STATE OF MICHIGAN

COURT OF APPEALS

BARBARA STOWERS,

Plaintiff-Appellant,

v

DANA BETTINGHOUSE,

Defendant-Appellee.

UNPUBLISHED
December 27, 1996

No. 189470
LC No. 94004141-NI

Before: Hood, P.J., and Neff and M.A. Chrzanowski*, JJ.

PER CURIAM.

Plaintiff brought this premises liability action against defendant following a fall down a stairway in defendant's home. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

Plaintiff paid rent and lived with defendant in defendant's home. Plaintiff was helping defendant insulate the basement of the house and was carrying her second load of lumber down the basement stairway when she fell and injured herself. She brought this action in negligence against defendant, asserting that defendant breached her duties to warn plaintiff of the condition of the stairs and to protect plaintiff from injury and her duties to inspect and maintain the stairs. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and 2.116(C)(10), arguing that she had no duty to plaintiff because the stairs were an open and obvious danger. Defendant also asserted that she was shielded from liability based on the volunteer doctrine, an issue which was not reached by the trial court.

Plaintiff responded to defendant's motion with evidence that the stairs were defective. An expert witness measured the stairs and found that, although the treads were the proper width, the overhangs were of varying lengths. Because of this, the stairs did not conform to the applicable building code. The expert also stated that he believed that the defective condition of the stairs was not open and obvious to laypersons. Plaintiff also attached her deposition testimony in which she stated that when she came down the stairs, the step was not there. The evidence indicates that plaintiff was responsible for

* Circuit judge, sitting on the Court of Appeals by assignment.

the laundry chores for the household and the washer and dryer were located in the basement; thus, plaintiff had descended the stairs on numerous occasions during the year she lived with defendant.

The trial court concluded that plaintiff, by living in the house and using the stairway on many occasions, was familiar with the steps and was charged with knowing she had to be careful using them. It found that the stairway presented an open and obvious danger and defendant had no duty to warn or otherwise protect plaintiff with regard to the stairs. Summary disposition was granted pursuant to MCR 2.116(C)(10), that there was no genuine issue of material fact and defendant was entitled to judgment as a matter of law.

We review the trial court's grant of defendant's motion for summary disposition de novo. *Ladd v Ford Consumer Finance, Inc*, 217 Mich App 119, 124; 550 NW2d 826 (1996). A motion under MCR 2.116(C)(10) tests the factual basis of the plaintiff's claim and allows the trial court to grant summary disposition where there exists no genuine issue of disputed fact and the moving party is entitled to judgment as a matter of law. *Id.* The trial court must consider in a light most favorable to the non-moving party all pleadings, affidavits, deposition testimony, admissions and other documentary evidence provided to it. *Id.* 124-125.

It is well established that a possessor of land owes an invitee a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land and which is known by the landowner or is something that the invitee will not discover, realize or protect themselves against. *Bertrand v Alan Ford*, Inc, 449 Mich 606, 609; 537 NW2d 185 (1995). However, where a danger is open and obvious, there is no absolute duty to warn. *Id.* at 612, citing *Riddle v McLouth Steel Products*, 440 Mich 85, 95-97; 485 NW2d 676 (1992). On appeal, plaintiff claims that, under *Bertrand*, although the stairs were open and obvious, due to their unusual nature, defendant's duty to plaintiff remained. Indeed, *Bertrand* explains:

> [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 a duty as well as breach become questions for the jury to decide. [*Id.* at 616-617, footnotes omitted.]

Applying *Bertrand*, we find that, although the stairs may not have complied with the applicable building code, their nature was open and obvious. Moreover, although the trial court did not reach the next prong, we find that the evidence submitted did not "create a question of

fact that the risk of harm was unreasonable." Therefore, defendant had no particular duty to plaintiff with regard to the stairs.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski