STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MARTIN, Plaintiff-Appellant,	UNPUBLISHED July 19, 2016
v	No. 328240 Kalamazoo Circuit Court
MILHAM MEADOWS I LIMITED PARTNERSHIP and MEDALLION MANAGEMENT, INC., Defendants-Appellees.	LC No. 2013-000485-NO

Before: STEPHENS, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Michael Martin slipped on the basement stairs in his rented townhouse and sustained permanent injuries. He filed suit against his apartment complex and its management company, asserting that they breached their duties under MCL 554.139 to ensure that his premises were fit for their intended use and to keep the premises in reasonable repair. Martin also raised a premises liability claim. The circuit court discerned no triable question regarding the stairway's condition and determined that defendants lacked notice of the danger. The court therefore summarily dismissed Martin's complaint.

Contrary to the circuit court's assessment, record evidence supports that Martin notified defendants of the slippery condition of his stairwell and that defendants failed to rectify this condition in violation of their statutory duty. As such, we reverse the summary dismissal of Martin's statutory claims and remand for continued proceedings. Martin failed to create a triable issue on his premises liability claim, however, as the condition of the stairs was open and obvious. We affirm the lower court's dismissal in that regard.

I. BACKGROUND

We consider the evidence in the light most favorable to Martin, as we must when reviewing a summary disposition ruling. Martin was a creature of habit and had engaged in the same workout schedule six days a week since he had moved into his townhouse on July 13, 2007. On October 15, 2010, Martin did warm-up exercises in the main floor living room. Martin then headed toward the basement where he kept exercise equipment. Martin opened the door to the basement stairwell and placed his tennis-shoe clad foot onto the first step. He immediately slipped and fell down the stairs, landing on the basement floor. As a result of his

fall, Martin is partially paralyzed, suffers from a traumatic brain injury, and requires around-the-clock care.

Martin described that the stairs leading to his basement had always been slippery. He had slipped three times before the current accident. Martin's adult son described that he had personally slipped twice and had observed two other adults slip on one occasion. Martin's neighbor, who had an identical stairwell, had also lamented the slipperiness of the stairs and noted that his daughter had fallen.

Martin notified defendants' representatives regarding the slippery condition of the basement stairs. He first spoke to one of the complex's maintenance men, Thomas Papesh, who advised Martin to notify the complex's office manager. Martin visited the office and made an oral report regarding the stairs to no avail. On September 14, 2009, Martin typed the following note and placed it in a rent-collection slot:

> I wanted to let you know that I slipped on the last couple of steps in the basement.
>
> I didnt [sic] get hurt but they are slippery.can [sic] you put down some strips or something on the steps?

Following Martin's fall, he filed suit alleging "that the paint used on the stairs in the basements of the town homes was slippery and causing tenants to fall." He accused defendants of violating MCL 554.139(1), which provides, in relevant part:

> In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located. . . .

Martin also contended that defendants' negligent conduct supported a common-law action.

During discovery, Martin secured the assistance of a professional engineer and construction expert, Patrick Glon. Glon determined the wooden staircase was coated with "normal paint that does not contain any 'slip-resistant' additives." Glon noted:

> Steps are more slippery when painted than when the wood is left bare. Unless, of course, the paint contains sand or some other "non-slip" additive. . . .
>
> Anti-skid adhesive tape, a very simple and inexpensive remedy, added to the nosings of the treads would provide a visual contrast to the tread nosings as well as making the nosings slip resistant.
>
> Again, the addition of an inexpensive pre-shaped metal or rubber strip or corner to the nosing of the tread would reduce the dangers of the painted staircase.

Glon also opined that the stairwell's design was dangerous. The stairwell was too steep and each step too narrow for an adult foot. The stairs were of varying heights and the handrail too low to be of assistance. These conditions created a substantial fall risk and violated building codes that had been in place since 1973, Glon opined.

Defendants' agents denied that Martin notified them that his basement stairs were slippery. None of defendants' agents were certain what type of paint was used on Martin's stairs prior to his accident. And the stairwell was repainted in 2011 when Martin moved out, precluding accurate testing. However, defendants' maintenance supervisor, Greg Newsome, asserted that their contractors always used "Sherwin Williams porch and floor paint." Defendants' expert engineering witness, John Leffler, conducted slip resistance testing on the top step after the stairs were repainted. Leffler opined that the slip resistance was within allowable limits. But Leffler admitted that the paint that was likely used did not include sand or other gritty materials and therefore was not the optimum choice.[1] Another expert studied the "fall kinematics and mechanisms" of Martin's accident and opined that he tripped forward, rather than slipping.

Following discovery, defendants sought summary disposition pursuant to MCR 2.116(C)(10). Defendants asserted that they lacked notice of the condition, negating liability under the statute and the common law. Specifically, even if defendants had received Martin's September 2009 note, it would only place them on notice that the bottom two stairs were slippery. Citing Leffler's report that the Sherwin Williams paint was adequate for the job, defendants also insisted that the stairs were safe, fit for their intended use, and kept in reasonable repair. Moreover, given Martin's regular use of his basement stairs, defendants contended that the slippery condition was well known to him and therefore open and obvious.

Martin retorted that his verbal and written communications notified defendants of the slippery condition of the entire staircase, not just the bottom two steps. He then expanded his theory about the dangerous condition of the staircase, arguing that his fall was not caused just by the slipperiness of the stairs, but also by the excessive steepness, narrow tread and inconsistent stair height as posited by Glon. The numerous defects rendered the stairs as a whole unfit as well as unreasonably dangerous in avoidance of the open and obvious doctrine, Martin asserted.

Ultimately, the circuit court dismissed Martin's complaint in its entirety. The court declined to consider the stairwell's "geometry" or whether its design violated building codes as Martin's complaint did not reference these alleged defects.

Lacking in this case was evidence of notice, the court determined, even though it accepted as true that Martin had orally complained about the stairwell's slipperiness as well as providing a written communication.

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[1] Martin filed a motion to exclude Leffler's report. The circuit court did not resolve this issue as it summarily dismissed Martin's complaint. Because the motion remains undecided, Martin is not precluded from refiling it on remand.

> [I]n this particular case, the only semblance of notice that was provided was a note provided by the plaintiff to defendants, not on their standard notification form, but a more informal notice . . . . That was submitted to the defendants over a year prior to the incident involved.
>
> Truly, from the court's standpoint if this were a situation that required immediate attention, one would think the plaintiff would have been beating the drums given the fact that the initial contact did not provide a response . . . from the defendants. In fact, the plaintiff specifically addressed what he thought would be helpful with regard to the bottom steps - mainly strips to provide additional friction at the bottom of the stairs. No indication that that was ever[] followed through on from the defendant, nor any indication that plaintiff renewed his request even after the incident in September of 2009. . . .
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> * * *
>
> [T]he court does not believe that the plaintiff provided adequate notice of the need for repair of the stairs. I don't buy into the argument that simply because there is some . . . specific complaint about a portion of the stairs that somehow that doesn't put the landlord on notice to at least go in and inspect the stairway generally.
>
> But, in this particular situation, I think that the plaintiff's notice and . . . the plaintiff understanding with regard to formal notice, and his use of an informal notification over a year before the incident occurred to me does not satisfy the notice requirement.
>
> Otherwise, quite frankly, a tenant simply advising a landlord of a problem of any kind, in essence creates a duty on that landlord to repeatedly go back and assure itself that a particular problem either has been remedied or no longer exist[s]. I think there is a temporal requirement with regard to that notice.

Had Martin felt the steps were overly dangerous, he would have followed through and made "a formal request for service."

In any case, the court noted that Martin was "very familiar with these stairs," as well as their slipperiness and dimensions, as he had "traversed [them] numerous times during his tenancy." Given Martin's familiarity with the stairs and the general condition of this feature, the court discerned no fact question that the stairs were unfit, not kept in reasonable repair, or so unreasonably dangerous to avoid the open and obvious doctrine. "Nothing about" the stairs indicated that they were "treacherous" or caused an "unusual or uniquely" high risk of harm or potential for severe harm. While Martin made "a point that these stairs were in need of repair, that they were worn, that they were well used," he "was fully aware of the condition of these stairs."

And defendants met their repair duties under the statute, the court concluded. "There is under Michigan Law no requirement that the defendants make the stairs fool-proof, if you will."

Although the stairs were worn, they "were not defective in the contexts of being broken or structurally unsound . . . . There was no[] indication that the stairs were in any way in danger of falling." The court therefore dismissed Martin's complaint in its entirety, a ruling that Martin now appeals.

II. LEGAL PRINCIPLES

The circuit court dismissed Martin's claims under MCR 2.116(C)(10), a decision we review de novo. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 243; 704 NW2d 117 (2005).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). . . . "[We] consider[] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

Martin alleged that defendants violated MCL 554.139(1), which imposes a duty on landlords to ensure that the premises "are fit for the use intended by the parties" and are kept "in reasonable repair. The statute "provides a specific protection to lessees and licensees of residential property in addition to any protection provided by the common law." *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Notably, because this statute imposes a duty above and beyond the common law, the open and obvious doctrine is not an available defense. *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003).

MCL 554.139(1)(a) requires a landlord to keep the premises "fit for the use intended by the parties." "The primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure." *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). " 'Fit' is defined as 'adapted or suited; appropriate[.]' " *Allison*, 481 Mich at 429, quoting *Random House Webster's College Dictionary* (1997). "MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants 'reasonable access' to different building levels." *Hadden*, 287 Mich App at 130.

Subsection (b) in turn requires a landlord to keep the premises in reasonable repair.

> "Repair" as a noun is defined as "the good condition resulting from continued maintenance and repairing." *Random House Webster's College Dictionary* (1997). "Repairing" involves "restor[ing] to a good or sound condition after decay

> or damage; mend[ing].” *Id.* Therefore, MCL 554.139(1)(b) refers to keeping the premises in a good condition as a result of restoring and mending damage to the property. [*Allison*, 481 Mich at 432 n 6.]

“ ‘The plain meaning of “reasonable repair” requires repair of a defect in the premises.’ ” *Id.* at 434, quoting *Teufel v Watkins*, 267 Mich App 425, 429 n 1; 705 NW2d 164 (2005). A “defect,” in turn, is “ ‘a fault or shortcoming; imperfection.’ Damage to the property would constitute an imperfection in the property that would require mending. Therefore, repairing a defect equates to keeping the premises in a good condition as a result of restoring and mending damage to the property.” *Allison*, 481 Mich at 434, quoting *Random House Webster’s College Dictionary* (1997).

To be held liable under the statute, however, the landlord must have some notice of a defect or that the property is unfit for its intended use. Liability only adheres where “(1) the lessor knew or should have known of the existence of the defects; [and] (2) the lessor realized or should have realized the risk of physical injury arising from the defect[.]” *Evans v Van Kleek*, 110 Mich App 798, 803; 314 NW2d 486 (1981) (quotation marks and citations omitted). See also *Raatikka v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978).[2]

In addition to citing a violation of statutory duties, Martin asserts a common-law premises liability action.[3]

> The law of premises liability in Michigan has its foundation in two general precepts. First, landowners must act in a reasonable manner to guard against harms that threaten the safety and security of those who enter their land. Second, and as a corollary, landowners are not insurers; that is, they are not charged with guaranteeing the safety of every person who comes onto their land. These principles have been used to establish well-recognized rules governing the rights and responsibilities of both landowners and those who enter their land. Underlying all these principles and rules is the requirement that both the possessors of land and those who come onto it exercise common sense and prudent judgment when confronting hazards on the land. These rules balance a possessor’s ability to exercise control over the premises with the invitees’

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[2] *Evans* and *Raatikka* also required a plaintiff to establish that the lessor concealed or failed to disclose the defect and that the defect was not readily observable. These elements were eliminated by *O’Donnell*’s pronouncement that the open and obvious doctrine does not apply to claimed violations of MCL 554.139. See *O’Donnell*, 259 Mich App at 581. The notice requirement has not been affected by subsequent caselaw.

[3] Martin insists that his claim sounds in ordinary negligence, rather than premises liability. However, “[w]hen a plaintiff’s injury arises from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence, even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff’s injury.” *Compau v Pioneer Resource Co, LLC*, 498 Mich 928; 871 NW2d 210 (2015).

> obligation to assume personal responsibility to protect themselves from apparent dangers. [*Hoffner v Lanctoe*, 492 Mich 450, 459-460; 821 NW2d 88 (2012) (citations omitted).]

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props*, 270 Mich App 4378, 440; 715 NW2d 335 (2006). "The starting point for any discussion of the rules governing premises liability law is establishing what duty a premises possessor owes to those who come onto his land." *Hoffner*, 492 Mich at 460.

Martin, as a tenant on his landlord's property, fell into the category of invitee. *Woodbury v Bruckner (On Remand)*, 248 Mich App 684, 691; 650 NW2d 343 (2001).

> 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. Thus, an invitee is entitled to the highest level of protection under premises liability law. [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).]

Thus, a landlord is liable to its tenant for injury caused

> by a condition on the land if the owner: (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. [*Stitt*, 462 Mich at 597.]

A landowner is not liable to an injured party under common-law principles, however, where the condition is "open and obvious." Whether a condition is open and obvious is judged by an objective standard by asking, "Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection?" *Price v Kroger Co*, 284 Mich App 496, 501; 773 NW2d 739 (2009). There are exceptions to the open and obvious doctrine. Liability may arise if special aspects make the condition unreasonably dangerous. *Hoffner*, 492 Mich at 455, 461-463. A condition is "unreasonably dangerous" if it "present[s] an extremely high risk of severe harm . . . where there is no sensible reason for such an inordinate risk of severe harm to be presented." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519 n 2; 629 NW2d 384 (2001). A condition is not automatically characterized as unreasonably dangerous "merely because a particular open and obvious condition has some potential for severe harm" or a situation in which severe harm could occur can be imagined. *Id.* Rather, only "unusual" conditions where the "risk of harm . . . is so unreasonably high" that its presence is "inexcusable" will rise to this level. *Hoffner*, 492 Mich at 462; *Lugo*, 464 Mich at 518-519 n 2.

III. NOTICE

In order to hold defendants liable under either the statute or the common law, Martin must establish that defendants were on notice of the allegedly defective condition. Viewing the evidence in the light most favorable to Martin, the court erroneously concluded that adequate notice of the stairs' slipperiness was lacking in this case. Martin communicated face-to-face with a maintenance worker and the office manager about the slippery condition of his staircase. While defendants' witnesses denied that these conversations occurred, we must credit Martin's testimony and permit a jury to determine his credibility. When defendants took no steps to investigate or remedy the situation, Martin wrote a note advising defendants that he had "slipped on the last couple of steps" and that "they are slippery." Martin requested that defendants "put down some strips or something on the steps." Viewed in the light most favorable to Martin, these notices applied to the condition of the entire stairway. Although Martin advised that he fell on the bottom steps, he indicated that "they"—possibly the stairs in general—were slippery and asked for a remedy for the stairs, not specifically for the bottom two.

It is not dispositive that these notices were not reduced to a service request form. The service request forms presented into evidence were in an assortment of handwritings, suggesting that they were not prepared by Martin, but by various of defendants' employees who received verbal communications about the condition of the townhouse. A jury may ultimately conclude that the absence of a service request form regarding Martin's stairs discredits his testimony that he lodged three complaints about the condition. A jury could also conclude, however, that defendants' agents failed in their duty to create such a form, allowing Martin's complaints to fall through the cracks.

The court further erred in determining that these notifications were too remote in time to place defendants on notice of the dangerous condition of the stairs. If this were a transient condition, like snow and ice, antiquated notice would destroy Martin's claim. However, Martin lodged a series of complaints about the slippery condition of his basement stairs, a condition that would not go away on its own. The circuit court determined that if the condition were really overly dangerous, Martin would not have given up and would have pursued his complaints until a remedy was provided. Yet, it is equally possible that Martin was tired of his complaints going unheeded and gave up. This is supported by Martin's testimony that he had complained to the office manager in the past regarding defective blinds and a sliding glass door in his townhouse and received "no response" and "got fed up." Under the court's theory, a landlord could avoid liability for injuries caused by defective conditions simply by ignoring his tenants until they gave up complaining and then sit back and to wait for injury to occur.

IV. STATUTORY VIOLATION

The court made only a terse analysis of whether Martin created a triable issue regarding whether the basement stairs were fit for their intended use and whether defendants kept them in reasonable repair. Interspersed with its notice analysis, the court indicated that it would not consider Martin's evidence regarding the "geometry" of the stairs or their potential violation of building codes because those claims were not raised in Martin's complaint. The court focused solely on Martin's claim that the stairs were overly slippery because of the paint applied. The court acknowledged that unrebutted evidence established that the paint used on the stairwell

lacked grit additive to enhance traction. The court incorrectly asserted that the experts agreed that this lack of additive did not render the stairs unreasonably dangerous. The court recited that defendants' testing revealed that even with inadequate paint, the traction on the stairs fell within permissible limits. The court then proceeded to the premises liability claim and found the conditions open and obvious.

As noted, the open and obvious doctrine does not apply to claimed violations of MCL 554.139 and Glon expressly found that the paint likely used on the stairs was inadequate and unsafe. Regarding the paint on the basement stairs, Glon's report states as follows:

> The staircase of the rental townhouse, including the risers and treads, is painted a uniform gray color. The uniform color of the steps of the staircase makes it hard to distinguish individual treads when looking down from the top. This, in turn, makes an overstep more likely and therefore, the steps become more dangerous. Tread nosings – or at least the leading edges of treads – should be marked in some way to make them clearly visible to users.
>
> Steps are more slippery when painted than when the wood is left bare. Unless, of course, the paint contains sand or some other "non-slip" additive. The paint on the staircase of the rental townhouse is normal paint that does not contain any "slip-resistant" additives.
>
> Anti-skid adhesive tape, a very simple and inexpensive remedy, added to the nosings of the treads would provide a visual contrast to the tread nosings as well as making the nosings slip resistant.
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> Again, the addition of an inexpensive pre-shaped metal or rubber strip or corner to the nosing of the tread would reduce the dangers of the painted staircase. Adding nosing's [sic] to the front corner of the treads would first, clearly identify the front edge of the tread so each tread could be distinguished from the others. And, second, the addition of nosing strips to the front edge of the treads would add some traction to the rounded corner of the treads.

This evidence suffices to create a genuine issue of material fact regarding Martin's claim that the stairs were not fit for the use intended by the parties.

In *Allison*, 481 Mich at 429, our Supreme Court defined the word "fit" as used in MCL 554.139(1)(a) to mean "adapted or suited; appropriate." That case involved a parking lot. The Supreme Court determined that "[a] parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles." *Id.* The Supreme Court held that a light snowfall did not render the parking lot unfit for use as a parking lot. *Id.*

This Court applied *Allison* in *Hadden*, 287 Mich App 124, which involved a snow and ice-covered exterior stairway rather than a parking lot. We observed, "[t]he primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure. . . . The stairway need not be in ideal condition, nor in the most accessible condition possible, but rather must provide tenants 'reasonable access' to building levels." *Hadden*, 287

Mich App at 130. And as this Court stated in *Hadden*, summary disposition is improper if "there could be reasonable differences of opinion regarding whether the stairway was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall." *Id.*

Reasonable minds could differ regarding whether Martin's basement stairway was appropriate for everyday use given its inherent slipperiness as described in Glon's report. Despite that Martin used the stairway regularly, Glon's report evinces that each time he did so, he risked a fall. Indoor stairs are not supposed to be slippery. While ice and snow are expected conditions in a parking lot during a Michigan winter, interior stairways are intended to provide safe and secure access from one level of a building to another. While the landlord is not an insurer of a stairway's safety, a landlord is not immune from liability under MCL 554.139(1)(a) merely because a tenant has safely traversed an unreasonably slippery stairway on multiple occasions. A tenant descending slippery stairs wearing certain shoes or treading slowly and carefully may avoid slipping. But standing alone, a tenant's ability to avoid an unfit condition does not render the premises fit for their intended use. Similarly, a question of material fact exists regarding whether defendants failed to keep the premises in reasonable repair after Marin provided notice of the steps' slippery condition.

V. AMENDMENT

Martin also complains that the circuit court should have considered various other "defects" uncovered by Glon during his investigation. After the circuit court granted defendants' summary disposition motion, Martin filed a motion for reconsideration and to amend his complaint to include these additional theories regarding the stairs' condition. The circuit court denied reconsideration, but never resolved Martin's motion to amend. As such, Martin is free to refile his motion on remand.

MCR 2.118(A)(2) provides that leave to amend "shall be freely granted when justice so requires." Motions to amend should only be denied for "particularized reasons," including undue delay, bad faith, repeated failures to cure pleading deficiencies, undue prejudice to the nonmoving party, and futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). It appears from the record that none of these concerns exist in this case. Rather, during the course of discovery, Glon inspected the subject stairs and discovered additional defects in their design, construction, and condition that could explain how Martin fell. These defects included that the handrail was positioned too low, the stair treads were too shallow, and the riser heights and stair treads were inconsistent. These irregularities potentially could support a claim that the stairwell was not fit for its intended purpose and might provide additional support for a claim that defendants failed to keep the stairs in reasonable repair. We take no position in this regard as these theories of liability have not yet been considered by the circuit court.

Amendment would not be futile on notice grounds either. It is not dispositive that Martin never complained to defendants about the inconsistent step size, handrail placement, or staircase steepness. Defendants had constructive notice that the stairwell's dimensions were dangerous. Constructive notice may be found if a danger has existed a length of time sufficient that the landlord, in the exercise of reasonable care, should have discovered and remedied it. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001) (citation omitted, emphasis in original)

("It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or *has existed a sufficient length of time that he should have had knowledge of it*."); *Kroll v Katz*, 374 Mich 364, 371; 132 NW2d (1965) (citation omitted) ("The rule as to the length of time that a given condition must obtain in order to charge one, sought to be held liable for resulting damages, with constructive notice, varies with the facts and circumstances involved and with the basis for the liability claimed."); *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979) ("Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it."). This is because a landlord, as an invitor, has an affirmative duty to " 'inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.' " *Conerly v Liptzen*, 41 Mich App 238, 241; 199 NW2d 833 (1972), quoting Prosser, Torts (3d ed), § 61, pp 402-403. See also *Stitt*, 462 Mich at 596-597 (discussing an invitor's duty to inspect the premises).

The townhouses in the Milham Meadows I development were constructed in 1972 with "cookie cutter" design basement stairwells and no structural changes have been effected since. In the 38 years between construction and Martin's accident, defendants' agents inspected the premises, including the stairwell, countless times. It would be a question of fact whether defendants had constructive notice because they had or should have discovered the dangerous irregularity of the stairwell. *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

VI. PREMISES LIABILITY

A common-law premises liability action is more difficult to plead and establish than a statutory claim because the defendant can overcome a complaint by establishing that the defective condition was open and obvious. The circuit court correctly dismissed Martin's common-law claim here because defendants did just that. Simply put, Martin lived in this townhouse for three years and three months before his accident. He understood that the stairs leading to his basement were slippery and had actually slipped on three occasions. Martin traversed his stairs frequently, working out six days each week in his basement. The slippery condition of the stairwell was therefore well known and open and obvious to Martin.

Martin failed to create a question of fact that an exception to the open and obvious doctrine existed in this case. In *O'Donnell*, 259 Mich App 569, this Court faced a stairway that was unreasonably dangerous. In *O'Donnell*, "a set of narrow stairs connected the main floor" of a resort cabin to a low-ceilinged sleeping loft. The loft was an open concept with a guardrail to prevent falls. However, the guardrail did not go all the way to the edge of the stairs, leaving an opening from which one could plummet if they missed the top stair. The stairs themselves were completely unguarded on one side and did not have a handrail for their complete length on the other. *Id.* at 571. This Court deemed the aggregate conditions of the staircase unreasonably dangerous even when a person used ordinary caution. *Id.* at 577-578.

While slippery and of irregular construction, the danger posed by the stairwell in this case in no way rises to the level of that in *O'Donnell*. No stairs were broken, no nails jutting out, and no boards loose. The handrail was positioned too low, but it ran the course of the stairwell and was securely fastened to the wall. The stairs do not rise to the level of danger posed by "an unguarded thirty foot deep pit in the middle of a parking lot," *Lugo*, 464 Mich at 518, or an unrailed second-story balcony. *Woodbury*, 248 Mich App at 694.[4] Accordingly, summary disposition was proper in relation to this claim.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher

[4] Martin has abandoned his circuit court claim that the stairs were effectively unavoidable. He makes no argument in this regard in his appellate or reply briefs. See *Prince v McDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).