STATE OF MICHIGAN

COURT OF APPEALS

RENEE MICKENS, Plaintiff-Appellant,	UNPUBLISHED May 3, 2002
v	No. 208269 Wayne Circuit Court
DEXTER CHEVROLET COMPANY, a/k/a HARRY SLATKIN BUILDERS, d/b/a SHERWOOD HEIGHTS APARTMENTS, and HARTMAN AND TYNER, INC., d/b/a SHERWOOD HEIGHTS APARTMENTS, Defendants-Appellees.	LC No. 96-616853-NO ON REMAND

Before: Sawyer, P.J., and Cavanagh and Fitzgerald*, JJ.

PER CURIAM.

In lieu of granting leave to appeal, our Supreme Court vacated our judgment and remanded this case to our Court for reconsideration in light of *Lugo v Ameritech Corp Inc*, 464 Mich 512; 629 NW2d 384 (2001). After permitting the parties to file supplemental briefs and upon reconsideration, we conclude that there is a genuine issue of material fact regarding whether the wet stairway was an open and obvious danger. Accordingly, we reverse the trial court's order granting defendants' motion for summary disposition.

This action arises as a consequence of plaintiff allegedly sustaining injuries when she slipped and fell on a wet stairway that led to her apartment. As a resident tenant using a stairway in a common area of the apartment complex, it is undisputed that plaintiff was an invitee. Thereafter, plaintiff filed this premises liability action which was subsequently dismissed by the trial court pursuant to MCR 2.116(C)(10), on the ground that the wet stairway constituted an open and obvious condition from which defendants had no duty to protect plaintiff. This Court affirmed. *Mickens v Dexter Chevrolet Co*, unpublished opinion of the Court of Appeals, issued January 14, 2000 (Docket No. 208269) (Cavanagh, J., dissenting).

* Judge Fitzgerald has been substituted for Judge Collins on remand.

This Court reviews a trial court's grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion brought under MCR 2.116(C)(10), the documentary evidence is considered in a light most favorable to the nonmoving party to determine whether the movant is entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Spiek*, *supra*.

Landowners have a legal duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land that the owner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, a premises owner does not have a duty to protect invitees from open and obvious dangers unless special aspects of that condition posed an unreasonable risk of harm. *Lugo*, *supra* at 517. A danger is open and obvious if it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection. *Hughes v PMG Building, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997).

In this case, defendants alleged in their motion that plaintiff knew that the stairs were wet before attempting their ascent, therefore, the allegedly dangerous condition was open and obvious. The trial court agreed. We disagree.

Under MCR 2.116(C)(10) the moving party has the initial burden of specifically identifying the issues on which there are no disputed facts and supporting its position with documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994); *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 386; 554 NW2d 49 (1996). Here, in support of their motion, defendants submitted plaintiff's statement to an insurance adjuster and a portion of her deposition testimony. However, both the statement and testimony are inconclusive as to whether plaintiff knew that the stairs were wet before attempting to ascend them. Defendants never specifically asked plaintiff whether she knew if the stairs were wet before attempting their ascent. Read in context, plaintiff's responses could reasonably be interpreted as indicating that she did not know until after she fell that the stairs were wet. Further, in an affidavit submitted in support of her motion for reconsideration, plaintiff asserted that she did not see or know that the stairs were wet. Because the statement and deposition testimony were not clear and unequivocal, plaintiff's affidavit is not deemed contradictory and is properly considered.[1] See *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 154-155; 565 NW2d 868 (1997).

Moreover, in the absence of plaintiff's knowledge of the condition, we cannot conclude that the wet stairs were an open and obvious danger. The record evidence fails to reveal any characteristics or qualities about the stairs that would cause an average person to discover that they were wet. See *Hughes*, *supra*. Therefore, considering the evidence in a light most favorable

[1] Neither plaintiff's transcribed statement to the insurance adjuster nor plaintiff's affidavit were objected to as being inadmissible evidence. See MRE 103(a).

to plaintiff, a genuine issue of material fact exists regarding whether the wet stairs posed an open and obvious danger.

We respectfully disagree with our dissenting colleague's position regarding the scope of review when our Supreme Court vacates a judgment of this Court in its entirety and remands the matter back to our Court with instructions to reconsider it in light of another apparently relevant case. When our entire judgment is vacated, we are required to reconsider each issue raised on appeal because the law of the case doctrine does not apply. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 94; 572 NW2d 246 (1997). Consequently, even issues not directly implicated by the precedent specifically referenced in the Supreme Court remand order must be reviewed and reconsidered. To the contrary, when our Supreme Court remands a case back to our Court without vacating the entire judgment, the law of the case doctrine prevents this Court from reconsidering issues outside the specific focus of the remand directive. See *Johnson v White*, 430 Mich 47, 51-52; 420 NW2d 87 (1988).

In this case, we were required to reconsider the entire matter on remand. Because *Lugo*, *supra*, held that common potholes are open and obvious conditions as a matter of law, *Id*. at 520, it primarily sets forth a clarification of the "special aspects" exception to the doctrine. *Id*. at 517-520. Accordingly, we were required to review the condition at issue to determine whether it was, in fact, an open and obvious condition before determining whether *Lugo* impacted the resolution of this matter. During the course of our subsequent review and contrary to our previous holding, it became apparent that defendants failed to establish that no genuine issue of material fact existed regarding the open and obvious nature of the condition, i.e., the wet stairs. The Supreme Court remand order empowered us to reconsider the entire matter and we will not apologize for performing a thorough review.

In light of our conclusion, we consider the trial court's alternate finding that there was no genuine issue of material fact regarding whether defendants had the requisite notice to remedy the condition. We disagree. In their motion for summary disposition defendants argued, first, that plaintiff's claim that she fell on wet stairs at 8:30 p.m. lacked credibility because it did not begin to rain until 10:00 p.m. and, second, if she fell at 10:00 p.m., defendants did not have notice of the condition. However, the evidence presented is conflicting and inconclusive regarding both the time of the incident[2] and the time that it began to rain.[3] Further, neither this Court nor the trial court may make credibility determinations or resolve questions of fact on a motion for summary disposition. See *Haliw v Sterling Heights*, 464 Mich 297, 315; 627 NW2d

[2] An accident report and plaintiff's deposition testimony indicate that plaintiff fell at 8:30 p.m. but plaintiff's statement to an insurance adjuster indicates that she fell at 10:00 p.m.

[3] The three sources of weather data that defendants submitted in support of their motion do not include legends. The records presumably referencing Detroit Metropolitan Airport indicate that it was cloudy from 8:00 p.m. through 11:00 p.m. and that there was thunder at 10:00 p.m. The record does not chart precipitation. The records presumably referencing Detroit City Airport indicate that data was missing for the 8:00 p.m. and 9:00 p.m. hours and, apparently, that a thunderstorm occurred at 10:00 p.m. The record does not chart precipitation. The records from National Climatic Data Center indicate that at 9:00 p.m. there was precipitation but no precipitation or thunderstorm is noted for the hours of 10:00 p.m. and 11:00 p.m.

581 (2001); *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Consequently, there is a genuine issue of material fact as to whether defendants had actual or constructive notice that the stairs were wet. See *Bertrand, supra*.

In consideration of our resolution of this matter we need not consider plaintiff's other issue on appeal.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

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Defendants-Appellees.	ON REMAND

Before: Sawyer, P.J., and Cavanagh and Fitzgerald, JJ.

SAWYER, P.J. (*dissenting*).

I dissent.

In our original opinion, we concluded, over my colleague's dissent, that the trial court correctly determined that there was no genuine issue of material fact regarding the applicability of the open and obvious danger doctrine. Thereafter, the Supreme Court vacated our opinion and remanded for reconsideration in light of their more recent decision in *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001).

On remand, the majority now reverses, concluding that there is a genuine issue of material fact regarding plaintiff's knowledge of the defective condition, a conclusion that is the direct opposite of what this Court decided in our first opinion. However, the majority does not reach this conclusion because of a change in the law announced in *Lugo*. Indeed, although the Supreme Court remanded this case for reconsideration in light of *Lugo*, the majority spends little time considering *Lugo*. In fact, the only consideration given to *Lugo* by the majority is to cite it for the proposition that there is no duty to protect invitees from open and obvious dangers unless the danger poses an unreasonable risk of harm. *Ante*, *slip op* at 2.

This case was not remanded to us to give plaintiff another bite at the apple on the question whether our original decision was correct. It was remanded to us to determine if, in

light of *Lugo*, a different result would be reached. It is clear from reviewing *Lugo* that it does not mandate a justifiable reason to change our original result.

I therefore stand by our original decision and would affirm.

/s/ David H. Sawyer