STATE OF MICHIGAN

COURT OF APPEALS

TERRY L. GREEN and PAM D. GREEN,

Plaintiffs-Appellants,

v

TRYKO HOLDINGS, L.L.C., d/b/a BROOKSTONE VALLEY APARTMENTS, and BROOKSTONE VALLEY ESTATES, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
February 24, 2011

No. 296599
Genesee Circuit Court
LC No. 08-090288-NO

Before: BORRELLO, P.J., and JANSEN and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right the order granting summary disposition in favor of defendants, owners of the apartment complex in question, in this action involving a slip and fall accident. We affirm.

The alleged dangerous condition in this case is a concrete slab with a 16-inch drop onto a sloped and mud-covered surface, located on the grounds of defendants' apartment complex. Plaintiff slipped on the mud-covered surface after stepping off the concrete slab, fracturing his right ankle and breaking his right leg.

Plaintiffs first argue that genuine issues of material fact exist regarding whether the alleged dangerous condition was open and obvious. We disagree.

We review a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). In reviewing the trial court's

[1] The plaintiffs are husband and wife, and the wife's claim is derivative. Therefore, the singular term plaintiff refers to Terry Green.

decision, the appellate court considers "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*.

The parties do not dispute that plaintiff was an invitee at the time of the slip and fall. Generally, landowners owe a duty to exercise reasonable care to protect an invitee from a dangerous condition on their 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 doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, 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 Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

With respect to steps and differing floor levels, the danger of tripping and falling is generally an open and obvious one, and injuries resulting therefrom are ordinarily not actionable absent special aspects of the condition that make the risk of harm unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). "[B]ecause steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety." *Id*. at 616. When analyzing the risk of harm, it is also appropriate to consider whether an alternate was readily available to the plaintiff. *Corey v Davenport College of Bus*, 251 Mich App 1, 9; 649 NW2d 392 (2002). Thus, the concrete slab and the step to the ground presented a typical open and obvious danger.

Plaintiffs primarily argue that the step cannot be considered open and obvious because plaintiff and his brother, Charles Green, could not perceive the depth of the drop or the sloped surface immediately below it from their vantage point. However, "it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases 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. Accordingly, the fact that, subjectively, plaintiff and Charles failed to adequately perceive the danger is irrelevant to the inquiry whether an average user of ordinary intelligence would have discovered the danger upon casual inspection.

Moreover, plaintiff did not casually inspect the ground below the step *immediately before stepping*. Rather, plaintiff stepped off the cement slab expecting that the step was of average height. If casual inspection is to mean anything, at the very least, it requires looking before stepping, and not merely observing a step while approaching it from a distance, and assuming it to be an ordinary one. Viewing the evidence in the light most favorable to plaintiffs, plaintiff knew that it was dark and raining, and that the surface below the cement slab was muddy. Under such circumstances, an average user of ordinary intelligence would have looked before stepping, and would have perceived the depth of the drop, as well as the sloped surface below.

Plaintiffs also argue that the alleged dangerous condition cannot be considered open and obvious because a maintenance supervisor inspected the property daily and failed to notice the condition of the step and surface below. This argument is flawed for the reasons stated above. It is also flawed because the maintenance supervisor testified that he *did* notice the deteriorating condition of the cement slab over the years. In fact, the property owner instructed him to fill the area with dirt, which he did on at least two occasions. The maintenance supervisor testified that he had never seen the condition in as bad of disrepair as represented in the exhibit photograph shown to him during his deposition. This photograph was not indicative of the condition at the time of plaintiff's slip and fall, and therefore it is not useful in determining whether the condition, at the time of plaintiff's slip and fall, was open and obvious. Therefore, the trial court did not err in concluding that no genuine issues of material fact remain regarding whether the alleged dangerous condition was open and obvious.

Assuming that the condition was open and obvious, plaintiffs argue that there exists genuine issues of material fact regarding whether the concrete slab, as well as the sloped, muddy surface below, was free from any special aspect that gave rise to a continuing duty to protect plaintiff from harm. We again disagree.

The special aspects doctrine provides that, where "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*, 462 Mich at 517. With respect to steps in particular, in *Bertrand*, the Court held that, "where there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' then the duty of the possessor of land to exercise reasonable care remains." *Bertrand*, 449 Mich at 617.

To constitute a special aspect sufficient to remove a condition from the open and obvious danger doctrine, the condition must pose a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo*, 464 Mich at 517-519. The illustrative examples that the Court provided in *Lugo* of special aspects include: (1) an unguarded, 30-foot deep pit in a parking lot that creates a risk of particularly severe harm, and (2) a commercial building with one exit where water has completely flooded the floor, making the hazard unavoidable. *Id*. at 518.

Here, plaintiffs' argument, that the condition has special aspects, focuses on the height of the step and the sloped surface below, which "caused his body to slip and twist and his leg to break." What plaintiffs do not explain, however, is how these features pose a uniquely high likelihood of harm or severity of harm if the risk is not avoided.

First, the danger of slipping after stepping off the concrete slab did not pose such a severe risk of harm that the condition should be deemed to have special aspects. The risk of falling a few feet to the ground does not render a condition unreasonably dangerous. As mentioned in *Lugo*, "[u]sing a common pothole as an example, . . . [u]nlike 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." *Lugo*, 464 Mich at 520. Moreover, the fact that plaintiff in fact suffered severe harm does not justify a retrospective conclusion that the condition presented a special aspect. *Id*. at 518 n 2. Rather, a court is to assess a given risk *a priori*—i.e., before the incident occurred. *Id.*

Likewise, as the trial court observed, the condition did not pose a uniquely high likelihood of harm because plaintiff could have easily avoided the danger. In particular, plaintiff could have avoided the danger by walking along the grass on either side of the concrete slab or exiting the way he entered without incident. Thus, the trial court did not err in concluding that no genuine issues of material fact remain that the condition was free from any special aspect that would render the open and obvious doctrine inapplicable.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood