STATE OF MICHIGAN

COURT OF APPEALS

GABRIEL BERMUDES,

Plaintiff-Appellant,

v

EDUARDO REYNOSO,

Defendant-Appellee.

UNPUBLISHED
April 28, 2009

No. 282720
Wayne Circuit Court
LC No. 06-622990-NO

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

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

This case arises out of plaintiff's fall down a stairway leading from a porch abutting the backdoor to defendant's residence. Plaintiff claims the second step on the five-step stairway caused him to fall because it was too narrow and that the stairway's handrail was too wide. Plaintiff brought a negligence suit based on a premises liability theory and defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendant claimed there was no genuine issue of material fact that the stairway constituted an open and obvious hazard without special aspects making it unreasonably dangerous. The trial court granted defendant's motion, finding an open and obvious danger without special aspects.

We review a trial court's decision to grant summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). Although the trial court did not indicate which rule it was relying on in granting defendant's motion, because the trial court relied on evidence outside of the pleadings we review its decision as having been granted under MCR 2.116(C)(10). *Detroit News, Inc v Policemen & Firemen Retirement Sys*, 252 Mich App 59, 66; 651 NW2d 127 (2002). When reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown*, *supra* at 551-552. A moving party is entitled to summary disposition pursuant to MCR 2.116(C)(10) when "[e]xcept 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." See *Lugo v Ameritech Corp*, 464 Mich 512, 520; 629 NW2d 384 (2001) (brackets in original). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *Campbell v Kovich*, 273 Mich App 227, 229;

731 NW2d 112 (2006). The court may consider affidavits, depositions, admissions and documentary evidence "to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6); see also *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

The elements of a negligence claim are that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant's breach caused the plaintiff's injury. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). The duty an owner or occupier of land owes to a visitor is dependent on the status of that visitor. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). One who enters another's land on invitation for a commercial purpose where the essence of the relationship is a pecuniary interest on the part of the landowner is considered an invitee. *Id*. at 596-597, 604-605. In this case, plaintiff contends he was an invitee, and defendant does not dispute his status as an invitee. Because we view the pleadings, admissions and other evidence in the light most favorable to plaintiff, *Brown*, *supra* at 551-552, we analyze this issue as if he had such status.

A premises owner owes a duty to an invitee to use reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo*, *supra* at 516. This duty does not generally apply where the danger is open and obvious. *Id.* An exception exists where there are special aspects to the danger. *Id.* at 517. If there is no genuine issue of material fact "with respect to whether plaintiff's claim was barred by the open and obvious danger doctrine," the defendant is entitled to summary disposition under MCR 2.116(C)(10). *Id*. at 520-521. "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff claims that there was a genuine issue of material fact as to the open and obvious nature of the stairway because the second step was unusually narrow and its dangerous nature was obscured by the fact that the stairway was painted white, plaintiff was unfamiliar with it, it was in violation of building codes, and plaintiff was distracted as he attempted to grasp the unusually large handrail. We disagree. In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995), our Supreme Court held, "because 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." Only "where there is something unusual about the steps, because of their 'character, location, or surrounding conditions,' [does] the duty of the possessor of land to exercise reasonable care remain[]." *Id*. at 617 (citations omitted). Here, plaintiff presented photographs showing that the stairway was dangerous, but he failed to present evidence creating a genuine issue of material fact that "an average user with ordinary intelligence [would not] have been able to discover" the danger and risk presented by it. *Joyce*, *supra*. Plaintiff acknowledged that nothing was hiding the condition of the second step or handrail and nothing was blocking his view. Plaintiff testified that he first saw the narrow second step after he had fallen, and he could not remember if his feet were within eyesight as he began his descent down the stairway. Plaintiff did not testify that he was watching where he placed his foot. Furthermore, plaintiff admitted that defendant had

informed him sometime before the fall that the stairway was going to be repaired because it was too narrow. And, a violation of a building ordinance alone does not impose a legal duty cognizable in negligence. *Summers v City of Detroit*, 206 Mich App 46, 51-52; 520 NW2d 356 (1994). We find that a reasonably prudent person would have discovered the danger posed by the second step and the wide handrail upon casual inspection; thus, the trial court properly concluded that the stairway was an open and obvious danger. *Bertrand*, *supra* at 616-617; *Joyce*, *supra*.

Additionally, plaintiff failed to present evidence creating a genuine issue of material fact that the stairway was "effectively unavoidable" or presented an "unreasonably high risk of severe harm." *Lugo*, *supra* at 518. The stairway was not unavoidable because plaintiff admitted during testimony that he could have exited through the front door of defendant's residence at the time he fell. In addition, the danger posed by the stairway did not constitute an "unreasonably high risk of severe harm" because plaintiff faced only a short fall down five wooden steps to the ground and both the steps and handrail were sturdy. Cf. *Corey v Davenport College*, 251 Mich App 1, 7; 649 NW2d 392 (2002) (a fall down an icy set of three steps does not create an unreasonably high risk of severe harm). Even viewing the evidence in the light most favorable to plaintiff, no reasonable juror could have concluded that the stairway presented a unique condition of "a substantial risk of death or severe injury." See *Lugo*, *supra* at 518. The trial court did not err in finding that no special aspects existed and granting summary disposition to defendant.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio