CASENOTE: MSJ AFFIRMED FOR LANDOWNER-- CONDITION OF STEP OPEN AND OBVIOUS. LANDOWNER NOT INSURER OF SAFETY. NO DUTY TO PERFORM HOME INSPECTION BEFORE PUTTING HOUSE UP FOR SALE.

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LAWATYOURFINGERTIPS(R)

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANDREA GORDON, Plaintiff and Appellant, v. JEFFREY ALLEN BERNARD et al., Defendants and Respondents.	B272072 (Los Angeles County Super. Ct. No. BC529060)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank Johnson, Judge. Affirmed.

Douglas Adam Linde and Erica Allen Gonzales for Plaintiff and Appellant.

Law Office of Cleidin Z. Atanous and Cleidin Z. Atanous for Defendants and Respondents.

Plaintiff Andrea Gordon fell on a stair while touring a home offered for sale. She brought suit against the homeowners and their real estate agent alleging premises liability and negligence. The trial court granted summary judgment for defendants, on the basis that the homeowners had no notice, actual or constructive, that there was any danger to the stair. Gordon appeals. We conclude the stair was open and obvious as a matter of law and, even if it were not, the homeowners had no notice of any dangerous condition. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Stair

This case turns on an understanding of the location of the stair over which Gordon fell. Although the stair was not part of the home's staircase, the staircase is a useful landmark in locating the stair. The house has a staircase going up to its second level. If one is walking down the stairs, the left-hand side of the stairs is a wall; the right-hand side is a handrail – the space is otherwise open to the family room on the first floor. At the bottom of the stairs is a hallway perpendicular to the stairs. If one

makes a 90 degree right turn upon reaching the hallway, there is a single step down into the family room. It is this step on which Gordon fell, although she had not come from the staircase.

If, instead of going right at the bottom of the stairs, one goes left, there is a hallway, with a bathroom coming off of it, and stairs down to the garage at the end of the hall. Gordon had come from this direction – having entered the hallway from the garage and gone into the bathroom – and fell on the single stair downward into the family room.

Significantly, however, this was not her first view of the stair. Instead, she had seen it from the family room upon entering the house. From this angle, the stair could not have been more noticeable. The family room wall, as well as the side of the banister going to the second floor, is white. The riser of the single stair, leading from the family room to the hallway, is also white. In contrast, the floor of both the family room and the hallway is an engineered hardwood. Close-up photographs show that the hardwood of the hallway extends slightly over the top of the stair (into the family room) in a bullnose, which, when viewed from a distance, further contrasts with the white riser and emphasizes that there is, in fact, a change in height from the family room to the hallway.

2. *Gordon's Fall*

On July 13, 2013, Gordon "slipped and fell on or around" the step. The house was owned by defendants Jeffrey and Lili Bernard. The Bernards had offered the home for sale through real estate agent Palma Garcia and other related defendants.

Gordon was not herself in the market for a new home, but was accompanying her friend, a potential buyer. The friend's real estate agent let them into the house by using her lockbox key.

None of the defendants were present in the house at the time of Gordon's fall.

Gordon entered the house through the front door. Upon entering the house, she was "in view of the step and hallway where she would eventually fall." The sun was shining and sunlight was coming through windows in the front of the house. Gordon went out to the backyard of the house, then re-entered from the garage, and came in the hallway from the far end. After stepping into the bathroom, she proceeded down the hallway toward the family room, and fell.

The precise location and mechanism of Gordon's fall are unknown, although she asserts she fell somewhere in the area of the step. According to Gordon's declaration, she "fell on [the] single stair." Gordon suffered a broken leg in her fall.

3. *Gordon's Complaint*

On November 27, 2013, Gordon filed a complaint, alleging a cause of action in premises liability/negligence against the Bernards, and a cause of action in general negligence against Garcia and the other real estate defendants.[4] She alleged the step was "an unexpected and visually indistinguishable 5.6 [inch] step-down change in elevation" which constituted an unreasonable risk of harm. She alleged the Bernards "knew, or through

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[4] These are broker Monterey Real Estate Investments, Inc.; its president Michael Paul Ribons; and Garcia's husband and assistant, Sergio Garcia. Garcia and her husband were sued both individually and doing business as the Garcia Group of MRI Property Management and Investments. As Palma Garcia was the Bernards' real estate agent, we use "Garcia" to refer to her.

the exercise of reasonable care, should have known" the dangerous condition created an unreasonable risk of harm. She alleged all defendants failed to remedy the condition or adequately warn of it.

4. *Defendants' Motion for Summary Judgment*

In November 2015, defendants moved for summary judgment on multiple grounds. Among others, defendants took the position that the step on which Gordon fell was open and obvious, resulting in no duty for defendants to warn of or remedy it. They submitted photographs of the step.

Additionally, the Bernards moved on the basis that they had no notice of any dangerous condition in their home. While they obviously knew of the step itself, they argued that they had no notice that it presented any danger. Specifically, Jeffrey Bernard submitted a declaration stating that his wife's parents had bought the house in 1981; he and his wife had moved there in 1993 and took ownership in 1999; and they rented out the house in 2011, prior to selling it in 2013. During all this time, neither Jeffrey nor Lili was aware of any problems in the area where Gordon fell. The Bernards had lived in the house for 15 years "without experiencing, witnessing, or hearing of any problems with the step at issue in this case."

5. *Gordon's Opposition*

In opposition, as to the issue of whether the step was open and obvious, Gordon submitted the declaration of a safety expert, Kelly Golda, who stated that the step was not only a dangerous condition, but a concealed one, in that "it could be easily over-

looked by persons unfamiliar with the layout of the house." Golda testified that "there were no obvious visual cues presented to facilitate improved step identification. There was no colored tape on the nose of the stair. There were no warning signs placed nearby."

As to the issue of whether the Bernards had notice of the dangerous condition, Gordon presented legal, factual, and evidentiary arguments. Legally, she argued that the law requires only that she establish the landowners had notice of the condition itself (i.e., the stair), not its dangerousness. Factually, she suggested that the Bernards had constructive notice of the dangerousness of the step. Specifically, she presented evidence that the paperwork Garcia gave the Bernards in connection with listing their home suggested that they could get a home inspection which would inform them of concealed defects in their home. Golda, Gordon's safety expert, stated that "a reasonably competent home inspector" would have "note[d] the single stair as a dangerous condition in any report." On the evidence front, Gordon objected to Jeffrey Bernard's declaration regarding the Bernards' lack of notice, both on the basis that Jeffrey Bernard had no personal knowledge as to Lili Bernard's or her parents'

Gordon also submitted the declaration of a real estate expert who testified that, based on the photos he reviewed, a reasonably careful real estate agent would have recognized the step as a concealed dangerous condition. Curiously, the record is devoid of any evidence that Gordon's friend's real estate agent, who had let Gordon into the home, recognized the step as a dangerous condition and felt the need to warn Gordon about it.

experience in the home, and on the basis that a lack of prior accidents is not relevant on the issue of dangerousness.

6. *Defendants' Reply*

The defendants' reply was supported by a great deal of evidence. As to whether the step constituted a dangerous condition, the defendants submitted declarations of a real estate expert and an expert in "human factors," both of whom testified the stair did not present a hazard. They also submitted the declaration of a professional engineer, who concluded that both when the step was originally built and at the present time, the step complied with applicable building regulations. Additionally, they challenged the opinions of Gordon's experts, as having been based on misleading photographs, taken in inadequate light.

In order to remedy the perceived flaws in Jeffrey Bernard's declaration, defendants submitted excerpts from Lili Bernard's deposition, in which she testified that, when her parents bought the house in 1981, Lili was 14, and moved into the house with her parents. She grew up in the house and lived there continuously from 1981 to 2010. During that time, she had not known of any injuries on the stair. While she and Jeffrey owned the house, she never even knew anyone to have stumbled over it. Defendants also submitted the declaration of their tenant, who had leased the home from February 2011 through June 2013. He had guests to the house and hosted parties there, and had no knowledge of anyone tripping or slipping on the stair.

7. *Gordon's Objection*

Gordon objected to the submission of evidence in connection with defendants' reply, as untimely and depriving her of an opportunity to answer it. However, although the hearing on the summary judgment motion was not held for another four months,

Gordon made no attempt to submit additional evidence to counter the evidence submitted with defendants' reply.

8. *Hearing and Order*

At the hearing on the motion, the court indicated its tentative position was to grant the motion. The court was persuaded that the Bernards had no notice that the step in their home constituted a dangerous condition requiring remediation or warning. The homeowners therefore had no duty. From this, the court concluded that Garcia and the other real estate defendants should also be granted summary judgment.

Gordon again argued that she need not establish defendants had notice that the condition was dangerous, but only that they had knowledge of the step itself. She also argued that the Bernards should be charged with constructive notice, as a home inspection would have informed them that the step was dangerous.

The court adopted its tentative and entered summary judgment for all defendants.

9. *Judgment and Appeal*

Judgment was entered. Gordon filed a timely notice of appeal. The judgment was subsequently amended to include costs.

DISCUSSION

On appeal, Gordon challenges the court's specific reasoning underlying its grant of summary judgment. As our review is de novo, we are not concerned with the trial court's rationale. Instead, we consider the issues raised in defendants' motion. We conclude that, under the circumstances, any danger posed by the stair was open and obvious and there was therefore no duty of any defendant to warn of it. Moreover, we conclude there is no

triable issue of fact as to whether the Bernards had notice that the step constituted a dangerous condition. We therefore affirm.

1. *Standard of Review*

" 'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' [Citation.] The pleadings define the issues to be considered on a motion for summary judgment. [Citation.] As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.)

We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

2. *General Principles of Premises Liability*

Property owners have a duty to "maintain their premises in a reasonably safe condition." (*Swanberg v. O'Mectin* (1984)

157 Cal.App.3d 325, 328.) It is a duty "to exercise reasonable care in keeping the premises reasonably safe." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1206 (*Ortega*).) "To establish liability on a negligence theory against an owner for injuries caused by a dangerous condition of the property, a plaintiff must prove duty, breach, causation, and damages. [Citation.] The same concepts of duty applicable to general negligence claims apply to premises liability claims. [Citation.]" (*Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th 1134, 1139 (*Hall*).) A property owner is not the insurer of the safety of visitors. Key to establishing liability is that the owner had actual or constructive knowledge of the dangerous condition. (*Ortega, supra,* at p. 1206; *Hall, supra,* at pp. 1139-1140.)

3. *The Step Was Open and Obvious*

"As a general rule, an owner or possessor of land owes no duty to warn of obvious dangers on the property. [Citations.]" (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 126.) "[I]f a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (*Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 393.) In some cases, the open and obvious nature of a condition can be resolved on summary judgment based on photographs of the condition. In such a case, the reviewing court looks at the photographs de novo. (*Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 15.) Summary judgment cannot be granted when the court concludes either that "reasonable minds might differ regarding whether the photographs correctly depict the alleged defect and the surround-

ing environs or whether the photographs conclusively establish the defect was open and obvious." (*Ibid.*)

In this case, reasonable minds might differ regarding whether some of the photographs correctly depict the stair. The parties dispute whether, when approaching the stair from the hallway, the surface of the hallway and the surface of the family room appear sufficiently distinguished. There are questions regarding the lighting conditions in Gordon's photographs, and neither party has provided color photographs which might help resolve the matter. (See *Kasparian v. AvalonBay Communities, supra,* 156 Cal.App.4th at pp. 24-25 [factors to consider include whether photos are color or black and white, and whether the lighting conditions were similar to the conditions at the time of the incident].) However, this dispute does not prevent us from determining the stair was open and obvious as a matter of law, based on the undisputed fact that Gordon was "in view of the step" from the family room side when she entered the house.

There were no allegations that the step was defectively constructed or that there was a slippery foreign substance on it. The only thing allegedly defective about the step is that it was there – that is, that the step was a 5.6 inch change in elevation. In and of itself, a change in elevation is not dangerous. What makes a change in elevation dangerous is when it is unexpected – if lighting conditions and other markings are such that the step cannot be seen, it may be dangerous. (*E.g. Markewych v. Altshules* (1967) 255 Cal.App.2d 642, 645, 648 [plaintiff's verdict supported when plaintiff tripped over a step which was unpainted and unmarked, in dark conditions].) If the step itself is open and obvious, there can be no danger arising from it. Here, Gordon first saw the step from the family room. From that view, the step

could not be more obvious. The white riser contrasts with the wood floor on both the family room and the hallway; the staircase going up serves as a useful reminder as to the location of the step; and there is no suggestion in the record of any furniture blocking the view. Reviewing the photographs, we conclude as a matter of law that this step was open and obvious. Our conclusion might be different if Gordon first approached the step from the hallway; having first seen it from the family room, however, it was not concealed.

Gordon suggests that even when the open and obvious quality of a dangerous condition absolves a defendant from the duty to warn about it, the defendant may still have a duty to remedy it. Case authority holds that a landowner may still have the duty to remedy an open and obvious danger when it is foreseeable that – even despite its obviousness – it may still cause injury, such as when necessity requires people to nonetheless encounter the danger. (*Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184.) Yet this is true when the condition has an inherent danger to be encountered, such as when a wet, slippery surface is the only means of entering a government building. (*Id.* at p. 1185.) Here, the stair was only dangerous when it was not anticipated. There was no danger in encountering an obvious stair, and therefore no duty to remedy it.

4. *The Bernards Had No Notice the Stair Was Dangerous*

Even if a triable issue of fact existed as to obviousness, we would still conclude that the Bernards were entitled to summary judgment on the basis that they had no notice – actual or constructive – that the stair could be unexpected and therefore dangerous.

As noted above, a property owner has no liability unless the plaintiff establishes the owner had actual or constructive notice of the dangerous condition. Gordon takes the position that knowledge of the condition, but not its dangerousness, is sufficient. This is not the law. To be sure, in some cases, such as when the dangerous condition is a foreign substance on the floor, notice of the condition implies notice of its dangerousness. (E.g., *Ortega, supra,* 26 Cal.4th at p. 1203.) But when the condition is alleged to be a structural element, such as a stairway, the plaintiff must "prove not only that the [structure] was dangerous but that the defendant knew or should have known that it was." (*Laird v. T. W. Mather, Inc.* (1958) 51 Cal.2d 210, 220 (*Laird*).)

Here, through the declaration of Jeffrey Bernard, the deposition testimony of Lili Bernard and, to a lesser extent, the declaration of their tenant, the Bernards established that they had decades of experience with numerous people encountering the step and no knowledge of it having presented a hazard to anyone. While a lack of accident history is inadmissible to establish a lack of dangerousness (*Thompson v. B. F. Goodrich Co.*

While it clearly would have been preferable to have offered Lili Bernard's deposition excerpts and the tenant's declaration in connection with defendants' summary judgment motion, there is no absolute bar to submitting evidence in connection with a summary judgment reply, and the trial court has discretion to consider it. (*Weiss v. Chevron, U. S. A., Inc.* (1988) 204 Cal.App.3d 1094, 1099.) Here, the trial court's order specifically references Lili Bernard's testimony, indicating that the court exercised its discretion to consider it. On appeal, Gordon does not contend this was an abuse of discretion.

(1941) 48 Cal.App.2d 723, 729), it was here offered to show lack of notice of dangerousness (cf. *Laird, supra,* 51 Cal.2d at p. 220 [evidence of previous accidents must be similar if offered to establish dangerousness, no similarity requirement if offered on the issue of notice]). This established that defendants had no notice of the dangerousness of the step, and shifted the burden to Gordon to establish a triable issue of fact regarding notice.

Gordon purported to meet this issue with evidence that the Bernards knew they could obtain a home inspection, and opinion testimony that a home inspection would have revealed the step's dangerousness to the Bernards. Yet mere knowledge that a home inspection *could* be conducted does not charge the Bernards with notice of everything an inspection would have disclosed. Gordon has provided no authority for the proposition that every homeowner listing their house for sale must obtain a pre-listing safety inspection and we will not impose any such duty.

As such, the Bernards had no actual or constructive notice of any dangerousness of their step. Summary judgment in their favor was appropriate.

DISPOSITION

The summary judgment is affirmed. Gordon shall pay defendants' costs on appeal.

SORTINO, J. *

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.