

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH MARINO and DOUGLAS MARINO,

Plaintiffs-Appellants,

v

RALPH NARTKER,

Defendant-Appellee.

UNPUBLISHED

April 30, 2009

No. 282564

Monroe Circuit Court

LC No. 06-021113-NO

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

PER CURIAM.

Plaintiffs Deborah and Douglas Marino appeal as of right the trial court's order granting defendant Ralph Nartker summary disposition pursuant to MCR 2.116(C)(10) in this premises liability case. We affirm.

Plaintiffs allege that Deborah sustained injuries to her tailbone when she fell down a flight of stairs in the house they were renting from defendant after the handrail detached from the wall. On appeal, plaintiffs argue that summary disposition was improperly granted because there was a material question of fact whether defendant breached his duty of care by failing to properly install the handrail and whether defendant's alleged negligence was a proximate cause of plaintiffs' injuries.

We review a trial court's decision on a motion for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim and "should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007) (citations omitted). The non-moving party may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the non-moving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We review for an abuse of discretion a trial court's decision to sanction a party for the destruction or spoliation of evidence. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich

App 207, 211; 659 NW2d 684 (2002); *Brenner v Kolk*, 226 Mich App 149, 160-161; 573 NW2d 65 (1997).

To establish a claim of negligence, a plaintiff must prove: (1) that the defendant had a duty to the plaintiff, (2) the defendant breached that duty, (3) the breach proximately caused an injury, and (4) the plaintiff suffered damages as a result. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). Different standards of care are owed to a plaintiff in accordance with the plaintiff's status on the land. *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). In this case, it is undisputed that plaintiff was a tenant and invitee of defendant. See *Id.* (stating that "a tenant is an invitee of the landlord"). Generally, a landlord owes a duty to invitees "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*, 464 Mich 512, 516; 629 NW2d 384 (2001).

The trial court concluded that because Douglas removed the handrail from the wall and plastered over the holes where the handrail was attached, plaintiffs denied defendant any meaningful opportunity to investigate how the handrail was attached to the wall and whether it was installed negligently.¹ As a consequence of plaintiffs' destruction of evidence, the trial court excluded photographs² as well as Douglas's description of how the handrail had been installed. The trial court concluded that plaintiffs failed to present evidence that created a material question of fact regarding whether defendant breached his duty of care. Plaintiffs argue that there is affirmative evidence of defendant's negligence and the trial court erred by suppressing the photographic evidence and Douglas's description of how the handrail was attached.

A trial court, from its inherent powers, has the authority to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced. *Brenner, supra* at 160. In *Brenner*, which is instructive here, the trial court granted summary disposition in the defendants' favor because the plaintiff failed to preserve evidence. *Id.* at 154-155. This Court reversed, in part, concluding that outright dismissal was too severe of a sanction. *Id.* at 163-164. The plaintiff in that case was injured while driving the defendants' vehicle. *Id.* at 151. While the plaintiff was able to remove part of the allegedly defective seat belt, the entire car was demolished before any other evidence could be retrieved. *Id.* at 152. This Court held that in a case involving a party's failure to preserve evidence, "a trial court properly exercises its discretion when it carefully fashions a sanction that denies the party the fruits of the party's misconduct, but that does not interfere with the party's right to produce other relevant evidence." *Id.* at 161. This Court noted that possible lesser appropriate sanctions included the exclusion of evidence that unfairly prejudices the other party or an instruction that

¹ Plaintiffs contend that the handrail was improperly installed by being screwed into plaster, rather than a stud, leading to inadequate mounting.

² The photographs, taken in May 2005, show the handrail with the brackets and plastic anchors as well as Douglas holding the handrail up to the wall where he alleges it was positioned along the stairs, but the screw holes had already been covered by plaster and their location is indiscernible.

the jury may draw an inference adverse to the culpable party from the absence of the evidence. *Id.*

In this case, as a sanction for plaintiffs' removal of the handrail from the wall and plastering over the screw holes, the trial court chose to exclude plaintiffs' photographs of the handrail depicting where plaintiffs contend it had been attached and Douglas's testimony regarding improper mounting. We conclude that the trial court did not abuse its discretion in excluding this evidence because plaintiffs' actions denied defendant any meaningful opportunity to investigate how the handrail was attached to the wall. In accordance with *Brenner*, the trial court fashioned a sanction that denied plaintiffs the fruit of their misconduct. Removing the handrail and plastering over the wall made plaintiffs the final source of where and how the handrail was attached.

Plaintiffs' argument that defendant did not suffer prejudice because he had personal knowledge regarding how the handrail was attached and admitted that the photograph of the wall anchors and screws looked like the items used to affix the handrail to the wall is misleading. Plaintiffs' theory rests on the installation of the handrail, not the type of anchors used. Douglas even testified that he believed the anchors needed to be placed into studs to secure the handrail. However, once Douglas completely removed the handrail and plastered over the wall, it was impossible for any objective evidence to be found. By removing the handrail and patching, it was impossible to determine if there was an anchor failure, a location failure, or even an abuse of the handrail. Moreover, contrary to plaintiffs' assertion on appeal, the trial court did not grant summary disposition as a sanction for the spoliation of the evidence. Rather, it excluded the photographs and Douglas's descriptions. Without that evidence, plaintiffs were without any affirmative evidence establishing a breach of duty by defendant. The trial court did not abuse its discretion by excluding the spoiled evidence, and it properly granted summary disposition on the ground that plaintiffs failed to create a material question of fact regarding whether defendant breached his duty.

Defendant also contends that summary disposition was proper because he did not have notice of the hazardous condition. Given our resolution of the prior issue, we need not address defendant's claim regarding lack of notice. Moreover, we need not address plaintiffs' claim that the trial court erred in finding that they failed to present sufficient evidence of causation.

Affirmed.

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