

STATE OF MICHIGAN
COURT OF APPEALS

ELLA LOUISE SIMMONS,

Plaintiff-Appellant,

v

BOB THIBODEAU, INC., d/b/a BOB
THIBODEAU FORD, INC.,

Defendant-Appellee.

UNPUBLISHED
February 21, 2006

No. 264215
Macomb Circuit Court
LC No. 04-000487-NO

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10) in this slip and fall case, where plaintiff fell as a result of a height differential between an elevated waiting room floor and a lower adjacent hallway floor, which floors were directly separated by the waiting room's door. The doorway was the only means of exit from the waiting room, and plaintiff fell as she was leaving the waiting room to return to defendant's service department to pick up her car following an oil change. The trial court summarily dismissed the action, ruling that the hazard was open and obvious, that plaintiff had actual knowledge of the danger having stepped up to enter the waiting room in the first place, and that there were no special aspects negating application of the open and obvious danger doctrine. We find it arguable whether the alleged hazard, hidden and obscured by a door, was open and obvious, and arguably there might be some credence to the claim that encountering the danger was unavoidable. Nonetheless, we affirm because plaintiff had personal knowledge of the height differential having previously traversed the area, and, even assuming that she did not have sufficient knowledge of the hazard or that harm could still be anticipated, the documentary evidence reflects that defendant had posted adequate warnings regarding the danger.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR

2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "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 might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

In general, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land, but this duty does not extend to requiring a warning or protecting invitees from hazards that are open and obvious, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517; 629 NW2d 384 (2001). "[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." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992)(emphasis added). In determining whether a condition is "open and obvious," an objective standard, i.e., a reasonably prudent person standard, is utilized. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 330; 683 NW2d 573 (2004). A danger is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

We decline to address the issues whether the alleged danger presented by the varying floor levels was open and obvious and whether special aspects existed. As indicated in *Riddle, supra* at 96, there is no duty to warn if a danger is known to an invitee. Plaintiff encountered the height differential when she stepped up to enter the waiting room, and thus she had some level of awareness of the danger before the fall. But even assuming that she did not have sufficient knowledge or that harm could still be anticipated, defendant satisfied any duty to exercise reasonable care and to warn and protect its customers by posting adequate warnings of the danger. Defendant presented evidence showing that the door has a written warning on it, alerting customers to "PLEASE WATCH YOUR STEP." Additionally, there is a warning showing a figure walking or stepping down a set of steps, along with a statement that reads, "STEP DOWN." Defendant submitted photographs showing the existence of these warnings that were utilized in its effort to warn and protect customers. Defendant also submitted an affidavit that definitively indicated that the warning sign and warning picture were both in place when the fall occurred and that they had been in place since before 1990. Plaintiff's simple inconclusive recollection in her deposition that she did not remember seeing any warnings is insufficient to create a factual dispute and overcome defendant's evidence that warnings were indeed posted and in place. Certainly, plaintiff could have obtained some concrete evidence through the discovery process showing that the warnings had only been erected after the fall, if this in fact were the case. Therefore, we conclude, as a matter of law, that defendant exercised reasonable

care to protect its invitees through the warning mechanisms enumerated by us above, and that defendant was entitled to summary disposition.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly