STATE OF MICHIGAN

COURT OF APPEALS

STEPHEN NANCE and ROBIN NANCE,

Plaintiffs-Appellants,

v

CHARLES FORTINBERRY and POMPEO GENARI, d/b/a POMPEO'S CUSTOM CARPENTRY,

Defendants-Appellees.

UNPUBLISHED
August 6, 1999

No. 208991
Oakland Circuit Court
LC No. 96-532217 NO

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Plaintiffs Stephen Nance and Robin Nance, appeal from a final order in this personal injury action arising from the collapse of a railing. The railing was built by defendant Pompeo Genari, on an elevated, exterior deck at the residence of defendant Charles Fortinberry, approximately two years before the accident. By stipulation of the parties, the action against Genari was dismissed without prejudice after the trial court granted summary disposition to Fortinberry pursuant to MCR 2.116(C)(10).[1] Plaintiffs now appeal as of right. We affirm.

The underlying facts are essentially undisputed. On June 22, 1996, Stephen and Robin Nance attended a barbecue as social guests at the home of Charles and Dana Fortinberry. As Mr. Nance leaned back against the railing of the elevated exterior deck, Mrs. Nance leaned into her husband to give him a kiss. The railing gave way and Mr. Nance fell more than ten feet, suffering a fractured wrist.

Plaintiffs contend that the trial court erred by granting Fortinberry's motion for summary disposition, arguing that Fortinberry was negligent with regard to the construction of the railing in that he acted as his own contractor by hiring Genari. We review a trial court's determination with regard to a motion for summary disposition de novo. *Spikes v Banks*, 231 Mich App 341, 345-346; 586 NW2d 106 (1998). On a motion under MCR 2.116(C)(10), this Court considers the pleadings and documentary evidence to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The duty of care a possessor of land owes to his social guests, or licensees, is the standard adopted in *Preston v Sleziak*, 383 Mich 442, 446-448, 453; 175 NW2d 759 (1970), as found in the Second Restatement of Torts:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,
>
> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees, and should expect that they will not discover or realize the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved. [2 Restatement Torts, 2d § 342, p 210.]

See *Preston, supra* at 453; *D'Ambrosio v McCready*, 225 Mich App 90, 93; 570 NW2d 797 (1997).

While plaintiffs were on Fortinberry's property as social guests, Fortinberry was obligated to exercise this standard of care. Accordingly, under the undisputed facts of this case, Fortinberry's liability to plaintiffs turns entirely on the question whether he knew or had reason to know of the dangerous condition of the railing, so that, upon plaintiffs' entry onto the property, his duty of care required him to either warn them of its condition or otherwise take reasonable steps to make the railing safe.

Plaintiffs submitted the affidavit of an expert who opined that "the railing failed on June 22, 1996 because it lacked a support post at the mid-point." However, the fact that an extra support post would have prevented the incident sheds little or no light on the question of whether Fortinberry knew, or should have known, that the absence of such a post posed an unreasonable risk of the railing's collapse. There is evidence that Fortinberry purchased the material and chose the design for the railing. However, Fortinberry had no special knowledge regarding construction practices and relied entirely on the expertise of Genari, a carpenter with more than forty years of experience, and an Independence Township inspector who allegedly approved the railing.

Genari tesitified by deposition[2] that the material Fortinberry purchased was designed for use as deck railing and that, in his opinion, the railing was up to code. Genari told Fortinberry that there were stronger materials available, but Genari never told Fortinberry that the material Fortinberry purchased was unsafe or inadequate for the job. The railing showed no signs of trouble during the two years prior to the accident, and Fortinberry let his three children use the deck on a regular basis. Both Genari and Fortinberry testified that the railing was examined by a township inspector and was approved. Plaintiffs offered the deposition testimony of two township inspectors who had no specific recollection of

inspecting the railing, but that neither contradicts nor corroborates the testimony that the railing was inspected. There is nothing to suggest that Fortinberry, a homeowner without special knowledge, knew or had reason to know that material designed for deck railing, and installed by an expert, would pose an unreasonable risk to anyone. The trial court did not err in granting summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[1] Fortinberry moved, nominally, for summary disposition under both MCR 2.116(C)(8) and (C)(10). Because the trial court relied on the parties' depositions and other documentary evidence, we will review the trial court's decision under MCR 2.116(C)(10).

[2] The parties stipulated at oral argument to introduction on appeal of Genari's entire deposition.