

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARY J. GANDOLFI and JOHN GANDOLFI,

UNPUBLISHED

March 28, 2000

Plaintiffs-Appellants,

v

No. 212727

Macomb Circuit Court

MARRIOTT INTERNATIONAL, INC.,

LC No. 97-002842-NO

Defendant-Appellee.

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Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

While vacationing in the Virgin Islands, plaintiffs were guests at one of defendant's hotels. On their first visit to the pool area of the hotel, Mary Jo Gandolfi slipped and fell on her left knee, shattering the knee cap. Plaintiffs filed a lawsuit against defendant alleging negligent maintenance, defective physical structure, and failure to warn. In support of these theories, plaintiffs claimed that some of the tiles used on the pool deck were different and more slippery than others. Defendant moved for summary disposition on the ground that the risk of slipping on wet tile was an open and obvious danger. The trial court agreed, and granted defendant's motion for summary disposition and dismissed plaintiffs' cause of action.

Plaintiffs argue that the trial court erred in granting summary disposition. We agree. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Henderson v State Farm Fire and Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). In ruling on a summary disposition motion under MCR 2.116(C)(10), the trial court considers pleadings, depositions, affidavits, admissions, and documentary evidence in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). When the nonmoving party bears the burden of proof at trial on a dispositive issue, the nonmoving party must present specific facts that establish the existence of a genuine issue of material fact. *Id.* Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact,

and the moving party is entitled to judgment as a matter of law. *Quinto, supra* at 362; MCR 2.116(C)(10), (G)(4).

To establish a prima facie case of negligence, the plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 667-668; 593 NW2d 578 (1999). If a legal duty does not exist, a negligence action must fail. *Blackwell v Citizens Insurance Co of America*, 457 Mich 662, 667; 579 NW2d 889 (1998). Whether a legal duty exists is a question of law that is decided by the court. *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993); *Reno v Chung*, 220 Mich App 102, 105; 559 NW2d 308 (1996), *aff'd* 461 Mich 109 (1999).

Defendant owns and operates the subject hotel and plaintiffs were paying guests in that hotel; there is no question that defendant owed a duty to plaintiffs to protect them from injury. *Upthegrove v Myers*, 99 Mich App 776, 779; 299 NW2d 29 (1980). "The invitor's legal duty is 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), citing 2 Restatement Torts, 2d, § 343, pp 215-216.

Defendant claims that it was open and obvious that wet tiles in the area of a swimming pool would be slippery. An invitor does not owe a legal duty to protect or warn against known or obvious dangers unless the harm can be anticipated despite the invitee's knowledge of the harm. *Riddle v McLouth Steel Products*, 440 Mich 85, 96; 485 NW2d 676 (1992); *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263-264; 532 NW2d 882 (1995). Whether a danger is open and obvious is determined from the perspective of an average person with ordinary intelligence. *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The inquiry is whether the average person would have discovered the danger upon casual inspection. *Id.* The plaintiff must "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence" of the danger. *Id.* at 475. Whether the plaintiff saw the danger is irrelevant to a determination of an open and obvious danger. *Id.*

Plaintiffs claim that there were two different types of tile in the pool area, rough tiles that were not slippery even when wet and glazed tiles that were slippery when wet. Plaintiff argues that the different, more slippery tiles were not open and obvious dangers. In support of this claim, plaintiffs presented the deposition testimony of plaintiff Mary Gandolfi that she slipped and fell when she stepped on a tile that was different from the other tiles on which she had been walking. She further asserted that after she fell, she looked at the tile on which she slipped and it was "different . . . [i]t was glazed"; she stated that she "had the impression that it was something put there to make everything look nice [and] snazzy." Moreover, she recalled that the other tiles felt like concrete while the tile that caused her to fall "felt different under [her] feet." Mary also claimed that one of defendant's employees, "Valerie," told her that other persons had slipped on the tiles and that defendant was planning on replacing the surface

around the pool.<sup>1</sup> The photographs<sup>2</sup> submitted to the trial court depict an apparently uniform surface; however, there appear to be some variation in the color, although not the texture, of the tiles.

This Court stated in *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997):

A landowner's duty to protect invitees may include a duty to warn. There is no *absolute* obligation to warn of open and obvious dangers. . . . However, even though there may not be an absolute obligation to provide a *warning*, this rule does not relieve the invitor from his duty to exercise reasonable care to protect his invitees against known or discoverable dangerous conditions. . . . The rationale behind this rule is that liability for injuries incurred on defectively maintained premises should rest upon the party who is in control or possession of the premises, and, thus, is best able to prevent the injury. [Emphasis in original; citations omitted.]

This Court concluded in *Hughes* that although the danger of falling off a roof overhang might be open and obvious, the danger that the roof overhang would collapse when a workman stepped on it was not obvious. *Id.* at 11. Similarly, in this case, while the danger that plaintiff might fall on a surface of wet tiles might be open and obvious, the danger that she might fall on a surface of what appeared to be uniformly rough tiles, but which contained interspersed glazed tiles, was not so obvious. See also *Arias v Talon Development Group, Inc*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 211755, issued 1/4/2000), slip op at 2 (reasonable factfinder could conclude that freshly painted handicap access ramp posed an unreasonable hazard to pedestrians).

It is true that plaintiffs' counsel conceded that, as a general proposition, it was open and obvious that a pool deck might be slippery when wet. However, in this case all of the tiles plaintiff walked on before falling were rough and not slippery, and since there was no obvious difference in appearance between the non-slippery tiles she walked on and the slippery, glazed tile she fell on, it was reasonable for plaintiff to assume all of the tiles would be of the same composition and therefore not be slippery. Furthermore, testimony that others had fallen in the same area supports the conclusion that defendant could anticipate harm to its guests despite the general knowledge that guests might have that wet tiles in the pool area might be slippery. In our opinion, the evidence could lead to the conclusion that an average person of ordinary intelligence would not have discovered upon casual inspection the risk of harm from slipping on occasional glazed and wet tiles. *Hughes, supra* at 11-12. Therefore, the danger of slipping on certain unique tiles was not open and obvious. Because the danger was not open and obvious, defendant owed plaintiffs a duty to warn of the danger. *Id.* "Once the existence of a duty towards the plaintiff is established, the reasonableness of the defendant's conduct is a question for the jury." *Arias, supra*, slip op at 2, citing *Riddle, supra* at 96-97. Therefore, summary disposition was not properly granted.

We conclude that the trial court erred in determining that the sporadically placed glazed tiles were an open and obvious danger. Plaintiffs presented sufficient evidence upon which reasonable minds could differ regarding the hidden danger of slipping on occasional glazed and wet tiles. The deposition testimony supported plaintiffs' allegation that the tile on which Mary slipped was different from the other

surrounding tiles. Viewed in the light most favorable to plaintiffs, this evidence would be enough to persuade a reasonable juror that the danger of slipping on occasional wet glazed tiles could not have been discovered by an average person of ordinary intelligence. “In the present case, the proofs create a question of fact with respect to whether the danger was ‘open and obvious’ and whether the risk of harm was unreasonable.” *Hughes, supra* at 11.

Because we agree that the danger posed by the interspersed glazed tiles was not open and obvious, it is unnecessary to consider plaintiffs’ other, alternative arguments regarding defendant’s liability.

Reversed.

/s/ Patrick M Meter  
/s/ Richard Allen Griffin  
/s/ Donald S. Owens

<sup>1</sup> We note that plaintiff lists a “Valerie VonDerAhe” who resided in St. Thomas, Virgin Islands, as a trial witness and that defendant lists a “Valerie Von Ahe.” Presuming that VonDerAhe or Von Ahe is the “Valerie” to whom plaintiff referred in her deposition testimony, and considering the evidence in a light most favorable to plaintiff, we must presume that Valerie would testify at trial that other guests had slipped on the wet, glazed tiles and that defendant’s awareness of this fact was leading it to consider replacing the entire tile surface of the pool area.

<sup>2</sup> These photographs are the only visual evidence of the tile in question. Different photographs could not have been introduced at trial in support of plaintiffs’ claim because the pool area has been remodeled.