STATE OF MICHIGAN

COURT OF APPEALS

FAITHIE FRALEY, TERRY FRALEY, JR., STEVEN FRALEY and JOEY FRALEY,

Plaintiffs-Appellants,

v

VIRGINIA J. CHRISTIAN and CHRISTIAN RENTALS, INC.,

Defendant-Appellees.

UNPUBLISHED
May 29, 1998

No. 199181
Otsego Circuit Court
LC No. 95-006481-NO

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition under MCR 2.116(C)(8) and (C)(10) based on the determination that the loose carpeting on the stairwell on which plaintiff Faithie Fraley fell was an open and obvious danger and that her continued use of the stairway with knowledge of the defect was the proximate cause of her injuries.

Plaintiffs first contend that summary disposition was inappropriate because the loose carpeting constituted an unreasonably dangerous condition that defendants were obligated to repair. This Court reviews motions for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). Ordinarily, a landlord's duty to repair only exists if there is a statute or special agreement requiring him to keep the premises in good repair. *Wallington v Carry*, 80 Mich App 248, 250; 263 NW2d 338 (1977). Where the landlord retains control over part of the premises, he is under a duty to keep those parts of the premises in a reasonable state of repair. *Lipsitz v Schechter*, 377 Mich 685, 687-688; 142 NW2d 1 (1966). Thus, where the landlord retains that degree "of obligation with respect to the demised property as to indicate that control rests in him he will be held to answer for any breach of the duty to maintain the premises in a reasonably safe condition." *Whinnen v 231 Corp*, 49 Mich App 371, 375; 212 NW2d 297 (1973).

In *Mobil Oil Corp v Thorn*, 401 Mich 306; 258 NW2d 30 (1977), the Supreme Court held that the common-law rule that a lessor could not be held liable for injuries arising from a breach of a

covenant to do repairs "has been abrogated in its applicability to leases for residential dwellings with the enactment" of MCL 125.136; MSA 5.2891(16). *Id.* at 310. The Court further adopted the rule stated in 2 Restatement Torts, 2d, § 357:

> A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to person upon the land which the performance of the lessor's agreement would have prevented, and
>
> (c) the lessor fails to exercise reasonable care to perform his contract. [*Id.* at 311-312.]

In the present case, provisions in plaintiff's lease reserved unto defendants the right to enter the premises to make repairs and required plaintiffs to contact and receive defendants' written permission before they could make any alterations to the premises. There was evidence that on at least one occasion, the loose carpeting was brought to the attention of the landlord who assured that it would be repaired. We conclude that defendants intended to retain control over the premises to make repairs and therefore had a duty to keep the stairwell in reasonable repair. However, a landlord's duty is affected by the open and obvious danger doctrine.

Tenants are regarded as their landlord's invitees. *Stanley v Town Square Cooperative*, 203 Mich App 143, 149; 512 NW2d 51 (1993). Although an invitor has a duty to maintain his property in a reasonably safe condition and is subject to liability for harm caused to invitees because of a condition on the land, there is no duty to protect or warn where the danger is open and obvious except in limited circumstances. *Riddle v McLouth Steel Products*, 440 Mich 85, 90, 95-96; 485 NW2d 676 (1992). In *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), the Supreme Court outlined the general rule 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. The issue then becomes the standard of care and is for the jury to decide." *Id.* at 611. In the instant case, plaintiffs provided evidence that the carpeting slid whenever someone walked down the stairs and that, when the injured party descended the stairs, she braced herself to protect against falling. There was also evidence that the interior stairs provided the only reasonable access to the basement at the time, and that defendants had been notified about the dangerous condition but had failed to repair it. Defendants could not reasonably have expected plaintiffs to use an alternate route to the basement and could reasonably have anticipated plaintiffs' continued use of the stairway. Accordingly, the allegations taken as a whole and viewed in a light most favorable to the plaintiffs created a genuine issue of fact regarding whether the risk of harm was unreasonable despite plaintiffs' knowledge and the obvious nature of the condition "and whether defendant breached a duty to exercise reasonable care by failing to remedy the danger." *Id.* at 625.

Next, plaintiffs contend that defendants were under statutory duties under the Michigan Housing Code to abate all unsafe and unhealthy conditions in a dwelling, MCL 125.536(1); MSA 5.2891(16), and to maintain the building in a reasonably safe condition, MCL 125.538; MSA 5.2991(18) and MCL 125.539; MSA 5.2891(19), and that defendants were bound by a statutory covenant to keep the premises in a reasonable state of repair, MCL 554.139; MSA 26.1109. Plaintiffs maintain that the open and obvious danger defense was inapplicable to these statutory duties. We note that there is still a question of fact regarding whether the Michigan Housing Code is applicable to the present case. Municipalities are classified within the statute according to their population and organization. Certain municipal organizations are outside the scope of the act. There is conflicting evidence in the record regarding whether the premises were located in Gaylord or Otsego Lake Township, and therefore it is not clear whether the premises are governed by the Michigan Housing Code.

Plaintiffs also argue that MCL 554.139; MSA 26.1109 created a statutory duty to keep and maintain the premises in reasonable repair. Whether a duty exists is a question of law for the trial court to decide. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). Duties may arise either from common law or from a statute. *Riddle, supra* at 95. We find the present case similar to those cases where municipalities were charged with breaching their statutory duty to maintain highways and were denied the opportunity to avail themselves of the open and obvious defense. *Haas v City of Ionia*, 214 Mich App 361; 543 NW2d 21 (1995); *Walker v Flint*, 213 Mich App 18; 539 NW2d 535 (1995). Application of the open and obvious defense to the statute at issue in the present case would allow defendants to escape liability where they were statutorily mandated to keep the premises in reasonable repair. Accordingly, we conclude that the open and obvious danger defense was not available to defendants with regard to this duty. Notwithstanding the inapplicability of the open and obvious danger defense, defendants are free to argue on remand "that the openness and obviousness of the danger establishes comparative negligence" on the part of plaintiff. *Haas, supra* at 364.

Finally, plaintiffs contend that defendants were not entitled to summary disposition as a matter of law on the issue of proximate cause. Rulings on proximate cause, although ordinarily a question for the jury, may be made by a trial court where "the relevant facts are not in dispute and reasonable minds could not differ as to the application of the concept of proximate cause to those facts." *Jarvis v Providence Hospital*, 178 Mich App 586, 594; 444 NW2d 236 (1989). Proximate cause has been defined as "that which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury and without which the injury would not have occurred." *Schutte, supra* at 137. If defendants were afforded a reasonable amount of time to repair the loose carpeting but failed to do so, then this nonfeasance could have been a substantial factor causing the fall. Because reasonable minds could differ over what were the substantial factors causing the fall--the worn carpeting, defendants' alleged nonfeasance, or plaintiffs'

continued use of the stairs with knowledge of the danger--defendants were not entitled to summary disposition as a matter of law on the issue of proximate cause.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage