

STATE OF MICHIGAN
COURT OF APPEALS

ANN HERR and GARY HERR,

Plaintiff-Appellants,

v

KEN MOSES,

Defendant-Appellee.

UNPUBLISHED
February 10, 2004

No. 242936
Oakland Circuit Court
LC No. 2001-033957-NO

Before: Owens, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*dissenting*).

I respectfully dissent because remand is inappropriate where the trial court granted summary disposition based in part on plaintiff's failure to prove causation and plaintiffs have not asserted on appeal that the trial court erred in ruling that the stake was not the cause of Ann Herr's fall.

Had the trial court granted summary disposition *only* based on its ruling that the open and obvious defense precluded a finding of liability, I would agree with the majority that this Court's opinion in *O'Donnell v Garasic*, ____ Mich App ____; ____ NW2d ____ (2003) would be controlling in this case. The majority would have been correct in their application of *O'Donnell* and in noting that "[t]he open and obvious doctrine is not available to deny liability to an injured invitee on leased or licensed residential premises when such premises presents a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws" *Id.* at slip op 7.

However, in the present case, the trial court also determined that there was no genuine issue of material fact on the element of causation. Plaintiffs have not asserted that the trial court erred in its determination that "based on [p]laintiff's own testimony, it was not the stakes that even caused her fall." Under MCR 7.205(D)(4), plaintiffs' appeal is limited to the issues raised in their application and their brief. Thus, plaintiffs have waived this issue because they did not include it in their statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). I would find that plaintiffs have waived any claim of error on both these findings and that any determination by this Court as to the issue raised in plaintiffs' brief would not affect the outcome of the trial court's grant of summary disposition.

I would affirm.

/s/ Bill Schuette