STATE OF MICHIGAN

COURT OF APPEALS

JEAN TEMPLE,

Plaintiff-Appellant,

v

SAMUEL SALEM, DDS,

Defendant-Appellee.

UNPUBLISHED
December 7, 1999

No. 203835
Genesee Circuit Court
LC No. 96-044355 NO

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

In this premises liability action, plaintiff alleged that on exiting her physician's office, which was located in a building owned by defendant, she was injured when she slipped and fell while stepping from the landing of a cement stairway to its first step. Plaintiff further alleged that the stairway did not have handrails as required by state and local building codes. The trial court granted defendant summary disposition on the basis that the danger posed by the stairway was open and obvious.

Plaintiff argues that the trial court erred by granting defendant summary disposition in reliance on the open and obvious doctrine because the missing handrail, an alleged building code violation, rendered the stairway unreasonably dangerous. We review the trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id*. The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists that would prevent entry of a judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

The parties apparently do not dispute that at the time of her injury, plaintiff occupied the status of an invitee. It is well-established that a business invitor has a duty to exercise due care to protect invitees from dangerous conditions on the business premises. *Riddle v McClouth Steel Products*

Corp, 440 Mich 85, 96; 485 NW2d 676 (1992). While the open and obvious doctrine may suspend the business invitor's duty of care with respect to dangers known to the invitee or dangers so obvious that the invitee might reasonably be expected to discover them, *id*., the business invitor remains liable for harm arising from open and obvious dangers when the invitor "*should anticipate the harm despite such knowledge or obviousness*." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995) (emphasis in original), quoting 2 Restatement Torts, 2d, § 343A(1), p 218. Thus, the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care. *Bertrand*, *supra* at 611 (For example, while there may be no obligation to warn of a fully obvious condition, the possessor may still have a duty to protect an invitee against foreseeably dangerous conditions.).

The Supreme Court in *Bertrand* noted the general rule that steps and differing floor levels were not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous. *Id*. at 614. It is plaintiff's position that defendant owed her a duty of care because the absence of a handrail, allegedly in violation of state and local building codes, qualified as something unusual about the steps that created an unreasonable risk of harm. We find that in the instant case, the absence of a handrail created a foreseeable and unreasonable risk of harm, and that defendant's duty of care remained despite the open and obvious danger generally presented by the stairway.

In the case before us, plaintiff in visiting her physician who occupied defendant's building was apparently required to descend the staircase on which she fell. We accept that plaintiff may be charged with knowledge of the general danger presented by steps, and acknowledge that plaintiff had previously traversed the very steps on which she fell.[1] Nonetheless, we find that no matter how carefully plaintiff or other visitors to defendant's building chose to negotiate the steps, it was foreseeable that some would, for one reason or another, lose their footing on the steps. The dissent's position ignores that mere awareness of the risk posed by the stairs lacking a handrail does not eliminate the danger the stairs pose to many individuals who, due to age, disability or medical condition, are unable to safely traverse the unavoidable stairs irrespective of how carefully they proceed. Just as defendant should have reasonably envisioned that occasional pedestrians would lose their footing, defendant should have also reasonably determined, especially in light of an applicable statute or ordinance requiring a stairway handrail, that his provision of a handrail would constitute a simple safety measure permitting these unfortunate pedestrians to avoid injury and reclaim their equilibrium.[2] The risk of harm posed by the absence of a handrail qualifies as unreasonable despite its obvious nature given the simplicity of the remedial measure that could have been taken and the severity of harm that handrail installation would potentially avoid. Therefore, whether defendant should have taken reasonable precautions to eliminate the risk of harm posed by the stairs represents an issue for the jury, and we conclude that the trial court incorrectly granted defendant summary disposition on the basis that the open and obvious doctrine relieved him of any duty to protect plaintiff. *Id*. at 610-611.[3]

Defendant argues that summary disposition of plaintiff's claim pursuant to MCR 2.116(C)(10) remains appropriate because plaintiff failed to produce any evidence regarding a breach of duty by defendant or that an alleged breach proximately caused plaintiff's injury. The record before us does not reveal exactly how plaintiff fell, whether she fell near the edge of the stairway where the handrail would

be, whether a rail would have broken her fall, or whether plaintiff reached for an absent rail. While defendant referred to excerpts from plaintiff's deposition in his brief in the circuit court, plaintiff's deposition itself is not in the record. Those excerpts cited by defendant concerned only the cause of plaintiff's initial fall, however, and included no references to the absent handrail. Plaintiff implies that she reached for a handrail, but does not cite any record support for this assertion. The circuit court did not address the proximate cause issue, but rather dismissed the case solely on the basis of a lack of duty. Because the circuit court did not reach the proximate cause issue, and the issue is not adequately addressed in the record before us, we must remand for a determination regarding this issue.

Were plaintiff able to show that defendant's failure to install a handrail proximately caused her injury, and assuming that defendant's failure constituted a statutory or municipal building code violation, summary disposition would be precluded; a violation of a statute creates a rebuttable presumption of negligence, while an ordinance violation is evidence of negligence. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 661; 473 NW2d 796 (1991). This Court in a factual context similar to that involved in the instant case held that evidence of a City of Detroit building ordinance violation mandated reversal of the trial court's grant of the defendants' motion for directed verdict. *Mills v AB Dick Co*, 26 Mich App 164, 167; 182 NW2d 79 (1970). Mills, the plaintiff invitee, had fallen while descending a staircase maintained by defendant A.B. Dick Company of Detroit, Inc. (AB Dick). *Id*. at 166-167. Mills alleged that the staircase was defective because it lacked a handrail. *Id*. at 166, 167-168. At the conclusion of the parties' proofs, the trial court directed a verdict for AB Dick on the basis that Mills had neither shown any negligence on the part of AB Dick nor that a causal relationship existed between the absence of a handrail and Mills' injuries. *Id*. at 166. This Court reversed according to the following analysis:

> The premises are located in the City of Detroit which, the defendants concede, by ordinance requires the installation of handrails on such a staircase. The violation of an ordinance is not, as distinguished from violation of a statute, negligence per se. It is, however, evidence of negligence. Railings are required for the protection of persons who accidentally lose their balance, including those who lose their balance through no fault of the landowner. The jury should have been permitted to determine whether defendants were negligent in failing to have conformed to the standard of care required by the ordinance.
>
> Moreover, apart from the ordinance, we think the Mills were entitled to have their case submitted to the jury under an instruction that if it finds the installation of a handrail on the open side of the staircase was necessary to make the premises reasonably safe for use by one, who, like Sidney Mills, was invited to come on the premises, on that ground as well it could find that the failure to have provided this safeguard was negligence.
>
> If the jury find that the failure to have provided handrails was negligence, it could also find from the evidence presented that there was a causal relationship between the absence of the railing and Sidney Mills' injuries. He testified that he fell to the right

over the unprotected side of the staircase. Had a railing been installed he might well have saved himself from injury.

> "Thus where it appears *how* an accident happened and also that the victim might have saved himself by taking advantage of a precaution which it has been shown defendant negligently failed to afford, courts have generally let a jury find the failure caused the harm, though it is often a pretty speculative matter whether the precaution would in fact have saved the victim." 2 Harper & James, The Law of Torts, § 20.2, p 1113. [*Mills*, *supra* at 168-169 (emphasis in original).]

Unlike *Mills*, the instant record does not reflect a definitive determination whether the lack of a handrail on defendant's stairway constitutes a violation of a specific statute or municipal ordinance. Plaintiff alleged only generally that state and local building codes required a handrail, and defendant initially conceded for purposes of the summary disposition hearing that a BOCA violation existed.[4] Because the proper disposition of this case depends on a definitive determination regarding the circumstances surrounding plaintiff's fall and, should these facts reveal a genuine issue regarding the handrail's role in plaintiff's fall, a definitive determination regarding the existence of a building code violation, we must remand to the trial court.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage

[1] In *Mills*, *supra*, the defendant landowner argued that the plaintiff invitee who had fallen down a stairway that lacked a handrail, in violation of a City of Detroit building ordinance, was contributorily negligent as a matter of law in using the stairway because he had used it many times before and knew that it was not provided with handrails. This Court rejected the defendant's argument, and quoted 2 Restatement Torts, 2d, § 473, p 523 in explaining that if the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he exposes himself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence in so doing unless he acts unreasonably. *Mills*, *supra* at 171.

[2] The parties refer to the BOCA Basic National Building Code, which is a national property maintenance code. We do not suggest that a BOCA violation in and of itself is in every case sufficient to create a jury submissible issue regarding the existence of an unreasonably dangerous condition.

[3] To the extent that defendant relies on unpublished opinions of this Court in arguing that a building code violation does not preclude a grant of summary disposition to a defendant landowner based on the open and obvious doctrine, his reliance is misplaced because these decisions are without precedential value. MCR 7.215(C)(1).

[4] Although the parties generally mentioned the code, neither party cited to a specific, applicable provision of this code. Defendant subsequently requested at the summary disposition hearing that the

court permit him to brief the issue of the existence of a building code violation if the fact that a violation occurred would affect the trial court's decision.