STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH M. WARD, Plaintiff-Appellant,	UNPUBLISHED July 17, 2014
v	No. 315685 Wayne Circuit Court
PHILLIP N. LOWRY and MATTHEW LOWRY, Defendants-Appellees.	LC No. 12-004611-NO

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

PER CURIAM.

In this premises liability action[1], plaintiff, Joseph Ward, appeals as of right the trial court's order granting summary disposition to defendants, Phillip and Matthew Lowry. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On April 6, 2009, plaintiff lived in a house next to defendants' house in Lincoln Park, Michigan. The two had been neighbors for fifteen years, and plaintiff had visited defendants' house "a couple times" in the past. Late in the morning on April 6, plaintiff walked to defendants' house to return some cigarette rolling supplies that he had borrowed. According to plaintiff, Matthew uses the cigarette rolling supplies to manufacture cigarettes, which he then sells. Defendants' front porch has three steps leading to the front door of the house; when plaintiff walked up the steps on his way in, he did not notice any defect in the steps or porch. On the day of the incident, the front storm door of defendants' house was broken; the glass was missing from the door, and the frame was taped shut. In order to enter the house, plaintiff had to

[1] Although plaintiff's complaint alleged various theories of liability associated with the incident, it is a well settled principle that the "gravamen of an action is determined by reading the complaint as a whole, and by looking beyond the mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW 2d 399 (2007). In the instant case, plaintiff's action arises solely from the condition of defendants' premises. Further, as plaintiff appeared to concede at the summary disposition motion hearing, the record does not support any other theories of liability.

step through the storm door, which he was able to do without incident on his way inside. Plaintiff used the left side of the staircase when he walked up the house. Plaintiff returned the supplies and talked with Matthew for approximately five to ten minutes inside the house. Plaintiff was aware that, in addition to the front door through which he entered the house, defendants' house had a side entrance.

As plaintiff exited the house, he stepped through the storm door, intending to descend the right side of the porch staircase. Plaintiff tripped while stepping out onto the porch, fell, and suffered injuries to his elbow. He did not trip over the lower part of the storm door. Plaintiff stated that he tripped on "uneven pavement," and that the entire porch "tilts." However, plaintiff could not estimate the angle of the alleged tilt during his deposition. Plaintiff further stated that he only noticed that the porch tilted after he had fallen and he was lying on the ground; he stated that the tilt was unnoticeable on his way into the house. Specifically, plaintiff stated that cloudy weather conditions and shadows at the time of the incident obscured the tilt of the staircase from view. Plaintiff stated that after he fell, Matthew came outside and apologized for the fall and said that he had been meaning to get the porch fixed. Plaintiff also stated that several days after the incident, Matthew told him that "a couple" other people had tripped on the porch in the past in the same way that plaintiff had, but none of those people had been injured.

Plaintiff sued defendants, alleging negligence arising out of "defective pavement/flooring, defective door, and missing handrail." Following discovery and case evaluation, the trial court heard defendants' motion for summary disposition. Defendants claimed that plaintiff was a licensee at the time of the incident, and thus, they did not owe him a duty to warn or protect him from open and obvious dangers. Further, the condition of the front door, porch, and absence of a handrail were open and obvious. Plaintiff opposed the motion and argued that he was an invitee because he was returning supplies that Matthew used for a business purpose, that the condition of the porch was not open and obvious, and that defendants were on notice of the defect. The trial court granted defendants' motion, concluding that regardless of whether plaintiff was an invitee or a licensee, the conditions on the front porch were open and obvious and that there were no special aspects, such as being effectively unavoidable, given that there was another method of entering and exiting the home.

I. OPEN AND OBVIOUS CONDITION

Plaintiff argues that the trial court erred when it concluded that there was no genuine issue of material fact as to whether the danger posed by defendants' front porch was open and obvious. We disagree.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews a trial court's decision on a motion for summary disposition de novo. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a

matter of law." *Id.* A genuine issue of material fact exists when reasonable minds could differ on an issue after the viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The duty of care a premises possessor owes depends on whether the person who enters the premises is an invitee, a licensee, or a trespasser. *Hoffner*, 492 Mich at 460. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). An invitee is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care had been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000) (quotation omitted). "[I]nvitee status is commonly afforded to persons entering upon the property of another for business purposes." *Id.* at 597. A premises possessor has a duty to his or her invitees to warn of any known dangers on the premises, and to make the premises safe. *Id.* This duty requires the premises possessor to inspect the premises and make any necessary repairs. *Id.*

A premises possessor also owes a duty to a licensee. *Id.* at 596. A licensee is "a person who is privileged to enter the land of another by virtue of the possessor's consent." *Id.* Generally, social guests are considered licensees "who assume the ordinary risks associated with their visit." *Id.* A premises possessor must warn a licensee of any hidden dangers the owner "knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Id.* However, the premises possessor is not required to inspect the premises or to make the premises safe for a licensee's visit. *Id.*

The parties disagree regarding whether plaintiff was an invitee or a licensee at the time he was injured. The trial court did not make a ruling on the question; rather, it stated that defendants were entitled to summary disposition regardless of whether plaintiff was considered an invitee or a licensee at the time of his injury. The undisputed facts in this case show that plaintiff was a licensee during his visit to defendants' house. Plaintiff stated that he went to defendants' home to return cigarette rolling supplies that he had borrowed; he also stated that Matthew used the supplies to manufacture and sell cigarettes. However, there was no evidence to suggest plaintiff intended to buy cigarettes or otherwise transact business as part of his visit to defendants' house. Further, there was no evidence that defendants invited plaintiff to the home for a business purpose or for any pecuniary gain. Accordingly, plaintiff did not visit defendants' house for a business purpose; rather, he was merely returning supplies that he had borrowed for his own personal use as a licensee. See *Stitt*, 462 Mich at 604 (holding "that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status" and that in order to establish that he is an invitee, "a plaintiff must show that the premises were held open for a *commercial* purpose."). See also *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006) (explaining that a person is an invitee if he or she is invited onto the land for the owner's commercial purposes or pecuniary gain).

Though a premises possessor does have a duty to warn a licensee of known dangers, he or she is not required to warn a licensee of open and obvious dangers. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001).[2] Specifically, "no liability arises if the licensee knows or has reason to know of the danger, or if the possessor should expect that the licensee will discover the danger." *Id.* Generally, whether a condition is open and obvious is considered objectively, considering whether an average person with ordinary intelligence would have discovered the condition upon casual inspection. *Price v Kroger Co of Michigan*, 284 Mich App 496, 500-501; 773 NW2d 739 (2009). The danger of tripping and falling on a step is generally open and obvious. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614, 537 NW2d 185 (1995). Accordingly, in the context of a trip and fall on steps, a premises possessor's failure to warn of the step generally cannot establish liability unless some "special aspect" of the particular steps makes the risk of harm unreasonable. *Id.*

Plaintiff argues that the danger posed by defendants' front porch was not open and obvious because the porch was slanted in a manner that was not visible. Specifically, plaintiff argues that because the porch slanted toward the ground, the slant would not be noticeable to a person walking up the steps and toward the porch, but it would pose a danger to someone leaving the home and descending on the steps. Plaintiff was unable to estimate the angle of the allegedly slanted porch in his deposition. Even considering the evidence in the light most favorable to plaintiff, it is unclear how an average person with ordinary intelligence would not have discovered the slant of the porch. Plaintiff walked up the steps and onto the porch approximately five to ten minutes before he fell. He asserts the slant was not noticeable at that time; however, the evidence presented shows that there is no genuine issue of material fact and that an average person of ordinary intelligence would have noticed any dangerous slant upon traversing the steps and the porch.[3] Further, plaintiff's fall occurred in the middle of the day. Plaintiff stated that he had been to defendants' house before, and he presumably used the steps and porch on those occasions. Although plaintiff argued before the trial court that the porch was obscured from view by shadows and cloudy conditions, a reasonable person still should have observed the alleged slant of the porch as he entered the home. Considering the general presumption that steps constitute an open and obvious danger, *Bertrand*, 449 Mich at 615, plaintiff has not demonstrated that there is a genuine issue of material fact regarding the open and obvious nature of defendants' front porch steps.

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[2] Even if plaintiff were an invitee during his visit to defendants' home, the open and obvious doctrine still applies. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612-613; 537 NW2d 185 (1995). Specifically, "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee *unless he should anticipate the harm despite knowledge of it on behalf of the invitee*." *Id.* at 613.

[3] Although plaintiff points out in his brief on appeal that he entered defendant's house on the left side of the porch and exited on the right side of the porch, he testified at his deposition that the "whole porch tilts."

II. SPECIAL ASPECTS

Plaintiff next argues that even if the hazard posed by the porch was open and obvious, it was effectively unavoidable. Specifically, plaintiff contends that while he was inside defendants' home, Matthew told him that the side door to the house was unusable. Plaintiff argues that because the side door was unusable, the front door and the front porch steps were the only exit from defendants' home, and thus, the hazardous condition was effectively unavoidable. We disagree.

A premises possessor is not required to warn a licensee of open and obvious hazards. *Pippin*, 245 Mich App at 143. However, a premises possessor may still be liable for open and obvious hazards if those hazards contain special aspects that make them unreasonably dangerous. *Lugo*, 464 Mich at 516-517. "[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.* at 519. This exception to the open and obvious danger doctrine is a narrow one. *Hoffner*, 492 Mich at 462. Michigan Courts have recognized two instances in which special aspects of an open and obvious danger may give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable. *Id.* at 463.[4] "Unavoidability is characterized by an *inability to be avoided*, an *inescapable result*, or the *inevitability* of a given outcome." *Id.* at 468. Further, "a hazard must be unavoidable or inescapable *in effect* or *for all practical purposes*." *Id.* A commercial building with only one exit for the general public where the floor is covered with standing water constitutes an effectively unavoidable hazard. *Lugo*, 464 Mich at 518. However, the "special aspects" doctrine applies only to visitors with invitee status, because the duty of a premises possessor to make a condition safe extends only to invitee visitors. See *Pippin*, 245 Mich App at 143. Plaintiff was a licensee; accordingly the special aspects doctrine does not apply, and his argument is meritless.

Even if plaintiff were an invitee, no genuine issue of material fact exists regarding whether defendants' porch was effectively unavoidable. Plaintiff stated in his deposition that he believed defendants' house had a side entrance. In his brief on appeal, plaintiff attached his own affidavit, in which he stated, "I was aware that the home also had a side door, but this door was not usable because I had been told by Defendants that the side door could not be used." Plaintiff's affidavit does not appear in the lower court file or the trial court's register of actions, nor was it presented to the trial court at the time of its summary disposition ruling. "[T]his Court's review of a trial court's decision on a motion for summary disposition is limited to the evidence that was presented to the trial court at the time the motion was decided." *Karaus v Bank of New York Mellon*, 300 Mich App 9, 15 n 2; 831 NW2d 897 (2012). Because plaintiff's affidavit is attached for the first time on appeal, this Court will not consider it. Further, according to the undisputed facts presented at the time of the trial court's summary disposition ruling, i.e., plaintiff's admission in his deposition, plaintiff was aware of a different exit from defendants' home. Because plaintiff had knowledge of a second exit, he cannot demonstrate a

[4] Plaintiff admits in his brief on appeal that the porch was not unreasonably dangerous.

genuine issue of material fact regarding whether the front porch was effectively unavoidable. See *Hoffner*, 492 Mich at 468-469 (explaining that when a person has a choice whether to encounter a hazard, the hazard cannot be described as unavoidable, or even effectively unavoidable). Plaintiff could have simply used the side door to avoid the alleged hazard posed by the front porch.

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher