

STATE OF MICHIGAN
COURT OF APPEALS

BONNIE PAXTON,

Plaintiff-Appellant,

v

BEST WESTERN STERLING INN,

Defendant-Appellee.

UNPUBLISHED

February 8, 2007

No. 272506

Oakland Circuit Court

LC No. 05-070912-NO

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

This case arises out of injuries suffered by plaintiff when she slipped and fell on a wet piece of tile-like material at the entrance of defendant's hotel bathroom. Plaintiff first contends that this threshold upon which she fell was not an open and obvious danger. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10)¹ should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant "may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 150; 715 NW2d 398 (2006). "A

¹ Defendant filed a motion for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). In presenting their arguments, the parties have gone beyond the pleadings. Therefore, their claims will be reviewed under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ.” *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

In a premises liability action, the plaintiff must prove the elements of a negligence cause of action: (1) that defendant had a duty to plaintiff, (2) the defendant breached that duty, (3) an injury proximately resulted from that breach, and (4) the plaintiff suffered damages. *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). Different standards of care are owed to a plaintiff in accordance with the plaintiff’s status on the land. A person entering upon the property of another for a reason directly connected to the landowner’s commercial business interest is an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). An invitor has a common law duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995). However, the basic duty to protect an invitee does not generally include removal of open and obvious dangers: “[W]here 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.” *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 3; 649 NW2d 392 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). “Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection.” *Teufel, supra* at 427. The test is objective and the court should look to whether a reasonable person in the plaintiff’s position would foresee the danger, not whether a particular plaintiff should have known that the condition was hazardous. *Corey, supra* at 5.

According to plaintiff’s deposition testimony, she was the fourth person in her party to take a shower in her party’s hotel bathroom on the morning in question. As a result, and given that the bathroom was handicap accessible with nothing to confine the water to the shower area, plaintiff testified that the bathroom floor was “extremely wet.” Plaintiff further conceded that “it is common that bathroom floors become wet and, therefore, that the threshold of the bathroom door would become wet.” In addition, plaintiff’s feet were bare and wet as she stepped across the threshold to exit the bathroom. The wet threshold can be considered an open and obvious danger if it was reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Teufel, supra* at 427. A reasonable person of ordinary intelligence in plaintiff’s position would have glanced down at the vicinity of her projected path, if only casually and for a brief moment, and discovered the danger presented by the wet threshold.² It is safe to assume that a bathroom floor, particularly if it is composed of a

² We note that that the threshold was a different color and material than the tile on either side of it and is easily visible in pictures submitted to the trial court.

marble/granite-like substance, is slippery when wet. Therefore, a reasonable person would have foreseen this danger upon casual inspection and taken steps to avoid it – either by stepping over the threshold, by drying it or one’s feet with a towel before stepping on it, by putting on socks or shoes for greater traction, or by stepping on it in a careful manner. Accordingly, the trial court properly granted defendant’s motion for summary disposition on the ground that there was no genuine issue of material fact that the dangerous condition of the wet threshold was open and obvious.

Second, plaintiff contends that even if the danger of the wet threshold was open and obvious, there were special aspects which made the threshold unreasonably dangerous. We disagree.

If special aspects of a condition make an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk.” *Teufel, supra* at 428; *Lugo, supra* at 517. “But where no such special aspects exist, the ‘openness and obviousness should prevail in barring liability.’” *Teufel, supra* at 428, quoting *Lugo, supra* at 517-518. “[I]f the particular . . . condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger.” *Bertrand, supra* at 611.

Here, plaintiff is unable to show that the alleged danger posed by the wet threshold was unavoidable. Open and obvious hazards are “effectively unavoidable” only when a person is forced to confront them in order to accomplish a necessary task. *Lugo, supra* at 518. As she concedes, plaintiff could have avoided any hazard posed by the threshold by simply stepping over it as she exited the bathroom. Thus, the threshold was not “unavoidable” in the sense contemplated by the *Lugo* Court. *Id.* See also *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002) (holding that a snowy sidewalk was not effectively unavoidable given that the plaintiff could have walked around it).

Similarly, plaintiff cannot show that the threshold posed an unreasonably high risk of severe injury. As our Supreme Court explained in *Lugo, supra* at 518, “[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.” Thus, for example, a “common pothole” does not “involve an especially high likelihood of injury” and poses “little risk of severe harm,” because “[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.” *Id.* at 520. Similarly, a slippery three-step rise, while likely presenting “some potential for severe harm,” does not present an unreasonably severe risk of harm so as to remove it from the open and obvious danger doctrine because, “[f]alling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit.” *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 7; 649 NW2d 392 (2002).

Insofar as a wet floor presents a risk that someone may slip and fall, the wet threshold certainly presented a danger. However, the “unreasonable danger” contemplated by *Lugo* categorically is of a different degree than that presented here. The risk presented by the threshold was one of potentially falling a short distance to the ground and not “falling an extended distance such as into thirty-foot-deep pit.” *Corey, supra* at 7. Thus, “it cannot be

expected that a typical person [slipping] on a [wet threshold] and falling to the [floor] would suffer severe injury” or a substantial risk of death. *Lugo, supra* at 520. Consequently, the wet threshold did not present an unreasonably high risk of severe harm so as to remove it from the open and obvious danger doctrine. Rather, it is reasonable to conclude that had plaintiff simply watched her step, any risk of harm arising from the wet threshold would have been obviated. Accordingly, the trial court properly granted defendant’s motion for summary disposition.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra