MICHIGAN Lawyers Weekly

COA: Suit may proceed after injury at party

Plaintiff fell on eight-inch drop into dark room

By: Lee Dryden in News Stories March 7, 2017

A lawsuit regarding a fall at a dinner party will continue after a split Michigan Court of Appeals panel ruled there was a question of fact whether a step should have been discovered upon casual inspection.

The majority reversed the Oakland County Circuit Court in Blackwell v. Franchi (MiLW No. 07-93917, 4 pages). Plaintiff Susan Blackwell was injured when she fell while entering a dark "mud room" — with an eight-inch drop-off — to set down her purse.

The defendant won summary disposition from the trial court in the premises liability case when arguing that the drop-off was open and obvious so there was no duty to warn the plaintiff about it.

Plaintiff's attorney Lindsay F. Sikora of the Oliver Law Firm in Livonia said she focused on "the objective standard of the open and obvious doctrine."

"Witness testimony established an average person in my client's position would not have seen the hazard," she said. "This created a question of fact regarding whether my client should have discovered the condition and allowed us to prevail in the Court of Appeals."

Defense attorney Steven M. Couch did not respond to a request for comment.

The Jan. 31 published opinion was written by Judge Douglas B. Shapiro, joined by Judge Elizabeth L. Gleicher. Judge Kirsten Frank Kelly dissented.

COA analysis

The plaintiff presented depositions "from several other party guests establishing that the drop-off into the mud room was not discoverable upon casual inspection at the time she encountered it," the opinion stated.

One guest who was walking with the plaintiff when the fall occurred testified they didn't realize there was a step down because there were no lights on in that room. She stated she likely would have fallen had she been walking ahead of the plaintiff.

Another guest, who did not see the plaintiff fall, agreed "the hallway into the mud room looked level and that the height differential could not be seen." She described the mud room as "very dark."

"Additionally, while the deposition testimony of the guests was not unanimous as to the lighting condition of the hallway adjacent to the mud room, everyone, including defendant Dean Franchi, was in agreement that the light inside the mud room was turned off at the time of plaintiff's fall," the opinion stated. "The photographs submitted by the parties also demonstrate that the drop-off is not easily seen, even with sufficient lighting.

The defendants argued that the height differential was open and obvious because "plaintiff could have turned on a light switch that was located at the entry to the mud room that would have illuminated the mud room."

"However, this is not a duty question but is instead a question of comparative negligence," the opinion stated, citing Lamp v. Reynolds from 2002.

The court referenced the 1993 case of Novotney v. Burger King Corp in stating that the open and obvious doctrine "focuses on the condition of the premises and the hazard as they existed at the time the plaintiff encountered them."

"There is no additional requirement that the plaintiff take reasonable steps to improve the visibility of the alleged hazard," the recent opinion stated. "Defendants' argument that plaintiff should have discovered and turned on the light switch is not merely a statement that plaintiff should have looked where she was going but is a statement that she should have altered the premises' condition by turning on the lights.

"Because the determination of whether defendants' owed plaintiff a duty to warn of the drop-off will depend on how the conflicting testimony regarding whether the drop-off was open and obvious is resolved, the conflicting testimony must be submitted to the jury, and the trial court's grant of summary disposition to defendant was erroneous," the court ruled while citing Bertrand v Alan Ford, Inc from 1995.

Dissent

Kelly dissented, writing that the "relevant inquiry is not whether the step was open and obvious, but whether the dark room was open and obvious."

During oral arguments, the plaintiff's attorney conceded that there was nothing remarkable about the step and that it would have been open and obvious had the room been properly lit, Kelly wrote.

"Plaintiff claims that the step was a danger because it was 'unknown.' However, it was unknown because plaintiff purposefully entered a dark room to confront unidentified dangers," the dissent stated. "The danger was not the stairs, but the dark room itself, which could have contained a variety of other unspecified and common-place 'dangers,' such as laundry baskets or toys.

"The fact that the room was not lit was open and obvious. Plaintiff should have realized the danger entering a dark and unknown room posed."

Concurrence

Gleicher concurred separately in response to the dissent. She wrote that Kelly's statement about the "relevant inquiry" stated the law inaccurately.

"The danger on defendant's land was a step shrouded in darkness," Gleicher wrote. "The readily apparent darkness of the coat room would have presented no danger had the step not been there.

"In the seminal case of Lugo v Ameritech Corp, Inc, 464 Mich 512, 516; 629 NW2d 384 (2001), our Supreme Court plainly enunciated that the duty of a premises possessor relates to risks of harm 'caused by a dangerous condition on the land.'"

The "dangerous condition" in this case is the drop-off that could not be seen on "casual inspection by an ordinary user of the premises," she wrote.

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