STATE OF MICHIGAN

COURT OF APPEALS

IRENE AMBS,

Plaintiff-Appellant,

v

FAMILY COUNSELING & SHELTER SERVICES OF MONROE CO INC and PATRICK J. WICKENHEISER and MARYELLEN M. WICKENHEISER,

Defendants-Appellees,

and

CITY OF MONROE

Defendant.

UNPUBLISHED
June 17, 2010

No. 289652
Monroe Circuit Court
LC No. 07-024706-NO

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant Family Counseling and Shelter Services of Monroe County, Inc., (Family Counseling) operates a children's visitation center (the center) in a building owned by defendants Patrick Wickenheiser and Mary Wickenheiser (the owners). This case arises from plaintiff's fall down the center's back stairway. Although plaintiff had not yet taken a step down from the porch to the stairs before she fell and could not explain the cause of her fall, she nonetheless maintained that she would not have fell had the stairs had a handrail. Plaintiff brought a negligence suit based on a premises liability theory and defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Defendants claimed there was no reasonable dispute that the stairway constituted an open and obvious hazard that was not unreasonably dangerous. The trial court granted defendants' motion. We affirm.

We review a trial court's decision to grant summary disposition de novo. *Brown v Brown*, 478 Mich 545, 551; 739 NW2d 313 (2007). 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*, 478 Mich 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." "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).

To establish negligence, plaintiff must show 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). One who enters another's land on invitation is generally considered an invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597, 604-605; 614 NW2d 88 (2000).

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 v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). 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).

Before addressing the open and obvious doctrine, we must address the trial court's holding that plaintiff's claim is speculative. The evidence indicates plaintiff cannot remember how she fell, except that she had not made it down to the first step. Defendants first suggest that plaintiff would not have needed a handrail until she actually took a step down. Defendants maintain that plaintiff is merely speculating that (1) if there was a handrail she would have used it and (2) had she used the handrail the injury would not have occurred.

In response, plaintiff relied on her testimony:

Q. All right. Do you have any idea how it is that you fell when you fell?

A. I don't know why. If there have been a railing there, I would have had my hand on the railing. There's no railing.

* * *

Q. Do you know if you were taking a step when you fell?

A. I probably was about to take a step, yeah.

Here, plaintiff's conclusory testimony that had there been a handrail she would not have fell is insufficient to create a question of fact. There is no evidence that plaintiff would have been able to grasp the railing upon falling. In other words, plaintiff may not have been in a position the grasp the handrail when she fell. Further, there is no indication that the railing would have prevented her fall. Had plaintiff managed to grasp the handrail she may have continued to fall. The trial court properly rejected "plaintiff's contention that 'but for' the missing handrail she would not have fallen since she is unable to testify 'why' she fell."

Further, even accepting plaintiff's contention that a handrail would have prevented her from falling, we would nonetheless conclude that the condition was "open and obvious" and that plaintiff failed to prove any "special aspects" rendering the condition unreasonably dangerous. 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 has not presented 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*, 249 Mich App at 238. Here, there is no real dispute, and plaintiff does not appear to challenge, that the lack of a handrail was open and obvious. The trial court properly concluded that the stairway was an open and obvious danger. *Bertrand*, 449 Mich at 616-617; *Joyce, supra*.

We find no merit to plaintiff's claim that there were special aspects to the condition nullifying the open and obvious defense. *Lugo* provides two examples illustrating special aspects to the danger: First, a commercial building with its only exit for the general public covered in standing water would be an unavoidable condition because a customer wishing to leave the store must depart through the standing water. *Id*., at 518-519; Second, a 30-foot deep hole in a parking lot would create a severe risk of harm because although one could avoid the condition, it would present a uniquely high likelihood of severe injury or even death absent remedial measures. *Id*.

Here, plaintiff argues that she was effectively trapped because the backdoor automatically locked behind her after employees of Family Counseling had shown her onto the back porch and returned inside. We agree with plaintiff that under the circumstances a reasonable person may have assumed that the door had automatically locked. However, we cannot further assume that employees of Family Counseling would not have answered the back door had plaintiff knocked. Plaintiff has the burden of establishing "special aspects" and, in this case, must show that she was effectively trapped; not merely that she *may* have been effectively trapped. *Lugo*, 464 Mich at 523. Plaintiff also presented evidence that a city building inspector had previously indicated that a handrail was required. However, defendants presented a subsequent letter from another city building inspector that did not indicate a handrail was required. In any event, 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). Moreover, we find persuasive the reasoning that 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 is something unusual about the stairs because of their character, location, or surrounding conditions. *Bertrand*, 449 Mich at 617.[2]

Plaintiff last argues that the absence of a handrail constitutes a public nuisance. This assertion lacks merit. As the trial court noted, plaintiff's nuisance claim merely restates her negligence claim and, accordingly, should be dismissed. *Fuga v Comerica Bank—Detroit*, 202 Mich App 380, 383; 509 NW2d 778 (1993), abrogated on other grounds, *Jennings v Southwood*, 446 Mich 125, 130; 521 NW2d 230 (1994). Further, there is no evidence identifying any common right enjoyed by the general public that was affected by the lack of a handrail. See *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

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[1] We recognize that "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

[2] Plaintiff relies heavily on *Temple v Salem*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 1999 (Docket No. 203835). In addition to lacking precedential value, MCR 7.215(C)(1), *Temple* was decided before *Lugo*, and thus did not even consider whether the condition had special aspects. Further, granting significant weight to *Temple* marginalizes the unpublished cases finding that the lack of a handrail (and additional defects) does not satisfy the special aspects required under *Lugo*. See *Carruthers v Haley*, unpublished opinion of the Court of Appeals, issued May 25, 2010 (Docket No. 290707); *Wright v Meadowood Jackson*, unpublished opinion of the Court of Appeals, issued June 16, 2009 (Docket No. 285379); *Bermudes v Reynoso*, unpublished opinion of the Court of Appeals, issued April 28, 2009 (Docket No. 282720); *Fowler v Detroit Symphony Orchestra*, unpublished opinion of the Court of Appeals, issued March 12, 2009 (Docket No. 282978); *Dyer v Russell*, unpublished opinion of the Court of Appeals, issued December 18, 2007 (Docket No. 273574).