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EXHIBIT 1

Bambe Johnson v. Meijer, Inc. Doc. 6111943590 Att. 1

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 14a0059n.06

No. 13-1546

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 23, 2014
DEBORAH S. HUNT, Clerk

BAMBE CAE JOHNSON,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
MEIJER, INC.,	)	THE WESTERN DISTRICT OF
	)	MICHIGAN
Defendant-Appellee.	)	
	)	
	)	
	)	

Before: SUHRHEINRICH, SILER, and KETHLEDGE, Circuit Judges.

KETHLEDGE, Circuit Judge. While Bambe Cae Johnson was shopping at Meijer, she accidentally—one might say negligently—rammed her shopping cart into a fire extinguisher mounted waist-high. The extinguisher fell and injured her toe. Johnson sued Meijer for negligence. Meijer moved for summary judgment, which the magistrate judge granted. We affirm.

In August 2010, Bambe Cae Johnson was pushing a shopping cart through the aisles at a Meijer store in Battle Creek, Michigan. Her granddaughter's car seat was in the front of the cart, partially obstructing Johnson's view. At some point, Johnson continued walking while she turned her head to look behind her. The handle of her shopping cart struck a fire extinguisher mounted in plain view on a column. The impact caused the extinguisher to fall, injuring Johnson's toe.

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We review de novo the district court's grant of summary judgment. *Lexicon, Inc. v. Safeco Ins. Co. of Am., Inc.*, 436 F.3d 662, 667 (6th Cir. 2006). As in most states, a negligence claim in Michigan has four elements: duty, breach, causation, damages. *Case v. Consumers Power Co.*, 615 N.W.2d 17, 20 (Mich. 2000). At issue here is whether Johnson presented evidence that would allow a jury to find that Meijer breached a duty to her.

Landowners owe invitees a duty to protect against dangerous conditions. *See Bertrand v. Alan Ford, Inc.*, 537 N.W.2d 185, 186 (Mich. 1995). But they do not owe a duty as to dangers that are open and obvious. *Lugo v. Ameritech Corp, Inc.*, 629 N.W.2d 384, 386 (Mich. 2001). A danger is open and obvious if "an average user with ordinary intelligence would [be] able to discover the danger and the risk presented upon casual inspection." *Corey v. Davenport College of Business*, 649 N.W.2d 392, 394 (Mich. App. 2002) (quoting *Joyce v. Rubin*, 642 N.W.2d 360, 364 (Mich. App. 2002)).

Here, it is undisputed that the fire extinguisher was mounted in plain view. And we agree with the district court that the risk that the extinguisher might dislodge if struck by a loaded shopping cart—thereby inducing gravity to drop the extinguisher to the floor—was open and obvious. That Johnson was looking away makes no difference; the standard is objective. *See Novotney v. Burger King Corp.*, 499 N.W.2d 379, 381 (Mich. App. 1993). Meijer therefore owed Johnson no duty to protect Johnson from the risk that the extinguisher might dislodge if she struck it with her cart.

Moreover, Johnson has no evidence—direct or circumstantial—that would allow a jury to find that Meijer was somehow negligent in the manner it secured the extinguisher. To the contrary,

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Julie Dreyer, a Meijer employee at the corporate headquarters, stated in her affidavit that the extinguisher had been inspected by local building code officials and the fire marshal, and that it complied with all applicable state and other codes. Nor does the doctrine of *res ipsa loquitur* apply here, because—contrary to Johnson's assertion—it was foreseeable that even a properly secured fire extinguisher might fall to the floor if struck by a loaded shopping cart. *See Rose v. McMahon*, 158 N.W.2d 791, 792–93 (Mich. App. 1968). Finally, we entirely agree with the magistrate judge's decision to strike Johnson's expert on reliability grounds, for the reasons stated in the judge's thoroughly reasoned opinion.

The district court's judgment is affirmed.

EXHIBIT 2

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STATE OF MICHIGAN

COURT OF APPEALS

STEVE AYVAZIAN,

Plaintiff-Appellant,

v

QUEST GOLF CLUB,

Defendant-Appellee.

UNPUBLISHED
September 13, 2016

No. 327792
Roscommon Circuit Court
LC No. 13-721536-NO

Before: TALBOT, C.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Plaintiff, Steve Ayvazian, appeals as of right the trial court's order granting summary disposition to defendant, Quest Golf Club, under MCR 2.116(C)(10). The trial court determined that there were no genuine issues of material fact regarding whether a hazard posed by Quest's stairs was open and obvious or unreasonably dangerous. We affirm.

I. FACTUAL BACKGROUND

Ayvazian testified that on August 8, 2012, he was playing a round of golf at Quest's golf course. Ayvazian and his partner decided to take a break between the ninth and tenth holes for some refreshments. They parked their golf cart, walked up the pathway to the clubhouse, and went up the clubhouse steps. When leaving the same door after his break, Ayvazian tripped on the steps and fell into an adjacent flower bed. According to Ayvazian, he believed he was already on the ground and missed the lowest step. He believed he fell because at that time of day, there were no shadows to identify the contours of the steps, and the steps lacked markings or other visual cues to differentiate them. Ayvazian seriously injured his neck.

Quest filed for summary disposition, contending that the steps posed an open and obvious hazard that lacked any special aspects to make them unusually dangerous. The trial court agreed, and Ayvazian now appeals.

II. STANDARDS OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must

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consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120. A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

III. OPEN AND OBVIOUS HAZARDS

Ayvazian contends that there was a genuine issue of material fact regarding whether the stairs were an open and obvious hazard because the steps in this case were not clearly marked as stairs. We disagree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000). A party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A premises owner has a duty to protect invitees—persons who enter the owner's premises at his or her express or implied invitation—from hidden or latent defects on his or her property. *Id.* at 90-91.

The premises owner's duty is the duty to *warn* the invitee of any hidden or latent defects. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). But a premises possessor is "not required to protect an invitee from open and obvious dangers." *Lugo v Ameritech Corp Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A danger is open and obvious where an average user with ordinary intelligence would have been able to discover the danger on a casual inspection. *Novotney v Burger King Corp,* 198 Mich App 470; 499 NW2d 379 (1993). Stairs are generally an open and obvious danger:

> With the axiom being that the duty is to protect invites from *unreasonable* risks of harm, the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. . . . Consequently, because the danger of tripping and falling on a step is open and obvious, the failure to warn theory cannot establish liability. [*Bertrand*, 449 Mich at 614 (citation omitted).]

In this case, some of Ayvazian's close-up photographs of the steps around noon illustrate a difficulty in distinguishing the steps. However, other photographs clearly show that the steps were visible, and Ayvazian testified that the trashcan positioned at the bottom of the steps provided a visual cue to the presence of the second step. More importantly, there is no dispute that Ayvazian was in fact aware of the presence of the stairs in general—he testified that he went up the stairs to enter the clubhouse, used the steps on prior occasions, and was aware that he was going down stairs when he mistakenly believed he was on the ground.

We conclude that the trial court did not err when it determined that there was no genuine issue of material fact regarding whether the steps posed an open and obvious hazard. Quest had

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no duty to warn Ayvazian about the open and obvious danger posed by the steps outside its clubhouse.

IV. UNREASONABLE RISK OF HARM

Ayvazian also contends that the trial court erred when it determined that no special aspects made the stairs unreasonable dangerous. Specifically, Ayvazian contends that the stairs' lack of guardrails and layout made them inherently dangerous. We disagree.

A premises owner may be liable even for open and obvious dangers in some narrow circumstances. *Hoffner v Lanctoe*, 492 Mich 450, 472; 821 NW2d 88 (2012). A landowner may be liable if the open and obvious danger has special aspects "that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]" *Lugo*, 464 Mich at 517. Special aspects include hazards that are "effectively unavoidable" or that present "a substantial risk of death or serious injury . . . ." *Id.* at 518. Everyday hazards such as steps and potholes do not pose highly unreasonable risks, even in the presence of distractions. See *id.* at 522. The risk of harm posed by stairs is generally reasonable. *Bertrand*, 449 Mich at 617.

However, stairs may pose an unreasonably dangerous condition if they are combined with other factors that unreasonably increase the danger. In *O'Donnell*, this Court considered a set of stairs and concluded that they posed an unreasonably dangerous condition:

> [T]he height and steepness of the stairs, the layout of the low-ceilinged loft, including the opening between the guardrail and the stair tread, open-sided staircase, inadequate stair rail, and lack of a light switch at the top of the stairs, when considered together, are special aspects giving rise to a uniquely high likelihood of harm from falling to the hardwood floor below, and therefore remove the condition from the open and obvious danger doctrine. [*O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 213 (2003), abrogated in part on other grounds by *Mullen v Zerfas*, 480 Mich 989 (2007).]

In this case, the stairs are not similarly dangerous. The evidence in the record indicates that the stairs in question were two broad, flat steps. The stairs lacked a railing. However, they did not pose the risk of an unguarded fall from a height, and the stairs themselves were not particularly steep. The remainder of the steps' character, location, and surrounding conditions give no indication that there is a serious risk of unreasonable harm. See *id.* at 578. While it is unfortunate that Ayvazian did not notice the steps and landed in the flowerbed in such a way as to seriously injure his neck, the risks did not pose an *unreasonable* risk of that danger.

We affirm.

/s/ Michael J. Talbot
/s/ Peter D. O'Connell
/s/ Donald S. Owens

EXHIBIT 3

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STATE OF MICHIGAN

COURT OF APPEALS

ROWLAND E. ROBINSON,

Plaintiff-Appellant,

v

ESTATE OF ELSIE TYLER, f/k/a CRYSTAL FOUNTAIN DRIVE INN,

Defendant-Appellee.

UNPUBLISHED
September 11, 2003

No. 242332
Mecosta Circuit Court
LC No. 01-014515-NO

Before: Meter, P.J., Talbot and Borrello, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor under MCR 2.116(C)(10). We affirm.

We review a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs,* 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand),* 463 Mich 534, 538-539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange,* 461 Mich 1, 5; 597 NW2d 47 (1999).

This case arose after plaintiff, who is legally blind in both eyes, broke his leg and dislocated his knee after falling down a step at defendant's establishment. Plaintiff first argues that the trial court erred by failing to determine subjectively whether the danger posed by the step was open and obvious. According to plaintiff, whether the danger posed by the step was open and obvious should be determined by whether the average visually impaired person would discover the danger. We disagree.

In *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 518 n 2; 629 NW2d 384 (2001), our Supreme Court noted that, in determining whether a danger is open and obvious, "it is important to maintain the proper perspective, which is to consider the risk posed by the condition *a priori,*

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that is, before the incident involved in a particular case." By focusing on the unsafe condition before a plaintiff is injured, the Supreme Court rejected any consideration of the "special aspects" of any particular plaintiff. Accordingly, the test to determine whether a danger is open and obvious is objective, not subjective. *Id.* at 524; *Joyce v Rubin,* 249 Mich App 231, 238; 642 NW2d 360 (2002). Whether a danger is open and obvious depends "on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo, supra* at 524.

Plaintiff next argues that the trial court erred in granting summary disposition on the grounds that the step was an open and obvious condition. We disagree.

Plaintiff was an invitee at defendant's restaurant because defendant's "premises were held open for a *commercial* purpose." *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 604; 614 NW2d 88 (2000) (emphasis in original). "An invitee is entitled to the highest level of protection under premises liability law." *Id.* at 597. Generally, an invitor owes a duty to his invitees "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo, supra* at 516. The duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers that are known to an invitee or are so obvious that an invitee can be expected to discover them himself. *Id.* at 516-517. An "open and obvious" danger is one that a person of ordinary intelligence would discover upon casual inspection. *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). However, even in the event that the danger is open and obvious, if "special aspects" of a condition make an open and obvious risk unreasonably dangerous, the possessor has a duty to take reasonable precautions to protect invitees from the risk. *Lugo, supra* at 517. "Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. "Typical open and obvious dangers . . . do not give rise to these special aspects." *Id.* at 520.

"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). In addition, "the risk of harm from steps is presumptively reasonable." *Spagnuolo v Rudds #2, Inc,* 221 Mich App 358, 360; 561 NW2d 500 (1997), citing *Bertrand, supra* at 616-617. However, there may be special aspects about particular steps that make the risk of harm unreasonable. *Bertrand, supra* at 614. "Where there is something unusual about the steps, because of their 'character, location, or surrounding conditions, . . .' then the duty of the possessor of land to exercise reasonable care remains." *Id.* at 617, quoting *Garrett v WS Butterfield Theaters, Inc,* 261 Mich 262, 263-264; 246 NW 57 (1933). In this case, plaintiff fell backwards down one step that separated two hallways. Plaintiff contends there were "special aspects" about the step which preclude application of the open and obvious doctrine. Specifically, plaintiff argues that the step in this case had "special aspects" because plaintiff's vision was impaired, the area by the step was dimly lit, the step was located near the restaurant's handicapped entrance, and there were no warnings or handrails.

We conclude that the conditions of the step do not constitute "special aspects" as contemplated by the Supreme Court in *Lugo.* "Only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" will remove a condition from the open and obvious danger doctrine. *Lugo, supra* at 519. Examples of

conditions constituting "special aspects" include: (1) "an unguarded thirty foot deep pit in the middle of a parking lot" resulting in a fall of an extended distance and (2) standing water at the only exit of a commercial building resulting in the condition being unavoidable because no alternative route is available. *Id.* at 518.

In this case, the danger of falling down one step does not give rise to a uniquely high likelihood of harm or severity of harm. Accordingly, because the condition presented by the step did not involve an especially high likelihood of injury and there was little risk of severe harm, defendant's fall down one step does not constitute the type of "special aspects" contemplated by *Lugo*. *Lugo, supra* at 520; *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 7; 649 NW2d 392 (2002). Therefore, the trial court did not err in granting defendant's motion for summary disposition on the basis that the danger posed by the step was open and obvious.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

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