STATE OF MICHIGAN

COURT OF APPEALS

DENNIS AHOLA and SANDRA AHOLA, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED December 15, 2009
v	No. 283576 Genesee Circuit Court
GENESEE CHRISTIAN SCHOOL, Defendant-Appellant/Cross-Appellee.	LC No. 07-086506-NO

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Plaintiff Dennis Ahola left the building housing defendant Genesee Christian School on a February evening, missed two steps that he could not see in the darkness, and suffered injury. In a subsequent complaint, plaintiff lodged premises liability and ordinary negligence counts against defendant.[1] The circuit court granted defendant summary disposition of the premises liability claim pursuant to MCR 2.116(C)(10), but denied summary disposition of plaintiff's ordinary negligence count. Defendant appeals by leave granted challenging the court's refusal to dismiss the ordinary negligence claim, while plaintiff cross appeals the court's dismissal of his premises liability count. We reverse and remand for further proceedings.

I

On February 8, 2005, plaintiff and his two sons attended a basketball game hosted by defendant. Plaintiff recounted at his deposition that it was light outside when he and his children arrived at the school. Because the parking lot directly in front of the building appeared full, plaintiff parked near the school's northwest entrance. Plaintiff and his sons entered the building through the entrance nearest their car, and ascended two or three steps before passing through the doors leading into the school.

[1] Because plaintiff Sandra Ahola raised a derivative loss of consortium claim in the complaint, the singular "plaintiff" hereinafter refers to Dennis Ahola.

Around 9:30 p.m., plaintiff and his boys began to walk back to their car. Plaintiff noted that the end of the school hallway nearest the northwest door was in near darkness. Plaintiff recalled that he saw no overhead lights illuminated and that the only available light emanated from a vending machine. When plaintiff opened the exit door and began to walk outside, he realized that it was "pitch-black. … You couldn't see anything. It was black. . . . It was just like an ocean of black." Plaintiff testified that he could not see the steps or the cracks in the sidewalk near the steps. He described that while walking toward the parking lot, "I missed the steps. I fell forward. I was stumbling, trying to catch my balance, and my foot caught on . . . the broken concrete, sidewalk crack, whatever there, and that slammed me right down. I mean, I hit hard." Other evidence submitted by plaintiff supported a reasonable inference that the outdoor lights intended to illuminate the area of the steps either had malfunctioned that evening or that the school's maintenance staff had not turned them on.

II

We review de novo a circuit court's summary disposition rulings. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion invoking subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

III

Defendant maintains that the circuit court erred in construing Count III of plaintiff's complaint as setting forth a negligence count independent of the premises liability claim in Count I. "In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct . . . ." *Laier v Kitchen*, 266 Mich App 482, 493 (opinion by Neff, J.); 702 NW2d 199 (2005). If the plaintiff suffers injury arising from a condition on land, rather than an activity conducted on the land, the claim sounds in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

Here, the entirety of complaint Count III alleges the following:

> 24. Plaintiff hereby realleges and incorporates by reference paragraphs 1-23 above.
>
> 25. That Defendant was under a duty to provide a well lit entrance/exit.
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> 26. *That Defendant breached the duty by negligently failing to provide lighting at an exit way*.

> 27. That as a result of that negligence Plaintiff sustained those injuries set forth in paragraph 17 above. [Emphasis added.]

The italicized contention that defendant "negligently failed to provide lighting at an exit way" plainly and directly emanates from defendant's duty as the owner, possessor, or occupier of the school property. As in *James*, the allegation in Count III avers that plaintiff suffered injury arising from a condition on the land, rather than an activity conducted on the land, and the claim thus sounds in premises liability. *Id*. at 18-19. We conclude that the circuit court erroneously construed Count III as an ordinary negligence claim distinct from the premises liability claims in Count I of the complaint.

IV

We next consider plaintiff's cross-appeal assertion that the circuit court incorrectly dismissed the premises liability allegations on the basis that the open and obvious danger doctrine barred these claims. "A common-law negligence claim requires proof of (1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages." *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009).

As an invitee, plaintiff was entitled to "the highest level of protection" imposed under premises liability law. *James*, 464 Mich at 20, quoting *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The landowner's duty encompasses not only warning an invitee of any known dangers, "but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs . . . ." *James*, 464 Mich at 19-20, quoting *Stitt*, 462 Mich at 597. Because plaintiff constituted a business invitee, defendant owed him a duty to exercise reasonable care to protect him against injury caused by unreasonably dangerous conditions on the land. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A premises owner is subject to liability if it breaches its duty to protect an invitee against an unreasonable risk of harm, "in spite of the obviousness or of the plaintiff's knowledge of the danger[.]" *Bertrand v Alan Ford, Inc*, 449 Mich 606, 624; 537 NW2d 185 (1995). In *Bertrand*, *id*., the Supreme Court explained this principle by invoking the following example of a danger known to an invitee from 2 Restatement Torts, 2d, § 343A, comment f, illustration 3, p 221:

> The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. *If it is found that this could reasonably be anticipated by A, A is subject to liability to B.* [Emphasis added.]

The Restatement prefaces this illustration with the observation,

> There are … cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not

> relieved of the duty of reasonable care which he owes to the invitee for his protection. …
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. … In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. … It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. [2 Restatement Torts, 2d, § 343A, comment f, p 220.]

The Supreme Court summarized in *Bertrand* that "if the risk of harm remains unreasonable, despite its obviousness *or despite knowledge of it by the invitee*, then the circumstances may be such that the invitor is required to undertake reasonable precautions." *Id*. at 611 (emphasis added).[2]

In *Riddle*, 440 Mich at 96, our Supreme Court defined open and obvious hazards as dangers known to the invitee or "so obvious that the invitee might reasonably be expected to discover them." When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence, because "an obvious danger is no danger to a reasonably careful person." *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474; 499 NW2d 379 (1993). The test for determining an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection? *Id.* at 475. Our Supreme Court has explicitly cautioned that when applying this test, "it is important for courts … to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001).

In *Hughes v PMG Building, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997), this Court also emphasized the objective focus of an open and obvious danger inquiry: "The test … that it is 'reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection,' is an objective one." (Citation omitted). The plaintiff in *Hughes*, a roofer, stepped onto a small porch overhang that lacked adequate support. The overhang collapsed and

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[2] The dissent contends that because plaintiff "was aware of the steps at issue having successfully navigated them three hours earlier" in the daylight, defendant owed plaintiff no duty to illuminate the steps after dark. *Post* at 2. This notion is simply incompatible with *Bertrand*'s recognition that an invitee's "knowledge" of an obvious danger does not as a matter of law eliminate an unreasonable risk of harm, the Restatement's acknowledgement that a reasonable person may "forget what he has discovered," and the comparative negligence statute, MCL 600.2958, which provides that in an action based on tort, "a plaintiff's contributory fault does not bar that plaintiff's recovery of damages."

the plaintiff fell, sustaining severe injury. *Id*. at 3. This Court framed the correct inquiry as, "not … whether plaintiff should have known that the overhang was hazardous, but … whether a reasonable person *in his position* would foresee the danger." *Id*. at 11 (emphasis supplied). In *Abke v Vandenberg*, 239 Mich App 359, 363-364; 608 NW2d 73 (2000), this Court recognized that darkness may impair a plaintiff's visibility to the extent that an otherwise observable danger no longer qualifies as open and obvious. See also *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) ("The fact that defendant's vacant warehouse was not adequately lighted was both obvious and known to plaintiff, but there was no evidence that he was aware or had reason to anticipate that there were interior loading docks that otherwise were not marked or blocked off.").

Here, the evidence establishes that plaintiff exited into a completely dark area in which the steps were not visible on casual inspection. Defendant should have reasonably anticipated that darkness over the steps in the school's unlit exit route amounted to an unreasonably dangerous condition that could result in injury. The fact that plaintiff had negotiated these steps three hours earlier, in daylight, neither eliminates the danger posed by unlit steps at night nor negates the landowner's duty. *Bertrand*, 449 Mich at 611. Surely, the primary purpose for lighting an exit area is to provide invitees with a safe route of ingress and egress when natural light is unavailable. The risk of harm posed by the absence of light here qualifies as unreasonable despite its obvious nature, given the simple remedial measure that could have prevented injury—turning on or repairing the lights. Consequently, we conclude that whether defendant unreasonably maintained its premises on the evening of the basketball game represents an issue for the jury.

Contrary to the circuit court's determination, the open and obvious danger doctrine does not eliminate defendant's duty to reasonably maintain the lighting around the steps. "[T]he open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Lugo*, 464 Mich at 516. Application of the requisite objective standard of open and obvious dangers mandates a determination whether a reasonable person *in plaintiff's position* that evening would have discovered the steps. Because the available evidence reasonably gives rise to a factual dispute regarding what a reasonable person in plaintiff's position should have seen on casual inspection, a jury must make this determination. *Abke*, 239 Mich App at 362-363. Case law from *Lugo* to *Novotney* teaches that a reviewing court must ascertain if factual questions exist with regard to whether a reasonable person in plaintiff's position, exiting from the northwest doors, would have seen the steps when casually inspecting his path of travel. *Novotney*, 198 Mich App at 475. See also *Lugo*, 464 Mich at 523:

> The trial court's remarks indicate that it may have granted summary disposition in favor of defendant because the plaintiff "was walking along without paying proper attention to the circumstances where she was walking." However, in resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious . . . . [Emphasis in original.]

In summary, reasonable minds could differ about whether the existence of the steps qualified as obvious to a reasonable invitee exiting the school that night in "pitch black" darkness, on *casual inspection* of the premises. See M Civ JI 19.03. Because the facts give rise

to a jury question concerning the open and obvious nature of the steps in the darkened exit area, we conclude that the circuit court incorrectly granted defendant summary disposition of the premises liability count under MCR 2.116(C)(10).

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

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher

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MARKEY, J., (concurring in part and dissenting in part).

I concur in Part III of the majority opinion which concludes that the trial court erred by considering plaintiffs' ordinary negligence claim separate from that of plaintiffs' premises liability claim because both theories are based on the condition of the premises. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). I respectfully dissent, however, from the conclusion that the trial court erred in finding plaintiffs' premises liability claim barred by the open and obvious doctrine. Consequently, I would reverse the trial court in part as to plaintiffs' Count III, affirm the trial court in part as to plaintiffs' Count I, and remand for entry of summary disposition for defendant.

I believe the majority erred in its analysis of the open and obvious doctrine by not fully considering the statement of that doctrine in *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). With respect to a premises condition, "where the dangers *are known to the invitee* or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id*. at 96 (emphasis added). Here, the facts are undisputed that plaintiff was aware of the steps at issue having successfully navigated them three hours earlier. See *Ante* at 6 n 2. The majority errs by dismissing plaintiff's knowledge of the steps as an issue of contributory negligence for a jury to determine. *Id*. Rather, the open and obvious doctrine goes to the very heart of whether defendant owes a duty to plaintiff at all. See *Riddle*, *supra* at 96; *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001) ("the open and obvious doctrine" is "an integral part of the definition of that duty"). And, duty is a question of law for the court to decide when there are no genuine issues of material fact. *Moning v Alfono*, 400 Mich 425, 436-437; 254 NW2d 759 (1977). Only when a premises condition has special aspects that make it unreasonably dangerous despite its being open and obvious so that it

presents a "uniquely high likelihood of harm or severity of harm if the risk is not avoided" does the duty to protect invitees from that risk still apply. *Lugo, supra* at 517-519.

I also disagree with the majority's conclusion that the disputed question of fact regarding the extent of illumination available at the time of plaintiff's fall creates a material question of fact whether the steps were unreasonably dangerous. A risk does not become unreasonably dangerous because a "simple remedial measure," i.e. more light, might be available to render the condition safer. *Ante* at 6-7. Rather, "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." *Lugo, supra* at 519. The majority's determination that defendant had "a duty to reasonably maintain the lighting around the steps," *ante* at 7, is not supported by the caselaw it cites; both *Abke v Vandenberg*, 239 Mich App 359, 363-364; 608 NW2d 73 (2000) and *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 127; 492 NW2d 761 (1992) are factually distinguished from the facts of the instant case.

In *Abke*, the plaintiff fell off a loading dock in the defendant's supply barn of which the plaintiff was not aware. In addition to a disputed questions of material fact existing regarding the condition of the lighting and whether a reasonably observant person would have appreciated the risk on casual inspection, *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), the *Abke* Court concluded that the premises in that case near a loading dock, might have been unreasonably dangerous even if the plaintiff had been aware of it. *Abke*, *supra* at 363-364. Similarly, in *Knight*, the plaintiff fell from a loading dock of which he was unaware and had no reason to anticipate. *Knight*, *supra* 127. Further, there was "no evidence that [the] plaintiff could intelligently choose not to encounter the hidden risk posed by the recessed loading dock." *Id*. Not so here, where plaintiff not only was aware of the steps outside the exit, he also chose to use them as a matter of convenience. He could easily have avoided the risk posed by the allegedly dark exit by leaving the building via its middle exit, which plaintiff conceded had more light available.

"[T]he 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). Indeed, steps and differing floor levels in buildings are so common that a premises owner does not owe a duty to make ordinary steps accident proof or to protect invitees from any harm they present unless special aspects render the steps or differing floor levels unreasonably dangerous. *Id*. at 614-617. I conclude, upon viewing the evidence in a light most favorable to plaintiff, that there is no genuine issue of material fact: Plaintiff fell on steps that were open and obvious with no special aspects. Plaintiff traversed the steps when entering the school earlier in the evening before it was dark in order to attend the basketball game, so plaintiff had the opportunity to take note of the steps before his unfortunate fall. See *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003), abrogated in part on other grounds *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007). The *O'Donnell* Court found that the stairs that the plaintiff attempted to traverse in the dark were open and obvious because plaintiff had viewed and used the stairs earlier in the evening. Here, plaintiff knew or should have known about the steps, passed by an exit with more light, and knew that it was dark when he walked outside, but he proceeded to walk forward into the darkness anyway. Thus, plaintiff knowingly encountered the danger of walking into the darkness.

Moreover, accepting plaintiff's claim regarding the lack of light, the undisputed facts establish it was not so dark that a reasonably prudent person would not have been able to safely traverse the steps. Plaintiff testified that it was not so dark that he was unable to see his feet; he could also see his sons who exited the building with him. One son, Derek Ahola, testified that it was not so dark that he was concerned about his own safety when he was walking. Both sons were able to safely naviagate the steps. Derek also conceded that if his father were paying closer attention to where he was walking, he might have seen the steps. Thus, I conclude the undisputed evidence establishes that an average person of ordinary intelligence would have discovered upon casual inspection the risk of walking into the darkness. *Joyce*, *supra* at 238. Consequently, even accepting plaintiff's claim of darkness, I conclude the steps were an open and obvious condition. *Id*. at 238-240; *O'Donnell*, *supra* at 575-576.

The steps and darkness here were not "effectively unavoidable," *Lugo*, *supra* at 518, nor does the danger of stumbling and falling because of not seeing two steps present an unreasonably high risk of severe injury. *Id*.; *Joyce*, *supra* at 241-243. In other words, falling to the ground under these circumstances, as opposed to falling an extended distance, like that of falling off a loading dock in *Abke*, *supra*, and *Knight*, *supra*, does not present an unreasonably high risk of severe injury. Consequently, there were no special aspects giving rise "to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" to avoid application of the open and obvious danger doctrine. *Lugo*, *supra* at 519.

I would reverse the trial court regarding its ruling that plaintiff set forth a viable separate claim of ordinary negligence, affirm the trial court's ruling that plaintiff's premises liability claim is precluded by the open and obvious doctrine, and remand for entry of summary disposition for defendant. We do not retain jurisdiction.

/s/ Jane E. Markey