STATE OF MICHIGAN

COURT OF APPEALS

CARL KURTYKA and SANDRA KURTYKA, Plaintiffs-Appellants, v MR. NICK'S, INC., Defendant-Appellee.	UNPUBLISHED May 8, 2007 No. 273320 Wayne Circuit Court LC No. 05-526544-NO

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendant. We affirm.

I Standard of Review

Plaintiff argues that the trial court improperly granted summary disposition in favor of defendant. We disagree. When reviewing a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we review the record de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). MCR 2.116(C)(10) tests the factual support of a claim. *Id*. "On review, [we] must consider the record in the light most favorable to the nonmovant to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law." *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005), citing *Dressel, supra*. Review is limited to the evidence presented to the trial court at the time the motion was decided. *Laier, supra*.

II Open and Obvious Condition

The trial court properly granted summary disposition in favor of defendant because the condition that caused plaintiff, Carl Kurtyka's,[1] injuries was open and obvious and did not present any special aspects. To sustain a negligence claim, a plaintiff must prove (1) that

[1] The singular term "plaintiff" refers to Carl Kurtyka because Sandra Kurtyka's loss of consortium claim is merely derivative.

defendant owed a duty to him, (2) that defendant breached that duty, (3) that defendant's breach of duty was a proximate cause of his damages, and (4) that he suffered damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). A landowner 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*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, "this duty does not generally encompass removal of open and obvious dangers." *Lugo, supra*. To determine if a danger is open and obvious, a court must determine whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

When viewing the evidence in the light most favorable to plaintiff, the evidence shows that plaintiff's injuries were caused by an open and obvious condition. Plaintiff was injured when he opened the door to defendant's banquet facility and fell down the stairs. He believed that he had opened the door to the men's bathroom, which was nearby. The banquet facility door, however, had a clearly posted sign that cautioned users that stairs were behind the door and that the door opened immediately onto the first step. The sign was posted directly above another sign that read, "authorized personnel only."

The open and obvious doctrine imposes an objective standard, and thus, we must look to whether an average user with ordinary intelligence would have been able to discover the danger. *Lugo, supra* at 523-524. It was open and obvious that the banquet facility door had a cautionary sign on it warning users that: (1) behind the doors were stairs, (2) the doors opened immediately onto the first step, and (3) only authorized personnel was permitted. Plaintiff admitted that he frequented defendant's establishment and was aware of the doors to the banquet facility and the men's bathroom. By his own admission, plaintiff was looking down the hallway and not paying attention to his surroundings when he mistakenly opened the banquet facility door. Plaintiff's injuries were not caused by defendant's failure to properly maintain its premises but because plaintiff failed to pay attention to his surroundings. Because a reasonable person upon casual inspection would discover that the banquet facility door did not enter in the bathroom, plaintiff failed to show the condition that caused his injuries was not open and obvious. *Corey, supra*.

III Special Aspects

Plaintiff alternatively argues that special aspects rendered the open and obvious condition unreasonably dangerous. We disagree.

Generally, "a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra*, at 517. Special aspects exist when the danger, although open and obvious, is unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id.* at 518-519; *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 693; 650 NW2d 343 (2001). The risk of falling an extended distance has been cited as a special aspect. *Woodbury, supra*. "It is the aggregate of factors that the trial court must analyze to determine if there are special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003).

In support of its claim, plaintiff notes that the banquet facility door could be opened with a mere push, opened into the descending stairwell rather than away from the stairwell, dim hallway lighting, the risk of falling an extended distance and the presence of building code violations created special aspects.

Initially, we reject as unsupported plaintiff's claim that the banquet facility door could be opened with a mere push. Plaintiff did not testify that the banquet facility door could be opened merely by pushing it open, but rather answered affirmatively his counsel's question that asked if he pushed open the door. Plaintiff plainly pushed open the door, but there is no evidence that specifically indicates that plaintiff opened the door without turning the doorknob, which is shown in pictures of the door by plaintiff's expert. Thus, we reject as unsupported plaintiff's claim that the banquet facility door could be opened with a mere push. We also reject as unsupported plaintiff's assertion that dim hallway lighting created a special aspect. Although plaintiff claims the hallway was dark when he entered the building from outside, he also testified that he did not pay attention to the lighting when he walked through the hallway to go outside. A party may not create an issue of material fact merely by contradicting his own deposition testimony. *Klein v Kik*, 264 Mich App 682, 688; 692 NW2d 854 (2005). Absent additional evidence indicating that the lighting was inadequate entering the bar, we reject as unsupported plaintiff's claim that dim hallway lighting created a special aspect.

In *Woodbury, supra,* pp 686-88, this Court cited the risk of falling an extended distance as a special aspect. However, *Woodbury* is distinguishable from the present case. The plaintiff in *Woodbury* fell from an unrailed rooftop porch. Here, a door protected the stairway with a cautionary sign warning users that the door opened immediately onto the first step of a stairway and that the use of the door was for authorized personnel only. We conclude that plaintiff's reliance on *Woodbury* is misplaced. Plaintiff fails to show that special aspects exist simply because plaintiff fell an extended distance down the stairs.

Plaintiff further argues that the presence of building code violations is a special aspect. Plaintiff notes that the banquet facility door opened in the wrong direction and the stairwell lacked a landing, as required by building code regulations. Although a violation of a building code may be some evidence of negligence, not all "code violations will support a special-aspects factor analysis in avoidance of the open and obvious danger doctrine. The critical inquiry is whether there is something unusual about the [stairway and door] because of their character, location, or surrounding conditions that gives rise to an unreasonable risk of harm." *O'Donnell, supra*, at 573. We cannot conclude that the character, location, or circumstances surrounding the banquet facility door and stairwell gives rise to an unreasonable risk of harm. Further, the posted cautionary sign warned potential users about the immediacy of the first step. In sum, plaintiff has failed to establish special aspects to avoid application of the open and obvious doctrine.

IV Other Issues

Plaintiff argues that the trial court erred when it dismissed all of their claims because defendant only sought partial summary disposition. We disagree. We review this unpreserved claim for plain error. *Kloian v Schwartz,* 272 Mich App 232, 242; 725 NW2d 671 (2006).

Defendant argued that it was entitled to summary disposition because the condition that caused plaintiff's condition was open and obvious. Although defendant's motion for summary

disposition primarily addressed the proximity of the banquet facility door and the men's bathroom, it also addressed the lighting in the hallway, the cautionary signs posted on the banquet facility door and the stairwell. After defendant set forth its argument, it requested that the trial court dismiss plaintiff's complaint in its entirety. Defendant requested that the court grant its entire summary disposition motion, or, in the alternative, partial summary disposition regarding plaintiff's claim for non-economic damages. Because defendant's motion for summary disposition sought summary disposition of all of plaintiff's claims, plaintiff has not established plain error affecting substantial rights.

Plaintiff next argues that the trial court improperly found that plaintiff lost his invitee status because he ventured into an unauthorized area on defendant's premises. We disagree. We review this unpreserved issue for plain error. *Kloian, supra,* p 242.

Although the trial court commented that plaintiff was "in a sense trespassing if [he went] down steps where he's not even authorized to go," plaintiff failed to show that the trial court relied on this statement in rendering its final decision. Rather, the trial court granted defendant's motion for summary disposition because it specifically found the condition open and obvious without special aspects. Plaintiff failed to establish plain error affecting substantial rights.

Plaintiff further argues that the trial court erred if it relied on defendant's comparative negligence argument. We review this unpreserved issue for plain error. *Kloian, supra,* at 242. Plaintiff's argument is assumptive and unsupported by the record. Plaintiff has failed to establish plain error affecting substantial rights.

Last, plaintiff argues that the trial court erred because it dismissed their negligence per se claim. We review this unpreserved issue for plain error. *Kloian, supra*. Plaintiff "do[es] not present any case law in support of their argument, any authority that explains the elements of the alleged torts, or even any explanation whatsoever of their argument. A party waives an issue when it gives the issue cursory treatment on appeal." *Badiee v Brighton Area Schools*, 265 Mich App 343, 359; 695 NW2d 521 (2005). Because plaintiff has given this issue such cursory treatment and "a party may not simply announce its position and 'leave it to this Court to discover and rationalize the basis for the party's claim,'" plaintiff waived review of this issue. *Badiee, supra,* at 360.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra