STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN YOUNG,

Plaintiff-Appellant,

V

AFRIKAN CHILD ENRICHMENT ASSOCIATION d/b/a NSOROMA INSTITUTE and SOUL HARVEST MINISTRIES,

Defendants-Appellees.

and

FIRST METHODIST CHURCH OF HIGHLAND PARK and ST. BENEDICT PARISH ARCHDIOCESE OF DETROIT,[1]

Defendants.

UNPUBLISHED
May 28, 2002

No. 230795
Wayne Circuit Court
LC No. 98-837382-NI

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Plaintiff Carolyn Young appeals as of right from the trial court's order granting summary disposition in favor of defendants Afrikan Child Enrichment Association, doing business as Nsoroma Institute (Nsoroma), and Soul Harvest Ministries (Soul Harvest) pursuant to MCR 2.116(C)(10). We affirm.

This is a premises liability case. Plaintiff, a public health inspector with the Wayne County Environmental Health Department, was visiting the Nsoroma, located in the city of Highland Park, on November 8, 1996, to ensure its compliance with state and county standards in order to become a charter school.[2] Nsoroma occupies the second floor of a church annex

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[1] The trial court entered an order, pursuant to the parties' stipulation, on August 3, 1999, dismissing St Benedict Parish Archdiocese of Detroit as a party to this lawsuit.

[2] At the time plaintiff visited the school in November 1996, it had yet to acquire licensing from the state to become a charter school, and was still operating as a private school.

owned by Soul Harvest. Nsoroma and Soul Harvest entered into a monthly lease in August 1996 that provided Nsoroma with the use of the annex's second floor as well as permission to use the fellowship room on the first floor to use as a lunchroom for the students. Soul Harvest purchased the church and its accompanying annex from First Methodist Church of Highland Park in 1994.

Plaintiff was visiting Nsoroma on November 8, 1996, for the second time for a reinspection. She had visited the school four weeks earlier to conduct a full inspection. After completing her reinspection, the director of Nsoroma, Malik Yakini, was escorting plaintiff to the annex's exit. As the two descended a stairwell from the second floor to the first floor, plaintiff slipped and fell down the stairs after stepping down from a landing between two flights of stairs. According to plaintiff's deposition testimony, the accident occurred at approximately 12:30 p.m. when a group of students were leaving the lunchroom and running up the stairwell. According to plaintiff, she was unable to grasp the handrail along the stairs before she fell. As noted, plaintiff had visited Nsoroma on a prior occasion for an inspection, and had traveled up and down the stairwell without incident. Plaintiff also walked up the same stairwell without incident on November 8, 1996.

Plaintiff filed a first amended complaint alleging negligence on April 16, 1999. Specifically, plaintiff alleged that the handrail along the stairwell was a "latent and unreasonably dangerous condition" because it was not "installed pursuant to generally accepted engineering standards, was not installed pursuant to the ordinances[s] and/or building code[s] of the City of Highland Park and was defective in several ways, including the height in which the handrail was installed." After discovery, Nsoroma moved for summary disposition under MCR 2.116(C)(8) and (10) on March 24, 2000. On April 7, 2000, Soul Harvest filed a concurrence with Nsoroma's motion. After plaintiff responded, the trial court conducted a hearing on the motion on June 2, 2000.

In support of its motion for summary disposition, Nsoroma first argued that it was not liable to plaintiff because it did not retain possession and control of the stairwell where she fell. Defendants also argued together that they were unaware of the alleged defective railing, and therefore could not anticipate a risk of harm to plaintiff. In their brief in support of the motion, defendants maintained that they did not owe a duty to plaintiff, apparently on the theory that the risk of falling down the stairs was open and obvious and that it did not pose an unreasonable risk of harm. In response, plaintiff argued that genuine issues of fact for the jury existed with regard to who had possession and control of the stairwell. Plaintiff also maintained that defendants breached their duty to inspect their premises for defects. Likewise, plaintiff countered defendants' argument that the railing's condition was open and obvious, and further argued that the railing was not installed in conformance with established industry standards.

At the completion of each parties' argument, the trial court rendered its bench ruling granting summary disposition in favor of defendants. The trial court did not articulate specific reasons for granting summary disposition, instead it noted only that it agreed with defendants' rationale supporting their motion. An order was entered accordingly on June 15, 2000. After plaintiff moved for reconsideration, the trial court denied the motion. Plaintiff now appeals as of right.

On appeal, plaintiff first argues that the trial court erred in failing to independently determine whether the risk of harm to plaintiff arising from the condition of the railing was

unreasonably dangerous. We do not agree with plaintiff's assertion. Although the trial court did not articulate in great detail its reasoning for granting defendants' motion, it did note that it granted summary disposition because it "adopt[ed] the rationale of the Defendants relative to this motion." In their brief in support of their motion for summary disposition, Nsoroma and Soul Harvest argued that they were not liable for plaintiff's injuries because the risk of harm to plaintiff was open and obvious, and that the risk was not unreasonably dangerous. Therefore, we are not persuaded by plaintiff's assertions that the trial court did not address this issue.

We review de novo a trial court's decision concerning a motion for summary disposition. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 495-496; 628 NW2d 491 (2001). The trial court in this case did not specify in its ruling whether summary disposition was granted under MCR 2.116(C)(8) or (10). However, because the trial court looked beyond the pleadings in rendering its ruling, we review its decision as having been decided pursuant to MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the first amended complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion brought pursuant to this subsection, we review the motion in the same manner as did the trial court. Specifically, we review the pleadings, deposition testimony, affidavits and other documentary evidence submitted by the parties in the light most favorable to plaintiff, the nonmovant, to determine whether a genuine issue of material fact warranting trial exists. *Id.*

In *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993), our Supreme Court recognized that to establish a claim of negligence, the plaintiff must present evidence to support the following elements: (1) that the defendant owed a legal duty to the plaintiff, (2) that the defendant breached the duty to the plaintiff, (3) that the plaintiff suffered damages, and (4) that the defendant's breach proximately caused the damage suffered. More recently, in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), Justice Taylor, writing for a majority of our Supreme Court, recognized that the open and obvious doctrine implicated in the present case is not an exception to the duty element of a prima facie claim of negligence, but "an integral part of the definition of that duty."

> [T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to take reasonable precautions to protect invitees[3] from that risk. [*Id.* at 517.]

To the extent that plaintiff argues in her brief on appeal that the risk of falling from the stairs was not open and obvious under Michigan negligence law, we disagree. As our Supreme Court stated in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995), "the danger of tripping and falling on [a] step[ ] is generally open and obvious . . . ." Further, this Court has held that a condition is open and obvious where it is readily observable to the average person of ordinary intelligence on casual inspection. *Hughes v PMG Building*, 227 Mich App 1,

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[3] The parties do not dispute that plaintiff held the status of an invitee on the premises. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

10; 574 NW2d 691 (1997); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). The test is objective rather than subjective, therefore the proper focus is on whether a reasonable person in the plaintiff's position would have foreseen the danger. *Joyce v Rubin*, ___ Mich App ___; ___ NW2d ____ (Docket No. 223908, issued January 15, 2002), slip op, 4. Consequently, we share Nsoroma's and Soul Harvest's view that no reasonable juror could conclude that the danger of falling down the stairs was not open and obvious.

This determination brings us to the question whether plaintiff has presented substantively admissible evidence creating a genuine issue for the jury regarding whether the risk of harm to plaintiff was unreasonable. The more refined inquiry, as articulated by the *Lugo* Court, is "whether there is evidence that creates a genuine issue of material fact regarding whether there are 'special aspects' of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm." *Lugo, supra* at 517. However, the *Lugo* Court qualified its ruling, noting that only "special aspects" that create a "high likelihood of harm or severity of harm . . . will serve to remove th[e] condition from the open and obvious danger doctrine." *Id.* at 519; see also *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 692-694; ___ NW2d ___ (2001); *Joyce, supra*, slip op at 5.

In support of her April 21, 2000, response to defendants' motion for summary disposition, plaintiff presented photographs of the stairway where she fell, a copy of the Department of Labor General Industry Safety Standards Commission's safety standards, as well as the affidavits of two experts, architect Douglas Necci and safety consultant George Bombyk. In their affidavits, Necci and Bombyk averred that "[t]he hand-railing on the right side of the stairway leading from the mid-way landing to the first floor was designed and installed in violation of generally accepted architectural standards," and that "[t]he hand-railing in question was installed in such a manner that it does not conform to general industry standards as established by the Department of Labor, General Industry Safety Standards Commission."[4] Plaintiff also presented Bombyk's March 7, 2000, letter to plaintiff's counsel detailing his findings after an examination of the area where plaintiff fell. In his letter, Bombyk concluded that "the handrail was improperly and defectively installed a distance of 12 inches to the right of the stairs instead of being affixed to the immediate side of the stringer which would have allowed easy access to it." Bombyk also concluded that the rail was "displaced and beyond the reach of an individual accustomed to grasping a handrail where it was normally installed." Bombyk also noted that the handrail did not extend a minimum of 12 inches beyond the edge of the top landing "which may have played a role in [plaintiff's] failure to reach it."

After reviewing the substantively admissible[5] evidence in the light most favorable to plaintiff, *Maiden, supra* at 120-121, we agree with the trial court that genuine factual disputes

[4] Both Necci and Bombyk also averred that the risk of danger to the general public was not open and obvious.

[5] We question whether Bombyk's letter is substantively admissible evidence that may be properly considered in reviewing a motion brought pursuant to MCR 2.116(C)(10). Because the letter would presumably be offered into evidence to prove the truth of the matter asserted therein, it is hearsay. MRE 801(c); see e.g., *Maiden, supra* at 124-125. Similarly, the letter does not appear to fall within any of the exceptions to the hearsay rule. MRE 803. Nonetheless, even
(continued…)

warranting trial do not exist with regard to whether the risk to plaintiff of falling down the stairs was unreasonable. In her brief on appeal, plaintiff argues that Necci and Bombyk's affidavits create genuine factual disputes for the jury regarding whether the risk of harm to plaintiff was unreasonable. We disagree. In *Lugo, supra* at 517-518, our Supreme Court provided examples of situations where "special aspects" of an open and obvious condition would serve to remove the condition from the open and obvious doctrine. These included a situation where a thirty-foot deep pit existed, unguarded, in the middle of a parking lot, or where a floor covered with standing water in a commercial building blocked the only exit. *Id.* at 518. The *Lugo* Court described these situations as "effectively unavoidable," and posing "a substantial risk of death or severe injury . . . ." *Id.*

In the instant case, the lone characteristic plaintiff has pointed to as creating an unusual aspect of the stairs, *Bertrand, supra* at 617, is that the handrail was allegedly mounted on the wall in violation of general industry and architectural standards. However, we are not persuaded that the alleged misplacement of the railing "involve[s] an especially high likelihood of injury" or "risk of severe harm" to the extent that the condition is removed from the open and obvious doctrine. Specifically, the record evidence is clear that the stairway where plaintiff fell possessed railings on either side. Therefore, plaintiff was not precluded from walking down the opposite side of the stairway to avoid any risk of harm caused by the allegedly defective railing. *Joyce, supra*, slip op at 6.

The present case is distinguishable from the facts in *Woodbury, supra* at 686, 694, where this Court concluded that a deck standing nine feet off of the ground outside of the plaintiff's residence without a railing presented an unreasonable risk of harm to the plaintiff in spite of its open and obvious condition. In sum, we are of the opinion that plaintiff has failed to offer evidence that the "character, location, or surrounding conditions" of the stairs were "out of the ordinary," *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 361; 561 NW2d 500 (1997), to the extent that the allegedly dangerous condition is removed from the open and obvious doctrine.

It is worthy of note that plaintiff conceded during her deposition that there was nothing overtly defective with the railing, and that she did not fall as a result of any debris on the stairs. Further, plaintiff testified that she was not looking when she attempted to grab the railing.

> *Q*. Did you look to reach the handrail?
>
> *A*. No, because I assumed that it was going to be there . . . .
>
> * * *
>
> *Q*. I'm simply asking, when you started down the stairs, did you look before you placed your hand?
>
> *A*. No.

(…continued)

considering the letter's substance, we do not believe that it creates a genuine issue of material fact regarding whether the open and obvious condition was unreasonably dangerous.

We are cognizant that our Supreme Court has cautioned lower courts that "[t]he level of care used by a particular plaintiff is irrelevant to whether the condition created or allowed to continue by a premises possessor is unreasonably dangerous." *Lugo, supra* at 522, n 5. However, absent any other evidence creating a material factual dispute with respect to whether special aspects existed that rendered the open and obvious risk of harm to plaintiff unreasonable, her mere failure to see that the railing was not within her immediate reach does not render the condition unreasonably dangerous. *Id.*; *Weakley v Dearborn Heights*, 240 Mich App 382, 386; 612 NW2d 428 (2000), remanded on other grounds 463 Mich 980 (2001); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 499; 595 NW2d 152 (1999).

Given our disposition of this issue, we need not address plaintiff's remaining issue on appeal.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Patrick M. Meter