STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HALE,

Plaintiff-Appellant,

v

AUBURN HEIGHTS APARTMENTS, G.D.E. GEORGIA, INC., and COLONIAL LAMPLIGHTERS, d/b/a G.D.E. RENOVATIONS,

Defendants-Appellees,

and

J.R. NAVARRO FENCING,

Defendant.

UNPUBLISHED
August 23, 2002

No. 233131
Oakland Circuit Court
LC No. 00-020314-NO

Before: White, P.J., and Neff and Jansen, JJ.

WHITE, P.J. (*dissenting*).

I respectfully dissent. Under the circumstances presented, I conclude that plaintiff did not show special aspects making the balcony unreasonably dangerous. *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001). *Woodbury v Bruckner (On Remand)*, 248 Mich App 684; __ NW2d __ (2001), is distinguishable.

Although *Lugo* speaks of special aspects that give rise to a "uniquely high likelihood of harm or severity of harm if the risk is not avoided," the mere fact that a plaintiff was subjected to falling from a second-story height if the risk was not avoided does not, in itself, satisfy *Lugo's* requirement that special aspects be present. In *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), the Supreme Court found no special aspects under *Lugo*. The Court focused on whether the risk of ice and snow on a sloped rooftop was unreasonably dangerous under the circumstances, and whether plaintiff presented evidence of "'special aspects' of the condition that differentiate it from the typical sloped rooftop containing ice, snow or frost," not whether the risk of harm from a fall from the roof posed a high likelihood of harm. *Perkoviq*, *supra* at 20.

In *Woodbury (On Remand)*, the unguarded balcony/landing was used by the plaintiff on a regular basis, and it was intended and expected by the defendant that she do so. In the instant case, the balcony was under repair. Defendant had warned the residents that contractors would be taking down the balcony walls, fixing the balcony floors, and installing new railings, and had asked the residents to remove personal items from the balconies and to stay off the balconies until the new railings were installed. Plaintiff was a regular visitor to his cousin's apartment and was aware that construction was in progress. He was aware that the rails had been removed and that the work was incomplete. Plaintiff nevertheless chose to use the balcony. I would hold that plaintiff has failed to show special aspects justifying the imposition of liability notwithstanding the open and obvious nature of the risk.

/s/ Helene N. White