STATE OF MICHIGAN

COURT OF APPEALS

C. J. VANNIEUWENHUYZEN,

Plaintiff-Appellant,

V

MADONNA UNIVERSITY, DEANNE HELSOM, DEAN HELSOM, STEPHANIE UBALLE, and STEVEN UBALLE, a/k/a ESTEBAN UBALLE,

Defendants-Appellees.

UNPUBLISHED
July 26, 2002

No. 226559
Wayne Circuit Court
LC No. 98-818430-NO

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right the circuit court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

Plaintiff C. J. VanNieuwenhuyzen suffered serious injury to her back after the ladder she was using to descend from a loft bed in a dormitory room at Madonna University slipped and she fell to the ground. Defendants Stephanie Uballe and Deanne Helsom were Madonna University students and residents of the dormitory room where plaintiff fell. On the day before her fall, April 19, 1997, plaintiff had painted her dorm room and because of the paint fumes, did not want to sleep in her room. Since Deanne Helsom's roommate, Stephanie Uballe, went away for the weekend, Deanne invited plaintiff to sleep in their room, which plaintiff did. After plaintiff awoke on the morning of April 20th, she began to climb down the ladder, which was in the same position it had been in when she used it to climb into the loft. Plaintiff testified that she was slightly off center as she stepped onto the second rung so that as she looked down, she could see where she was stepping. As she stepped onto the third rung, the ladder slipped, and plaintiff fell.

Defendants Steven Uballe and Dean Helsom, Stephanie's and Deanne's fathers, respectively, constructed the loft beds in September 1996, at the beginning of the 1996-1997 school year. The lofts raised the beds several feet off of the ground and were designed to create more livable space in the dorm room. At the time they were constructed, the lofts did not have a ladder. After Mr. Uballe and Mr. Helsom finished building the lofts, two members of the Madonna University staff inspected the lofts, as the university's loft guidelines required. The

guidelines did not mandate a ladder, and the lofts passed inspection. Stephanie and Deanne obtained the ladder at a later time from another student in the dorm. The ladder did not have hooks on it and was not otherwise attached to the lofts. It did, however, have angled ends cut at the top and the bottom so that it could rest against the edge of the loft and on the floor.

Initially, plaintiff filed suit solely against Madonna University, claiming that the school breached its duties to keep the premises safe from hidden defects, to inspect the bed and ladder for latent defects or dangers, and to warn of dangers which it knew or should have known existed. Subsequently, plaintiff amended her complaint to allege that Stephanie and Deanne breached their duties to keep their room reasonably safe and free from hidden defects, to inspect the premises for dangers or defects, and to warn and notify plaintiff of dangers or defects in the ladder. Plaintiff also alleged in her amended complaint that Mr. Uballe and Mr. Helsom failed to exercise care and caution in the construction and maintenance of the loft.

All defendants moved for summary disposition. The trial court granted their motions pursuant to MCR 2.116(C)(10),[1] finding that the open and obvious doctrine applied to eliminate the liability of defendants on all of plaintiff's premises liability claims. Plaintiff subsequently moved for reconsideration, which the trial court denied. Plaintiff appeals the grant of summary disposition by right. Although we conclude that the trial court erred in part of its reasoning, we affirm.

II. Standard of Review

This court reviews trial court decisions on motions for summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich ___; ___ NW2d ___ (Docket No. 117985, decided 5/29/02), slip op at 5. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim. *Id.* at 10. The moving party has the initial burden of showing that no genuine issues of material fact exist, and the opposing party must produce substantively admissible evidence demonstrating that there are genuine issues of material fact in order to avoid summary disposition. *Id.* at 10. The court reviews the affidavits, pleadings, depositions, admissions, and other admissible evidence that the parties submit in a light most favorable to the non-moving party. *Id.* at 11. If the evidence shows that no genuine issues of material fact remain, the moving party is entitled to judgment as a matter of law. *Id.*

III. Analysis

Initially, we note that the trial court did not reach several grounds for relief argued by defendants because of its conclusion regarding the open and obvious nature of the ladder. Plaintiff urges this Court to refuse to consider on appeal any alternate grounds that would

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[1] Defendant Madonna University moved for summary disposition based on MCR 2.116(C)(8) and (10). Although the trial court's opinion does not state on what grounds it granted the university's motion, it is evident that the court's decision was based on MCR 2.116(C)(10) because the court considered more than just the pleadings. *Smith v Globe Life Ins*, 460 Mich 446, 455; 597 NW2d 28 (1999).

support summary disposition. She argues that because those grounds were not considered or discussed by the trial court, they are not properly preserved. Generally speaking, plaintiff is correct. "Issues that are not properly addressed by the trial court are not preserved for review." *Koster v June's Trucking*, 244 Mich App 162, 168; 625 NW2d 82 (2000). However, if the issues that the trial court did not reach are questions of law, this court may address them if all of the necessary facts are presented. *Id.*

Because we agree with the trial court that the open and obvious doctrine applies to the facts of this case and thus precludes plaintiff's claims against Stephanie, Deanne, and defendant Madonna University, it is not necessary to analyze any alternate arguments raised by those defendants. We disagree, however, with the trial court's conclusion that the open and obvious doctrine applies to plaintiff's claims against Dean Helsom and Steven Uballe. Accordingly, we address whether defendants Mr. Helsom and Mr. Uballe owed a duty to plaintiff. Duty is a question of law for the court, *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997), and because we determine that all of the facts necessary to our decision have been presented, our review of the issue is appropriate. Despite the errors in the trial court's reasoning, we find that it ultimately reached the correct result, and therefore we also affirm the trial court's dismissal of the claims against Mr. Helsom and Mr. Uballe. *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000).

A. Basis of the Trial Court's Ruling

In its opinion, the trial court found that plaintiff was an invitee of all of the parties; however, this finding is incorrect as defendants Steven Uballe and Dean Helsom indisputably had no possession or control of the dorm room. As such, these defendants could not be an invitor to plaintiff. Additionally, in their respective summary disposition motions, Deanne contended that plaintiff was a licensee in her room, and Stephanie claimed that she owed plaintiff no duty at all because she was away for the weekend. While Madonna University argued that it did not possess the room where plaintiff fell and that it was in a traditional landlord/tenant relationship with Stephanie and Deanne, it did not for purposes of summary disposition, challenge the claim that plaintiff was its invitee.

A person's status on the land or premises of another as either an invitee, licensee, or trespasser determines the duty that the possessor of the land owes to the person on the land. *Pippin v Atallah*, 245 Mich App 136, 141; 626 NW2d 911 (2001). Because the trial court stated that the parties agreed that plaintiff was an invitee, it analyzed the duty element of plaintiff's negligence claims under the standard applicable to invitees. We find, however, that plaintiff was not an invitee of all of the defendants, and that the trial court erred by applying the same standard of care to all of the defendants.

B. Plaintiff's Status

An invitee is a person who is on another's premises for a commercial purpose mutually beneficial to both parties. *Taylor v Laban*, 241 Mich App 449, 454; 616 NW2d 229 (2000) and *Stitt v Holland Abundant Life*, 462 Mich 591, 604; 614 NW2d 88 (2000). "'A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent[,]'"

either express or implied. *Pippin, supra* at 142 (citation omitted). A social guest is typically a licensee. *Stitt, supra* at 596.

As stated above, Madonna University does not dispute that plaintiff was its invitee. Because plaintiff was a "customer" of Madonna University's "business," this is the correct classification of plaintiff's status on defendant university's land. Plaintiff was not, however, an invitee of any of the remaining defendants. As to Stephanie and Deanne, plaintiff was a licensee because she was a social guest in their dormitory room. *Id.* We note that although Stephanie did not expressly grant plaintiff permission to use her room, she knew that plaintiff frequently visited her room, and her permission to visit on this occasion was implied.

As for Steven Uballe and Dean Helsom, the trial court improperly treated plaintiff's claims against them as premises liability claims. Because they had neither possession nor control over the dorm room where plaintiff fell, they face no liability for the condition of the premises. *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994).

C. Defendants' Duties

As stated by this court in *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000),

> To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.

"Duty is any obligation that the defendant has to the plaintiff to avoid negligent conduct." *Jenks v Brown*, 219 Mich App 415, 417; 557 NW2d 114 (1996). Whether a defendant owes a duty to a plaintiff is a question of law for the court. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997).

> In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. [*Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997) (citations omitted).]

Based on our review of these variables, we find that neither Mr. Uballe or Mr. Helsom owed plaintiff the duties that she claimed they did—to exercise care and caution in the construction and maintenance of the loft beds and to keep them in a reasonably safe condition. These defendants had no relationship with plaintiff, and their conduct, building the loft, was not connected to plaintiff's injury, falling from the ladder. Additionally, neither of these defendants constructed the ladder, which plaintiff admits is the focus of her claim, rather than the loft beds themselves.

Furthermore, the evidence does not show that either Mr. Uballe or Mr. Helsom could have foreseen the harm that plaintiff suffered. For example, plaintiff did not demonstrate that Mr. Helsom knew that the ladder was being used in the dormitory room. Although he saw it on one occasion, he did not inspect it, and was under the impression that Deanne and Stephanie were not going to use it. While Mr. Uballe was aware that the ladder was in use because Stephanie told him she had fallen from it, the evidence does not show that he had ever seen the ladder or learned about its condition and manner of use. Plaintiff cites no law to support that these defendants owed her a duty under these circumstances, and we find as a matter of law that no duty existed. Because no duty exists, plaintiff's claims against Mr. Uballe and Mr. Helsom cannot succeed. The trial court properly granted summary disposition to these two defendants, albeit for the wrong reason.

As stated above, the remaining defendants duty to plaintiff depends on her status as an invitee of Madonna University and as a licensee of Deanne and Stephanie. Of the duties imposed on possessors of land, the duty to invitees is the most rigorous. *Stitt, supra* at 597.

> The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises, and depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. [*Id*.]

The duty owed to licensees, however, is less demanding. A possessor of land only owes a duty to a licensee to "warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt, supra* at 596. A licensor does not have to make the premises safe, but must avoid injuring the guest through willful and wanton misconduct. *Taylor, supra* at 455-456.

Dangers that are open and obvious come with their own warning, so a premises possessor does not have a duty to protect visitors against these types of dangers. *Pippin, supra* at 143. However, where the premises possessor also has a duty to make the premises safe, as does an invitor, the open and obvious nature of the danger will not eliminate liability if the condition was still unreasonably dangerous. *Id.* Recently, in *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 517; 629 NW2d 384 (2001), our Supreme Court summarized the open and obvious doctrine as it pertains to invitees:

> [T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.

The Court indicated that the "critical question" is

> whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an

> unreasonable risk of harm, i.e. whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability. [*Id.* at 517-518.]

"[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519.

To determine if a danger is open and obvious, the court considers whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Abke v Vandenberg*, 239 Mich App 359, 361-362; 608 NW2d 73 (2000), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Upon de novo review of the substantively admissible evidence presented to the trial court, we find that the danger of the ladder from which plaintiff fell was open and obvious. An average user of ordinary intelligence who was casually inspecting the ladder would have been able to discover the danger of using a ladder that was merely leaning against the loft, recognizing that it could slip and fall while in use. Although we note that plaintiff actually knew the ladder was unsecured, could be moved, and could only be used safely if properly positioned and used, our decision is not based on plaintiff's subjective knowledge. Rather, we objectively find that the ladder presented an open and obvious danger. As such, we find that Stephanie and Deanne, as licensors, did not have a duty to warn plaintiff about the use of the ladder. Since plaintiff did not allege willful or wanton misconduct by Stephanie or Deanne, summary disposition was appropriately granted in their favor.

With regard to Madonna University, our analysis does not end with the determination that the ladder presented an open and obvious danger. Pursuant to *Lugo*, we continue to examine whether the ladder had "special aspects" that made the risk of harm unreasonable despite its openness and obviousness. *Lugo, supra* at 517.

Plaintiff has not demonstrated through substantively admissible evidence that there were any special aspects of the ladder that made it unreasonably dangerous. Although plaintiff suggests that the use of the ladder was unavoidable, its use became necessary only after she used it to climb into the loft. Additionally, Deanne and Stephanie used the lofts for some time without any ladder at all. In support of her argument, plaintiff offered evidence regarding Madonna University's role in keeping the dormitories safe. She relies on the fact that the loft guidelines did not have additional requirements for ladders and that two resident assistants employed by the university saw the ladder in use but did nothing to prevent its use or make it safe. These facts only become relevant, however, if the court determines that the university owed plaintiff a duty with regard to the ladder. Because plaintiff has not provided evidence of any special aspects of the ladder that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided," we find that the risk of the ladder did not remain unreasonably dangerous despite

its open and obvious condition and that the trial court properly granted summary disposition to Madonna University.[2] *Lugo, supra* at 519.

Plaintiff also argues that the open and obvious doctrine pertains to only claims based on a failure to warn. This argument has no merit. In *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999), this Court concluded that the open and obvious doctrine applies not only to claims that a defendant failed to warn but also "to claims that the defendant breached a duty in allowing the dangerous condition in the first place." In this case, plaintiff based some of her claims against Madonna University on the university's allowing the condition to exist. Based on *Millikin*, the open and obvious doctrine applies to this theory as well, and, based on the analysis above, summary disposition is appropriate.

Contrary to plaintiff's assertions, *Walker v City of Flint*, 213 Mich App 18, 21; 539 NW2d 535 (1995), does not conflict with the principle stated in *Millikin*. The Court in *Walker*, *supra* at 22, stated that the "defense of open and obvious danger relates to a claim of a duty to warn, but will not exonerate a defendant from liability where the claim is one of a duty to maintain and repair the premises." The Court clarified, however, that the defense of open and obvious danger was inapplicable to claims based on a *statutory* duty to maintain and repair the premises. *Id.* at 23. Both *Milliken* and the present case are distinguishable from *Walker* because plaintiff's claims are based on common-law premises liability.

Finally, plaintiff argues that the open and obvious danger doctrine is fundamentally inconsistent with changes in tort law enacted by our Legislature in 1996. MCL 600.2958 states that "in an action based on tort and other legal theory seeking damages for personal injury, property damage, or wrongful death, a plaintiff's contributory fault does not bar plaintiff's recovery of damages." MCL 600.2957 states that in a personal injury action, "the liability of each person shall be allocated under this section by the trier of fact . . . and in direct proportion to the person's percentage of fault." Plaintiff claims that the open and obvious doctrine cannot be reconciled with these statutory provisions because the doctrine is based on the injured person's failure to exercise due care for her own safety.

This argument fails because it is based on a misconception. In *Lugo*, our Supreme Court made clear that in assessing whether a danger is open and obvious, the plaintiff's actions are not the focus of the court's analysis. Rather,

> in resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious and, if so, whether there were special aspects of the situation that nevertheless made it unreasonably dangerous. . . . [T]he fact that the plaintiff was also negligent would not bar a cause of action. This is because Michigan follows the rule of comparative negligence. Under comparative negligence, where both the plaintiff and the defendant are culpable of negligence with regard to the plaintiff's injury,

[2] The evidence that plaintiff presented regarding other minor falls from the ladder does not persuade us that the risk of harm was "uniquely high." Moreover, as the court in *Lugo* stated, we cannot analyze the condition retrospectively to conclude that because plaintiff was seriously injured, the risk of harm presented by the condition was uniquely high. *Lugo, supra* at 519 n 2.

> this reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether. [*Lugo, supra* at 523-524.]

Accordingly, the open and obvious danger doctrine does not conflict with the cited sections of Michigan law.

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder