

STATE OF MICHIGAN
COURT OF APPEALS

DONNA CHMIELEWSKI,

Plaintiff-Appellant,

v

KARMAYS FLOWERS & GIFTS, L.L.C.,

Defendant-Appellee.

UNPUBLISHED

March 2, 2006

No. 257154

Jackson Circuit Court

LC No. 03-006333-NO

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's injuries occurred when she slipped and fell on a step located on defendant's front porch. She approached the right door of the two front doors to defendant's business, opened the door, and started to enter, but then decided to enter the other door. She turned left and walked toward the other door, but missed the step and fell. Plaintiff admitted that she did not slip or trip on anything, but simply did not see the step down where she fell.

Plaintiff filed suit alleging negligence. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that the dangerous condition involved was open and obvious. Plaintiff argues that the condition was not open and obvious, and that even if the condition was open and obvious, it presented "special aspects" that rendered it "unreasonably dangerous" in spite of its open and obvious nature. We disagree.

We review 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 for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School Dist*, 255 Mich App 60, 67; 661 NW2d 586 (2003).

A landowner has a duty to exercise reasonable care to protect invitees 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, a premises possessor is not generally required to protect an invitee from open and obvious danger. *Id.* The question of whether a

condition is “open and obvious depends on whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection.” *O’Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003). “Because the test is objective, this Court ‘looks not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.’” *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Only when a condition on the land contains “special aspects” that render it unreasonably dangerous in spite of its open and obvious nature, such as when it is “effectively unavoidable” or presents a “uniquely high likelihood of harm or severity of harm if the risk is not avoided,” does a landowner continue to owe a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517-519; *Joyce, supra* at 240.

Our Supreme Court has stated, “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). The *Bertrand* Court specifically stated that different floor levels in buildings are such a common occurrence that the landowner does not owe a duty to make ordinary steps foolproof or to protect invitees from any harm they present unless special aspects of the steps make the risk of harm unreasonable. *Id.* at 614-617. For there to be an unreasonable risk of harm, there must be something unusual about the character, condition, or surroundings of the steps. *Id.* However, like other open and obvious dangers, this entails a showing of an unusually high likelihood of harm or an unusual risk of severe harm in order to remove the condition from the open and obvious danger doctrine. *Lugo, supra* at 519 (footnote omitted).

In the instant case, we conclude that the trial court did not err when it found the danger open and obvious and not otherwise unreasonably dangerous. The photographs presented by the parties indicate that the step and the ground below it were the same color and texture, or at least similar. But the fact that plaintiff did not see the step before she fell is irrelevant. *Hughes, supra* at 11. If the condition creates a risk of harm solely because the plaintiff failed to notice it, the open and obvious doctrine eliminates liability if the plaintiff should have discovered it and realized its danger. *Bertrand, supra* at 611. Likewise, the failure to provide a clearer demarcation at the step down from the doorway to the remainder of the porch does not render this condition unreasonably dangerous. Ordinary steps do not pose an unreasonable risk of harm despite the absence of warnings or the failure to mark the steps with a contrasting color. *Id.* at 618-621. In addition, we note that, although the step down is difficult to discern from some of the photographs, the concurrent step up to the remaining doorway is clearly visible. This provides a visual clue to an individual in plaintiff’s position that a height differential might exist in the area where plaintiff fell. Other visual clues evident from the photographs include the height of the railing and the side view of both doorways from the parking lot.

Finally, we reject plaintiff’s contention that the open and obvious doctrine does not apply, because she presented expert testimony that the conditions on the premises violated the BOCA building code. The open and obvious doctrine cannot be used to avoid a specific statutory duty. *Jones v Enertel, Inc*, 467 Mich 266, 270, 650 NW2d 334 (2002); *O’Donnell, supra* at 581. However, this Court has consistently held that building code violations are insufficient to impose a legal duty of care on an invitor. *O’Donnell, supra* at 578-579; *Summers v Detroit*, 206 Mich App 46, 51-52; 520 NW2d 356 (1994). Although a building code violation may be some evidence of negligence, it is insufficient to impose a legal duty cognizable in

negligence. *Id.* See also *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 9 n 1; 649 NW2d 392 (2002); *Ward v Frank's Nursery & Crafts, Inc.*, 186 Mich App 120, 135; 463 NW2d 442 (1990).

The dangerous condition here was open and obvious. These steps do not present “a uniquely high likelihood of harm or severity of harm.” *Lugo, supra* at 518-519. We hold that the trial court did not err when it granted defendant’s motion for summary disposition.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Jane E. Markey