STATE OF MICHIGAN

COURT OF APPEALS

JOHN ZAINEA,

Plaintiff-Appellant,

v

THE CITY OF GROSSE POINTE WOODS,

Defendant-Appellee.

UNPUBLISHED
December 17, 2002

No. 232513
Wayne Circuit Court
LC No. 00-003691-NO

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

On February 17, 1998, plaintiff fell down a stairway in front of the entrance to defendant's city hall building. The stairway consisted of two steps leading up to a porch and had two handrails following the steps up and down. There were steps located between the two handrails and on the outside of both of the handrails. Plaintiff had been to the building many times before and was very familiar with it. Plaintiff never had any difficulty walking up or down the stairs before February 17, 1998. On the day of the accident, plaintiff fell on an outside portion of the stairway where there was no handrail. Plaintiff testified that he was not sure what caused him to fall.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition where the absence of handrails on the stairway created an unreasonably dangerous condition. We disagree. The trial court did not specify under which subrule it granted defendant's motion for summary disposition. However, in granting defendant's motion, it appears that the trial court relied on photographs and plaintiff's deposition testimony. Therefore, we will treat the motion as being granted pursuant to MCR 2.116(C)(10), under which the court may properly consider matters outside the pleadings. *Velmer v Baraga Area Schools*, 430 Mich 385, 389; 424 NW2d 770 (1988).

The grant or denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). A motion for summary disposition may be granted under MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10). "A motion under MCR 2.116(C)(10)

tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Id.* The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. *Id.*

A governmental agency is generally immune from tort liability if it is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998). "'This immunity is broad in scope, subject to a limited number of narrowly drawn exceptions.'" *Id.*, quoting *Reardon v Dep't of Mental Health*, 430 Mich 398, 407; 424 NW2d 248 (1988). A public building exception to governmental immunity is set forth in MCL 691.1406, that provides, in pertinent part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

In order to establish that the public building exception governs a particular case, a plaintiff must establish that:

> (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period. [*Sewell, supra* at 675.]

Defendant does not dispute its status as a governmental agency or the fact that the city hall where plaintiff was injured was a public building open for use by members of the public. The issue is if plaintiff presented a question of fact regarding whether the stairway at defendant's city hall was a dangerous or defective condition of the building.

There is no dispute in this case that plaintiff was an invitee on defendant's property. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Liability for an invitee's injuries may result from the failure to warn of a hazardous condition, negligent maintenance of the premises, or defects in the physical structure of a building. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995). Generally, this duty does not encompass removal of open and obvious dangers. *Lugo, supra* at 516. "Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection." *Weakley v City of Dearborn Heights*, 240 Mich App 382, 385; 612 NW2d 428 (2000), remanded on other grounds 463 Mich 980, on remand 246 Mich App 322 (2001). "[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 undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517. "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. In resolving an issue regarding the open and obvious doctrine, courts must focus on the objective nature of the condition of the premises, rather than the subjective degree of care used by the plaintiff. *Id.* at 523-524.

Plaintiff argues that the staircase in front of defendant's city hall presented an unreasonable risk of harm. We recognize that our Supreme Court has provided guidance in this area in *Bertrand, supra*.

> [B]ecause steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable. However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. [*Bertrand, supra,* 449 Mich 616-617.]

After reviewing the record and the applicable law, we conclude that the danger presented by the staircase in front of defendant's building was open and obvious. A reasonable person would recognize the danger inherent in stairs upon casual inspection. Furthermore, plaintiff admitted that he was familiar with the building and had used the steps without difficulty in the past. Plaintiff presented no evidence showing that the danger from the stairs was not apparent to an average person upon casual inspection. Therefore, the issue is whether there is a question of fact regarding whether the stairs presented an unreasonable risk of harm.

Plaintiff further argues that the stairs presented an unreasonable risk of harm because they did not contain handrails on the outside of the staircase, in violation of the Building Officials & Code Administrators International, Inc., building code (BOCA), and because it was foreseeable that people might walk down the side of the stairway without the handrail on their way to the parking lot. We recognize that a violation of a building code may be some evidence of negligence. *Summers v Detroit*, 206 Mich App 46, 51-52; 520 NW2d 356 (1994). However, as pointed out in a recent unpublished opinion of a panel of this Court when faced with a similar issue, a violation of a building code "does not go to the question whether there is something unique about the steps that renders them unreasonably dangerous even when the open and obvious danger is perceived." *Franklin v Peterson*, unpublished opinion per curiam of the Court of Appeals, issued August 17, 1999 (Docket No. 208964).[1] The critical inquiry is whether there

[1] We recognize that "[a]n unpublished opinion is not precedentially binding under the rule of (continued…)

is something unusual about the stairs because of their character, location, or surrounding conditions. *Bertrand, supra*, 449 Mich 617.

Our review of the record reveals that the stairway at issue consisted of only two steps leading up to a porch. There was also a ramp with handrails that led up to the entrance of the building. Although the stairway did not have handrails on both sides, it did have two handrails down the middle with an aisle between them. A person wanting to enter defendant's city hall could have walked up or down the portion of the stairway with the handrails or used the ramp with handrails. Furthermore, although it may have been foreseeable that some people would walk down the side of the stairway to get to the parking lot or to avoid crowds, it was not foreseeable that this would create an unreasonable risk of harm. We find that plaintiff has not presented evidence of any "special aspects" of the stairway that made it unreasonably dangerous. *Lugo, supra*, 464 Mich 519. Even assuming that the stairway violates a BOCA provision by not having handrails on both sides, the steps do not present an unreasonable risk of harm. While the stairs may have caused plaintiff's injury, they were simply ordinary stairs. We find that the stairway in question did not constitute an unreasonably dangerous condition. Accordingly, because plaintiff has not established a genuine issue regarding any material fact in this case, summary disposition was appropriate. *Maiden, supra*, 461 Mich 120.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

(…continued)

stare decisis." MCR 7.215(C)(1).