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Meagher-Cox v. Winarski
N.Y.A.D. 2 Dept., 2006.

Supreme Court, Appellate Division, Second Department,
New York.

Christine MEAGHER-COX, respondent,
v.

David WINARSKI, et al., appellants.


Aug. 1, 2006.

Background: Special needs teacher at a children's center, who was injured when she fell while exiting a playground, sued the premises owners to recover damages for personal injuries. The Supreme Court, Kings County, [Schack, J.](#), entered judgment for the teacher, and owners appealed.

Holding: The Supreme Court, Appellate Division, held that a height differential of two and one-half to three-inches the playground and an adjacent asphalt parking lot was open and obvious and not inherently dangerous.

Reversed.

West Headnotes

Schools 345 

[345](#) Schools

[345I](#) Private Schools and Academies

[345k5](#) k. Property, Funds, and Liabilities in General. [Most Cited Cases](#)

Height differential of two and one-half to three-inches between a matted playground and an adjacent asphalt parking lot was open and obvious and not inherently dangerous, thus precluding imposition of liability in premises liability suit brought by a special needs teacher injured when she fell while exiting the playground; teacher entered and exited the playground with her students five days a week, she did not have any accidents or problems with the matting before her accident, and there was no expert testimony demonstrating that the matting constituted a dangerous condition.

Gold, Stewart, Kravatz, & Stone, LLP, Westbury, N.Y. ([Jeffrey B. Gold](#) and [Cheryl Spinner Kravatz](#) of

counsel), for appellants.

Baron Associates, P.C., Brooklyn, N.Y. ([Susan R. Nudelman](#) and Seth McArthur of counsel), for respondent.

[DAVID S. RITTER](#), J.P., [GABRIEL M. KRAUSMAN](#), [ROBERT A. LIFSON](#), and ROBERT J. [LUNN](#), JJ.

In an action to recover damages for personal injuries, the defendants appeal from a judgment of the Supreme Court, Kings County ([Schack, J.](#)), entered March 8, 2005, which, upon the denial of their motion for judgment as a matter of law, made at the close of evidence, and upon a jury verdict finding them 60% at fault and the plaintiff 40% at fault in the happening of the accident, is in favor of the plaintiff and against them.

ORDERED that the judgment is reversed, on the law, with costs, the motion is granted, and the complaint is dismissed.

The plaintiff tripped and fell over a two and one-half to three-inch "abrupt edge" between the matted playground located outside the Canarsie Childhood Center (hereinafter the Center) and the adjacent asphalt parking lot. The plaintiff was a special needs teacher at the Center and was exiting the playground while holding two students by the hand when she fell. She commenced this negligence action against the defendants, as owners of the premises, seeking to recover damages for her injuries.

At trial, the plaintiff testified that the condition of the matting on the playground existed for at least a year and five months prior to the accident. Further, she testified that she took her students into the playground five days a week during that time period. The defendant David Winarski testified that he did not receive any complaints about the playground area and did not notice any problems with the area when he visited the premises a couple of months before the plaintiff's accident.

The plaintiff was well aware of the height differential between the playground matting and the adjacent as-

phalt, as she entered and exited the playground with her students five days a week. This, along with other evidence introduced at the trial, demonstrated that the condition was open and obvious, as it was readily observable by the reasonable use of one's senses (*see Gaines v. Shell-Mar Foods*, 21 A.D.3d 986, 987, 801 N.Y.S.2d 376; *Jang Hee Lee v. Sung Whun Oh*, 3 A.D.3d 473, 771 N.Y.S.2d 134). Further, the plaintiff did not have any accidents or problems with the matting before her accident, and there was no expert testimony demonstrating that the matting constituted a dangerous condition. Under these facts, the height differential was open and obvious and not inherently dangerous as a matter of law (*see* *100 *Pirie v. Krasinski*, 18 A.D.3d 848, 796 N.Y.S.2d 671; *Tenenbaum v. Best 21 Ltd.*, 15 A.D.3d 646, 790 N.Y.S.2d 236; *Cupo v. Karfunkel*, 1 A.D.3d 48, 51-52, 767 N.Y.S.2d 40). Accordingly, the Supreme Court should have granted the defendants' motion for judgment as a matter of law at the close of proof and dismissed the complaint.

The defendants' remaining contentions are either unpreserved for appellate review or academic in light of our determination.

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32 A.D.3d 379, 820 N.Y.S.2d 98, 212 Ed. Law Rep. 421, 2006 N.Y. Slip Op. 06066

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