STATE OF MICHIGAN

COURT OF APPEALS

DONALD W. JENKINS,

Plaintiff-Appellant,

v

PATRICIA MILLER,

Defendant-Appellee.

UNPUBLISHED
July 27, 2006

No. 268237
Oakland Circuit Court
LC No. 2004-062360-NO

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

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

Plaintiff's injuries occurred when he slipped and fell on stairs located at the side of defendant's home. At the time, plaintiff was attempting to enter defendant's backyard to remove a tree. According to plaintiff, his foot slipped as he stepped onto one of the wooden railroad ties used to form the stairs. Plaintiff's foot caught a protruding metal pole designed to hold the stairs in place, his weight shifted, and he broke his leg as he fell.

Plaintiff filed suit alleging negligence. The trial court granted summary disposition in favor of defendant under MCR 2.116(C)(10), finding that the dangerous condition involved was open and obvious and did not present any special aspects that rendered it unreasonably dangerous in spite of its open and obvious nature.

We review de novo a trial court's ruling on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). In evaluating a motion under MCR 2.116(C)(10), a court considers the entire record in the light most favorable to the nonmoving party, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id*. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id*.

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, but is not generally

required to protect an invitee from open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A condition is open and obvious if 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, we look to whether a reasonable person in plaintiff's position would foresee the danger, not to whether plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). Only when a condition on the land contains "special aspects" that render it unreasonably dangerous in spite of its open and obvious nature 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.

Plaintiff argues that genuine issues of material fact existed regarding whether the danger was open and obvious. We disagree. We find that the slightly protruding metal pipes holding the railroad ties would have been visible upon casual inspection from a person in plaintiff's position. We have carefully reviewed the photographs presented by the parties depicting the area in which plaintiff fell. Photographs of the stairs show the existence of the pipes from the vantage point of someone who is descending, notwithstanding any discoloration from weathering. While an average person of ordinary intelligence is not required to closely inspect every inch of a surface upon which he or she might step, public policy requires a person to take reasonable care for his or her own safety. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17; 643 NW2d 212 (2002); *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995). A reasonable person in plaintiff's position would have been able to discover any danger presented by the pipes.

Moreover, even were we to agree with plaintiff's assertion that he could not easily see the protruding pipe, plaintiff still cannot show that the dangerous condition that caused his fall was hidden from casual inspection. Plaintiff did not trip on the protruding pipe. Plaintiff was not walking down the edge of the stairs where the pipes were located, but down the middle of the stairs. He slipped on the wet wood, and his foot struck the pipe. We find this distinction important. The "hidden" danger of the pipe did not cause plaintiff's fall, although it may have contributed to the extent of his injury. Plaintiff admitted that he knew that wood landscaped stairs could be slippery when wet, and that the steps were wet before he started down them. It is reasonable to conclude that plaintiff would not have been injured if he had been more closely watching the area where he was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff failed to come forward with sufficient evidence to create a genuine issue of material fact regarding whether an average person with ordinary intelligence would have discovered the condition upon casual inspection. *O'Donnell*, *supra* at 575.

Plaintiff also argues that the stairs possessed "special aspects" that rendered them unreasonably dangerous despite any open and obvious condition. He contends that the condition posed a uniquely high likelihood of harm and was effectively unavoidable. We disagree. Summary disposition is improper if a reasonable trier of fact could find the condition had special aspects that "give rise to a uniquely high likelihood of harm or severity of harm." *Lugo*, *supra* at 519. The *Lugo* Court provided examples of a commercial building with only one public exit where the floor is covered with standing water, and an unguarded thirty-foot deep pit in the middle of a parking lot as constituting unreasonably dangerous conditions. *Id*. at 518. In any

particular case the aggregate of factors present should be analyzed to determine if a uniquely high likelihood or potential severity of harm exists. *O'Donnell*, *supra* at 578. One such factor is that encountering the condition was effectively unavoidable. *Lugo*, *supra* at 518.

Here, even viewing the evidence in a light most favorable to plaintiff, somewhat steep and uneven stairs without a handrail do not present a unique condition of "a substantial risk of death or severe injury." *Lugo*, *supra* at 518. Moreover, plaintiff's deposition testimony directly contradicts his argument that the steps were effectively unavoidable. He had already avoided using the steps to enter the backyard on his earlier visit by going around the right side of the house. He also admitted that he could have sought to enter the yard through the house. We agree with the trial court that no reasonable juror could have concluded the staircase had special aspects posing an unreasonable risk of harm.

We affirm.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra