts that the danger posed by the steps was not in fact open and obvious and that if it was, the steps constituted special aspects which removed them from the open and obvious doctrine.

Plaintiff was defendant's tenant. Tenants are regarded as their landlord's invitees. *Woodbury, supra,* 691. "[A]n invitee is entitled to the highest level of protection under premises liability law." *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 597; 614 NW2d 88 (2000). Generally, "an invitor has a duty to maintain his property in a reasonably safe condition and is subject to liability for harm caused to invitees because of a condition on the land." *Woodbury, supra,* 691. Ordinarily, however, there is no duty to protect or warn where the danger is open and obvious. *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992). An open and obvious danger is one that an average person of ordinary intelligence would discover upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). However, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra,* 517. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.,* 519 (footnote omitted); See *Mann v Shusteric Enterprises, Inc*, ___Mich ___ ; ___ NW2d ___ (2004) (Docket No. 120651, slip op p 12-13, June 30, 2004). "[T]ypical open and obvious dangers . . . do not give rise to these special aspects." *Lugo, supra,* 520..

The record does not support plaintiff's claim that defendant did not meet its initial burden of establishing that the danger posed by the ice on the steps was open and obvious. Defendant, as the moving party, had "the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). Defendant supported its motion for summary disposition with photographs of the steps as well as a document containing climatological data.

We also find that the danger posed by the ice on the steps was open and obvious. In *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 5; 649 NW2d 392 (2002), we held that the danger posed by snowy and icy conditions on steps was open and obvious. The *Corey* Court stated, "[p]laintiff is a reasonable person who recognized the snowy and icy condition of the steps and the danger the condition presented. Thus, we . . . conclude that the condition was open and obvious in the present case." *Corey, supra,* 5. Like the steps in *Corey,* the danger posed by the icy steps in this case was open and obvious. Plaintiff stated the steps "appeared to be clear" on the day she fell, however, she admitted that she "didn't really pay that much attention." Plaintiff's daughter stated that while the ice on the steps was not visible from plaintiff's angle, it was visible when viewing the steps from a different angle. Plaintiff also acknowledged that she had lived in Michigan for many years and understood and recognized that winter weather conditions could create slippery and icy conditions.

Determining whether a danger is open and obvious "focus[es] on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo, supra,* 524. Plaintiff failed to notice the ice on the steps because she "didn't really pay that much attention." A danger is open and obvious if an average person of ordinary intelligence

would discover it upon casual inspection. *Novotney, supra,* 475. Even if the ice was "black ice," as plaintiff's expert stated, the ice was visible to plaintiff's daughter upon casual inspection. Because the ice would have been apparent upon casual inspection, the danger posed by the icy steps in this case was open and obvious. *Corey, supra,* 5.

We reject plaintiff's contention that the danger posed by the steps constituted a special aspect as contemplated by the Supreme Court in *Lugo.* *Lugo* emphasized that "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" will remove a condition from the open and obvious danger doctrine." *Lugo, supra,* 519. The Supreme Court also cited the following examples of open and obvious dangers that would constitute special aspects: (1) a danger that is "effectively unavoidable," such as standing water at the only exit from a commercial building, or (2) "an unguarded thirty foot deep pit in the middle of a parking lot" resulting in a fall of an extended distance. *Id.,* 518.

Plaintiff contends the steps had special aspects for the following reasons: (1) plaintiff's daughter stated that the ice on the steps could not be seen when looking at the steps from plaintiff's angle, (2) the ice was on a step, (3) the step "required a big step down," (4) the step "was slanted in two planes," (5) there was no handrail, and (6) "the steps were effectively unavoidable." In *Lugo,* the Supreme Court held that standing water at the "only" exit for the general public made the danger "effectively unavoidable." *Id.* However, the instant case is distinguishable from the example cited in *Lugo* because there were actually three exits from the residence. Based on plaintiff's expert's testimony, the distance from the porch to the ground was at most thirty-three inches. In *Corey, supra,* we held that falling several feet down ice-coated steps did not constitute special aspects under *Lugo.* *Corey, supra,* 6-7. Even accepting all of plaintiff's evidence in a light most favorable to plaintiff, the danger posed by the steps did not "give rise to a uniquely high likelihood of harm or severity of harm" and thus did not constitute the type of special aspects contemplated by *Lugo.* *Id.,* 519-520.

Plaintiff finally argues that the trial court erred in finding that there was no genuine issue of material fact regarding whether defendant's conduct was the proximate cause of plaintiff's injury. "[P]roving proximate cause actually entails proof of two separate elements: (1) cause in fact, and (2) legal cause, also known as 'proximate cause.'" *Skinner v Square D Co,* 445 Mich 153, 162-163; 516 NW2d 475 (1994). "A plaintiff must adequately establish cause in fact in order for legal cause or 'proximate cause' to become a relevant issue." *Id.,* 163. "The cause in fact element generally requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id.*

In order to establish a genuine issue of material fact regarding causation, "a causation theory must have some basis in established fact." *Id.,* 164. It is not "sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory." *Id.* Conclusions unsupported by allegations of fact do not suffice to establish a genuine issue of material fact. *Easley v University of Michigan*, 178 Mich App 723, 726; 444 NW2d 820 (1989).

Plaintiff argues that several factors either caused or could have caused her to fall on the steps and asserts that her injuries were proximately caused by the ice on the steps that was caused when water from the porch above the steps ran off and froze on the steps. In the alternative, plaintiff asserts that her injuries were caused by the absence of a handrail and the defective condition of the steps. In support of her assertions, plaintiff submitted expert evidence

to the trial court indicating that an unnatural icy condition caused plaintiff's fall due to improperly configured step, roof, and gutter systems.

After viewing the evidence in a light most favorable to plaintiff, we find that the premises contained defects in habitability that were a cause in fact of plaintiff's accident and injuries. *DeBrow, supra,* 463 Mich 538-539. Accepting plaintiff's arguments as true, the evidence submitted suggests that defendant's negligence was a cause of plaintiff's fall and affords a reasonable basis for the conclusion that it is more likely than not that defendant's conduct was the proximate cause of plaintiff's fall and injuries. *Skinner, supra,* 445 Mich 165. While the trial court has pointed to other potential causes, we find that this mixed question of causation creates a justiciable question of material fact appropriate for the jury. *Reeves v Kmart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998); *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995). Accordingly, the trial court erred in granting defendant's motion for summary disposition based on lack of causation.[1]

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

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello

[1] The issue of causation will necessarily be revisited upon factual development of the breach of statutory duties claim on remand.