

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

Concrete Steps Do Not Fall within the Purview of the Special Aspects Doctrine

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Plaintiff fell while leaving Oakwood Healthcare, Inc.'s, (hereinafter, "Defendant") facility in October 2013. Plaintiff alleged that she was walking on what appeared to be level concrete when she encountered unmarked steps that were not readily apparent. Plaintiff argued that her view of the steps was obscured by an optical illusion created by the unmarked steps. At her deposition, Plaintiff admitted that she (1) failed to notice the steps; (2) that the weather was dry and it was still daylight at the time of her fall; and (3) that nothing obstructed her view of the steps. In support of her claims, Plaintiff argued that the steps created an unreasonable risk of harm as they were not in compliance with the Life and Safety Code and the Standard Practice for Safe Walking Surfaces.

Defendant filed a motion for summary disposition arguing that Plaintiff's claims, although labeled as an ordinary negligence action, sounded in premises liability. Accordingly, Plaintiff's claims were barred as the alleged defective steps were open and obvious. Defendant further argued that no special aspects made the steps unreasonably dangerous. The trial court granted Defendant's dispositive motion, opining that there was nothing "unusual" about the character, location, or surrounding conditions of the steps and therefore the steps did not present an unreasonable risk of harm.

The appellate court affirmed the order granting Defendant's dispositive motion on three bases – (1) Plaintiff's claim sounded in premises liability as opposed to ordinary negligence; (2) the danger presented by falling on a step is considered open and obvious unless there is something unusual about the steps that makes the risk of harm unreasonable; (3) there was nothing unreasonably dangerous about the steps, and therefore, the Special Aspects Doctrine did not apply.

SECRET WARDLE NOTES

To circumvent the rigid proofs required to succeed in premises liability actions, plaintiffs often plead ordinary negligence, which is negligence stemming from a defendant's conduct as opposed to a defect on the land. In an unpublished opinion released November 17, 2016, *Needham v Oakwood Healthcare, Inc.*, (Docket No. 328293), the Court of Appeals affirmed that injuries resulting from an alleged defect on the land sound exclusively in premises liability. The *Needham* case also held that concrete steps are open and obvious and do not fall within the purview of the Special Aspects Doctrine, unless there is something unusual about the character, location, or surrounding conditions of the steps.

As an initial matter, the appellate court noted that, although Plaintiff labeled her claim as a negligence action, it was clear after reading her complaint as a whole that Plaintiff's claims sounded in premises liability. Indeed, when an "injury develops from a condition of the land, rather than emanating from an activity or conduct that created the condition on the property, the action sounds in premises liability." *Woodman v Kera, LLC*, 280 Mich. App. 125, 153 (2008). Accordingly, the trial court properly applied principles of premises liability when granting Defendant's motion.

Under Michigan law, a landowner's liability does not extend to dangers that are "open and obvious." *Price v Kroger Co. of Mich.*, 284 Mich App 496, 500-501 (2009). A condition is "open and obvious" when an average user with ordinary intelligence would have discovered the danger and risk upon casual inspection. *Hoffner v Lanctoe*, 492 Mich 450 (2012). The relevant inquiry is an objective test – whether a reasonable person in plaintiff's position would have foreseen the alleged dangerous condition – not whether a particular plaintiff would have foreseen the danger. *Lair v Kitchen*, 266 Mich App 482, 496 (2005).

The danger presented by tripping and falling on a step is considered an open and obvious danger unless there is something unusual about the step that presents an unreasonable risk of harm. *Bertrand v Alan Ford*, 449 Mich 606 (1995); see also, *Lugo v Ameritech Corp., Inc.*, 464 Mich 512, 521 (2001). "[O]nly 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*, 464 Mich at 519. "When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that *unreasonable* risk of harm." *Hoffner*, 492 Mich at 461.

Upon reviewing the evidence proffered by Plaintiff, the appellate court held that it was clear Defendant's steps presented an open and obvious danger that a reasonable person would have discovered upon casual inspection. Further, upon reviewing the photographs submitted to the court, it was clear that black metal handrails existed on each side of the steps. Further, photographs depicted a nearby ramp, which was adjacent to the steps. All factors considered, the presence of handrails and ramp combined were enough to put a reasonable person on notice of an approaching drop in elevation. In essence, the court refused to adopt Plaintiff's subjective perspective of the steps, and instead, provided the longstanding objective standard defined in *Lair*.

Further, the appellate court determined that Plaintiff failed to establish that the steps contained special aspects that created a high likelihood of harm or severity of harm. The court looked to Plaintiff's own testimony, wherein she testified that she failed to notice the steps, the weather was dry that day and it was daylight, and nothing physically obstructed her view of the steps. Further, the court specifically noted that "it cannot be expected that a typical person falling a distance of several feet would suffer severe injury or a substantial risk of death." *Corey v Davenport College of Business* (on remand), 251 Mich App 1, 7 (2002).

Finally, Plaintiff contended that the steps presented an unreasonable risk of harm because they were not in compliance with the Life and Safety Code and the Standard Practice for Safe Walking Surfaces. In response, the appellate court held that, even assuming there was a code violation, the proper inquiry remains whether there were special aspects that gave rise to an unreasonable risk of harm. In sum, the steps did not

contain special aspects that made them unreasonably dangerous. Accordingly, Plaintiff's claims were properly dismissed.

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