

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA RAMBO,

Plaintiff-Appellant,

V

WARREN DENTAL ASSOCIATES, P.C., d/b/a
SUNRISE DENTAL CENTER,

Defendant-Appellee.

UNPUBLISHED

June 6, 2006

No. 264552

Macomb Circuit Court

LC No. 03-053897-CH

Before: Sawyer, P.J., and Wilder and H Hood*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I

Plaintiff was injured when she tripped during her first appointment at defendant's facility on July 11, 2002. Defendant's billing department employee escorted plaintiff to the area where her dental x-rays would be taken. The x-ray machine sits in a small alcove adjacent and partially protruding into, the main hallway. The machine is raised and lowered on a center track to adjust for the weight of the patient. The patient stands and places his or her jaw on a rest pad, while the machine takes a panoramic x-ray. While the machine was allegedly at a height more appropriate for use by a person shorter than plaintiff, plaintiff attempted to position herself for an x-ray by walking, at the direction of plaintiff's billing department employee, underneath the machine. While doing so, plaintiff caught her foot and tripped on a two-inch tall wooden rise or ramp that runs perpendicularly across the hallway and covers an exposed pipe. The front and back sections of the rise are sloped while the top is flat. A black mat covers a portion of the wooden rise. Although plaintiff tripped, she was able to break her fall by grabbing a nearby bookcase. Plaintiff did not require immediate medical attention and proceeded with her dental examination.

Plaintiff filed a complaint in circuit court seeking damages for an injured rotator cuff, a torn ACL in her right knee, and injuries to her back, neck, and ankles/feet. In Count I of her second amended complaint, plaintiff alleged that the wooden rise created an unavoidable hazard. Count II asserted a general negligence claim, alleging that defendant's billing department

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

employee was unqualified to operate the x-ray machine and negligently failed to operate the machine by raising it on the center track to provide a safe path for plaintiff to walk. In Count III, plaintiff asserted a nuisance claim, alleging that the wooden rise constituted an unreasonable interference in the use or path of travel.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), asserting that the open and obvious doctrine barred plaintiff's claims and that plaintiff's added claims of general negligence and nuisance were attempts to avoid the application of the open and obvious defense.

In response, plaintiff principally argued that the combination of having to simultaneously watch her head to ensure that she did not hit the machine and walk over an unexpected ramp or rise caused her to trip. Plaintiff also argued that the billing department employee's lack of experience in operating the x-ray machine caused her to partially block plaintiff's pathway, which forced plaintiff to walk underneath the machine. In addition to photographs, plaintiff relied extensively on the deposition testimony of the office manager who testified that the employee in question lacked any training to operate the x-ray machine.

The trial court granted summary disposition in favor of defendant on plaintiff's premises liability claim on the ground that the danger was open and obvious, concluding that the parties' photographs established that the wooden rise was readily distinguishable and discoverable upon casual inspection. In rejecting plaintiff's claim that the wooden rise was unavoidable and that special aspects precluded application of the open and obvious danger doctrine, the trial court stated:

To the contrary, plaintiff could have stepped over the floor mat and entirely avoided it. It is also important to note steps, floor mats, and ramps are common parts of buildings and are encountered by the average person on a daily basis. Steps, floor mats and ramps are neither inherently dangerous nor do they give rise to a unique high likelihood of harm or severity of harm if not avoided.

With regard to plaintiff's negligence claim, the trial court concluded:

. . . [Plaintiff] failed to establish defendant breached that duty or [that] defendant's breach was a proximate cause of her alleged injuries. Plaintiff testified she saw the x-ray machine. Significantly, she was not forced to walk under the machine. Plaintiff could have asked and waited for defendant's employee to move the x-ray machine before walking through the doorway. In addition the actions of defendant's employee did not cause plaintiff to trip; plaintiff could have taken her time to encounter the raised floor mat and defendant's employee did not prevent plaintiff from observing the raised floor mat.

The trial court also rejected plaintiff's argument that the wooden rise constituted a nuisance at law, given that defendant's office manager testified that in the four years previous, no employee or patient had ever tripped over the rise. The trial court further concluded the wooden rise did not constitute a nuisance in fact, given that mats and ramps are not inherently dangerous, and that "plaintiff could have moved the x-ray machine or asked that it be moved if

she felt that she could not safely maneuver herself over the raised floor mat.” Accordingly, the trial court granted defendant’s motion for summary disposition. Plaintiff now appeals.

II

When deciding a motion for summary disposition under MCR 2.116(C)(10), 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). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A 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. *Id.*

III

Plaintiff first argues the trial court improperly made a finding of fact by concluding that plaintiff could have waited for defendant’s employee to adjust the x-ray machine. We disagree.

Michigan courts have long recognized the principle that a court is not to make findings of fact or weigh credibility in deciding a motion for summary disposition. See *Lytle v Malady*, 456 Mich 1, 38 n 39; 566 NW2d 582 (1997).

In this case, the record evidence supports the trial court’s conclusion. Specifically, upon reaching the machine, plaintiff testified in relevant part as follows:

Q. You get to a location--

A. And just stop, she puts her hands on machine, she says okay, come on under here. She put both hands up there and she had her hands on the machine, a big round steel machine. It was big . . . So when she said come under here and I went well, and I looked behind her because the machine was low so I would have to duck to get under there and she said well, come on, like that, like rushing me along and I looked to see if there was any room to go around her and she says come under here. So I went under, but I was watching my head, so I wouldn’t hit my head because it was really low they had the machine [sic], she had her arms up on it. So there was no room behind her to go and I walked underneath watching so I didn’t hit my head

Given plaintiff’s admitted hesitation and clear observance of the risk, we reject plaintiff’s suggestion that her ability to make an intelligent decision to not walk in the area vanished on the basis of the employee’s instruction. Invitors are not absolute insurers of the safety of their invitees. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (citation omitted). “If he knows the actual conditions, and the activities carried on, and the dangers involved in either, *he is free to make an intelligent choice* as to whether the advantage to be gained is sufficient to justify him in incurring the risk by *entering or remaining on the land.*” *Id.* at 611, quoting Restatement Torts, 2d, § 343, comment e (emphasis added).

Next, plaintiff argues that the trial court erroneously applied the open and obvious doctrine to her ordinary negligence claim where it is properly applicable only to premises liability claims. We disagree.

Plaintiff properly states that the open and obvious danger doctrine does not apply to an ordinary negligence claim. *Laier v Kitchen*, 266 Mich App 482, 484, 502; 702 NW2d 199 (2005) (Neff, J.; Hoekstra, J., concurring in part and dissenting in part). However, this was not the basis for the trial court's dismissal of plaintiff's ordinary negligence claim. Instead, the trial court concluded that plaintiff failed to show defendant breached a duty to provide safe passage or that defendant's breach was a proximate cause of her injuries. We find no error.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co.*, 463 Mich 1, 6; 615 NW2d 17 (2000) (citation omitted). [A] party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing there is a genuine issue for trial." *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 321-322; 575 NW2d 324 (1998), mod on other grounds *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999).

As observed by the trial court, plaintiff testified she was injured while being led to the x-ray machine, "not during the actual process of having x-rays taken." Thus, plaintiff's assertion of negligent operation of the x-ray machine is unwarranted based on the undisputed facts, which establish no breach of duty or proximate causation.

Plaintiff next argues that the trial court erred when it determined that the wooden rise was open and obvious. We disagree.

Generally, a premises owner 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). However, this duty does not generally include the removal of open and obvious dangers. *Id.* If the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, the 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.*, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Whether a particular danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

In this case, the wooden rise was so obvious that plaintiff should have reasonably expected to discover it. Under Michigan law, the general rule pertaining to steps and differing floor levels is that they are "not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Bertrand, supra* at 614. The parties' photographs clearly demonstrate that the white wooden rise was distinguishable from the brown tweed carpet. Nor is there any record support for plaintiff's suggestion that the proximity of the wooden rise to the x-ray machine required her to navigate a maze or "jungle jim."

Contrary to her suggestion that the wooden rise was directly underneath, photographs show there was ample room to negotiate the passage between the wooden rise and the x-ray machine, as plaintiff would have reached the wooden rise before she attempted to walk under the x-ray machine.

Plaintiff nonetheless argues, on the basis that the wooden rise was “unavoidable,” the wooden rise was unreasonably dangerous pursuant to *Lugo, supra*. We disagree.

Under *Lugo*, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the landowner has a duty to undertake reasonable precautions to protect his invitees. *Lugo, supra* at 517. However “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 serve to remove that condition from the open and obvious danger doctrine.” *Id.* at 519.

Contrary to plaintiff’s argument, this case does not involve “special aspects” as explained in *Lugo*. The fact that the wooden rise ran across the threshold does not make it unavoidable or establish that the condition created an unreasonable risk of harm. Persons seeking to enter the area had two options: (1) stepping over the two-inch wooden rise or (2) stepping directly on the flat area located at the top of the rise. Further, the question of whether a danger is open and obvious is based upon an objective test of the condition being open and obvious to a reasonably prudent person, and the individual characteristics of an adult plaintiff may not be considered in the inquiry. *Bragan v Symanzik*, 263 Mich App 324, 332-333; 687 NW2d 881 (2004), citing *Mann v Shusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004). Thus, plaintiff’s age or physical limitations are an insufficient basis for determining whether special aspects of the wooden rise created a high likelihood of severe harm. Falling from a two-inch rise does not present the same concern for a severe injury comparable to an injury from a thirty-foot pit, nor has plaintiff demonstrated that the condition created an unavoidable hazard. Accordingly, we conclude that the trial court did not err in granting summary disposition based on the open and obvious doctrine.

Finally, plaintiff argues that the trial court improperly made findings of fact and assessed plaintiff’s comparative fault when it dismissed her nuisance claim. Plaintiff claims that “the wood covered pipe is [a] nuisance because it unreasonably interferes with the path of travel.” We disagree.

Because plaintiff’s claim does not concern an invasion of her interest in the private use and enjoyment of land, *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992), plaintiff’s claim sounds in public rather than private nuisance. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190, 684; 540 NW2d 247 (1995) (a public nuisance is an unreasonable interference with a common right enjoyed by the general public).

A public nuisance involves “not only a defect, but threatening or impending danger to the public” *People ex rel Wayne County Prosecutor v Bennis*, 447 Mich 719, 731-732; 527 NW2d 483(1994), citing *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). To constitute a public nuisance, an act “offends public decency.” *Id.*, citing *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968). The activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or

prevent the public from the peaceful use of their land and the public streets. *Id.*, citing *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957).

The only authority plaintiff cites to support her claim is *Bishop v Northwind Investments, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals, entered September 16, 2004 (Docket No. 250083) (holding that a slip and fall accident caused by a public nuisance is not subject to the open and obvious defense).¹ This opinion is not binding on this panel, MCR 7.215; moreover, the Supreme Court reversed *Bishop* for the reasons stated by the dissenting judge. See *Bishop v Northwind Investments, Inc*, 473 Mich 861; 699 NW2d 302 (2005). Plaintiff has not cited any binding authority, and we will not research and analyze the basis for her claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).²

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Harold Hood

¹ In *Bishop*, the majority concluded that trial court erred in denying the plaintiff's motion to amend his pleadings to add an public nuisance claim against the defendant construction company for its role in building a roof that allowed snow and ice to accumulate and drip on the walkway in front of the door of a business open to the public. *Bishop, supra* at pp 6-7. The majority also concluded that the plaintiff presented sufficient evidence to create a factual whether the roof created an unreasonable interference in the use of a way of travel by allowing ice and snow to drip unchecked on a public walkway. *Id.* Judge Griffin dissented, noting that the majority failed to cite any authority for the proposition that a slip a fall accident caused by a public nuisance is not subject to the open and obvious doctrine and that the plaintiff "relabelled a negligence claim action as a public nuisance in the transparent attempt to avoid the "open and obvious defense."” *Id.* at pp 8-9. Ultimately, Judge Griffin concluded that the trial court properly denied the motion to amend the complaint because the plaintiff's amendment to add the nuisance claim would be futile given that the construction company did not have control of the premises. *Id.*

² Even if we were to address the merits of plaintiff's claim that wooden rise constitutes a nuisance because it unreasonably interferes with the path of travel, we would nonetheless conclude that plaintiff's individual injury from a fall in a dental office is an insufficient basis to establish a public nuisance. "The fact that [an aggrieved wrong] is committed in a public place does not make it public." *Attorney Gen ex rel Muskegon Booming Co v Evert Booming Co*, 34 Mich 462, 476 (1876). More importantly, given plaintiff's cursory argument, plaintiff failed to show how the wooden rise interfered with the rights of the community at large. *Williams v Primary School Dist*, 3 Mich App 468, 476; 142 NW2d 894 (1966).