STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER S. ANBARI,

Plaintiff-Appellant,

v

UNION SQUARE DEVELOPMENT, INC., UNION SQUARE CONDOMINIUM ASSOCIATION, and GLENN WOUDENBERG,

Defendants-Appellees,

and

PHILLIP JOHN ANTHONY,

Defendant.

UNPUBLISHED
March 15, 2012

No. 302833
Kent Circuit Court
LC No. 09-005406-NO

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Glenn Woudenberg's motion for summary disposition.[1]

Plaintiff and Woudenberg both own condominium units at the Union Square Development in Grand Rapids. In March 2008, plaintiff was showing his condominium to prospective renters. He opened an unlocked, unmarked door that he thought led to an exercise room. Instead, the door was a second entrance to one of Woudenberg's two units. Plaintiff stepped through the door, fell six feet to a concrete floor, and sustained injuries. Woudenberg was in the process of renovating the unit, and earlier he had asked his employee, Michael Anthony, to remove a platform in front of the door and to barricade and lock the door. Anthony did remove the platform, but he did not lock the door. He placed a small barricade at the bottom of the door.

[1] The other defendants are not involved in this appeal.

After plaintiff sued, Woudenberg moved for summary disposition, and the trial court granted the motion under MCR 2.116(C)(10). We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id*.

Plaintiff first argues that he was a licensee on the premises at the time of the accident.[2] As stated in *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001):

> Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee. Michigan has not abandoned these common-law classifications. Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. Thus, a landowner's duty to a visitor depends on that visitor's status.
>
> A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "wilful and wanton" misconduct.
>
> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only 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. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit.

In *Pippin v Atallah*, 245 Mich App 136, 142; 626 NW2d 911 (2001), this Court stated that "[a] licensee is a person who is privileged to enter the land of another by virtue of the possessor's consent. Such consent may be either express or implied. Permission may be implied where the owner, or person in control of the property, acquiesces in the known, customary use of property by the public." (Internal citations and quotation marks omitted.) Plaintiff argues that Woudenberg acquiesced to the use of the door in question by the general public and that plaintiff therefore was a licensee. Plaintiff relies on the facts that (1) Woudenberg testified that the original intent of the unit in question involved a commercial purpose, (2) Woudenberg did not place a sign on the door identifying it as a residential unit or

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[2] Although plaintiff states in a bolded subheading that he was an invitee, he does not develop the invitee argument and has thus abandoned that argument. He also explicitly states: "The plaintiff concedes that plaintiff was not an invitee as to defendant Woudenberg and that he was either a trespasser or licensee."

warning of its dangerous condition, and (3) Woudenberg failed to secure the door, which was adjacent to a common area.

The trial court ruled as follows with regard to this issue:

> The record does not support a finding that plaintiff consented, or even acquiesced to plaintiff's presence in his condominium residence. The door was closed, no light is alleged to be on, and a barricade was erected over the entrance on the interior side of the door. Plaintiff does not allege he received express permission from defendant to enter the residence. He was allegedly looking for the exercise room and followed instructions from a stranger whom he met in the hallway. The fact that the suite was initially designated as a coffee shop is not dispositive given that plaintiff does not allege that he entered the residence believing it was a coffee shop, nor does the record establish that the space was ever used as a coffee shop or that plaintiff believed he was privileged to enter the suite because he assumed it was still a coffee shop. Accordingly, the Court agrees with defendant that plaintiff was a trespasser.

We find the trial court's reasoning persuasive. There is no evidence that Woudenberg "acquiesce[d] in the known, customary use of [the] property by the public." *Id*. Plaintiff did not know what lay behind the door when he opened it; he simply opened a door without invitation. See, generally, *Steger v Immen*, 157 Mich 494, 495-498; 122 NW 104 (1909) (the plaintiff was so contributorily negligent in opening a door, erroneously assuming that it contained a bathroom, and subsequently falling that the issue of duty need not be reached). We agree with the trial court that plaintiff was a trespasser.

Plaintiff argues that even if he was a trespasser, the court erroneously dismissed the case because Woudenberg's actions were willful and wanton. In *Taylor v Laban*, 241 Mich App 449, 457; 616 NW2d 229 (2000), this Court set forth the following elements for establishing willful and wanton conduct:

> (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [Internal citation and quotation marks omitted.]

In the present case, the trial court ruled as follows with regard to this issue:

> There is no basis to support a finding that defendant's actions were "tantamount to a willingness" that the injury would occur. Defendant testified that he instructed Mr. Anthony to lock the door and barricade it. The door was closed and a barricade was erected. In previous cases, the Michigan Court of Appeals has found that a failure to erect a fence or other safeguard does not constitute wanton and willful conduct.

We again agree with the trial court. In *Cheeseman v Huron Clinton Metropolitan Authority*, 191 Mich App 334, 335; 477 NW2d 700 (1991), the Court stated the following in discussing the requirements for establishing willful and wanton conduct: "The conduct alleged must show an intent to harm or such indifference to whether harm will result as to be the equivalent. The indifference, if not intentional, is found in the notion that in a given case the injury is probable, likely, or to be expected." Woudenberg did not show such indifference because he instructed his employee to lock and barricade the door. Plaintiff cites a jury instruction, M Civ JI 19.10, which states that an occupier of premises who owes a duty may not delegate that duty to another and thereby avoid liability. First, jury instructions do not constitute binding law. See, e.g., MCR 2.516(D)(1). Moreover, Woudenberg did not delegate his duty "to refrain from injuring [plaintiff] by 'wilful and wanton' misconduct." *James*, 464 Mich at 19. Instead, he accepted that duty and discharged it by instructing his employee to lock and barricade the door.

Plaintiff next argues that Woudenberg breached M Civ JI 19.09, which states that "[a] possessor of land . . . has a duty to exercise ordinary care in maintaining his . . . premises in a reasonably safe condition in order to prevent injury to persons traveling along an adjacent . . . public way." The trial court ruled as follows with regard to this issue:

> The Court does not find the record supports a finding that defendant rendered a common area dangerous, which is what is implicated by Michigan Civil Jury Instruction 19.09 as cited in plaintiff's supplemental brief. The only potential common area here would be the hallway, as there is no allegation the condominium suite was ever used as a coffee shop or plaintiff entered the suite anticipating it would be the coffee shop. Plaintiff, apparently, did not find the exercise room. Plaintiff's suggestion that somehow the doorway was part of the common area is not supported by the record and is, in fact, disputed by Ralph Janssens, the assistant to the building manager, who testified during deposition that the individual condominium owners are responsible for repairs to a damaged floor but not for hallway walls. . . . The record does not support a finding that defendant's construction interfered with the hallway or plaintiff's passage on it.

We find no basis on which to disturb the trial court's ruling. First, plaintiff's argument is based on a non-binding jury instruction. Second, plaintiff was not injured in the "public way" but in Woudenberg's private premises. In the context of this issue, plaintiff cites *Langen v Rushton*, 138 Mich App 672, 679; 360 NW2d 270 (1984), wherein the Court stated that a possessor of land may be liable for injuries to persons outside the land that are caused by conditions of the land. This doctrine is inapplicable in the present circumstances, because, again, plaintiff was injured while in Woudenberg's private premises.[3]

Plaintiff argues that Woudenberg breached a duty of reasonable care separate from any duty relating to premises liability. Specifically, plaintiff argues that Woudenberg's conduct amounted to the improper performance of his construction work in the building. The trial court reasoned as follows with regard to this argument:

[3] Plaintiff asserts that he was injured while "utilizing the hallway."

> With respect to plaintiff's claim for negligence, the [c]ourt finds this indistinguishable from plaintiff's claim for premises liability. The underlying allegations here are that plaintiff was injured from an allegedly defective condition on defendant's property and, therefore, it is a claim for premises liability. . . . Defendant's claim of negligence is duplicative and, therefore, summary disposition is appropriate.

The trial court's analysis, once again, is correct. Premises-liability law is applicable in cases involving a condition of land. See, generally, *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Plaintiff's injury resulted from a condition of the land and plaintiff is suing the landowner. That this condition arose out of Woudenberg's actions is not dispositive; indeed, many conditions of land arise out of a person's actions. Plaintiff may not avoid the law of premises liability by characterizing this case as one involving ordinary negligence, when he was injured by a condition of the land and is alleging a breach of reasonable care on the part of the landowner.

Plaintiff next argues that Woudenberg was acting as a general contractor and breached duties set forth in ANSI (American National Standards Institute) regulations. The trial court ruled as follows concerning this issue:

> [T]he [c]ourt does not agree that the record supports a finding that defendant breached a duty owed as a general contractor. Even if the ANSI regulations provide the applicable standard of care, the portions cited in plaintiff's supplemental brief relate to "pedestrian areas" and encourage measures to "restrict the public from access to the job site." The [c]ourt does not agree that defendant's condominium suit[e] was a "pedestrian area" and the door was closed, thereby restricting the public's access to the job site. Furthermore, defendant's claim that Michigan law does not recognize a special duty on the part of a general contractor to a trespasser appears to be supported by the case law.

Once again, we find no basis on which to reverse the trial court's ruling. As noted in *Derbabian v S&C Snowplowing*, *Inc*, 249 Mich App 695, 711-712; 644 NW2d 779 (2002), a contractor owes a general duty to act so as not to unreasonably endanger the well-being of those lawfully on the site of the project. However, and significantly, plaintiff *was a trespasser on Woudenberg's premises* when he opened the closed door and stepped inside. Accordingly, this precept is not applicable. In addition, plaintiff cites no case law or other law indicating that the ANSI standards he cites create or define a duty of care in Michigan.[4]

Plaintiff contends that Woudenberg voluntarily "assumed the duty of protecting plaintiff from the lack of a platform when he instructed Michael Anthony to barricade and lock the door." The trial court ruled as follows concerning this issue:

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[4] Nor was there evidence of a common work area as discussed in *Candelaria v BC General Contractors*, *Inc*, 236 Mich App 67, 74-75; 600 NW2d 348 (1999).

> Finally, the [c]ourt disagrees that defendant's instructions to Mr. Anthony are sufficient to find that he assumed the duty to protect the plaintiff here. In *Zychowski v AJ Marhsell*, *Inc*, [233 Mich App 229; 590 NW2d 301 (1998),] the case cited in plaintiff's brief, the Court found defendant did not voluntarily assume a duty to assist with a recall effort because his assistance was never directly requested by the party initiating the recall and defendant undertook no affirmative actions regarding this. . . . The same is true here. Defendant instructed Mr. Anthony to barricade and lock the door. There is no allegation he undertook any affirmative action to do it himself or that he was in a position to do so.

On appeal, plaintiff once again cites *Zychowski*. In that case, the Court stated that "[a] party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform. . . . Once a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Id*. at 231. The Court ruled that a company had taken no affirmative action to assist with a recall effort involving a defective product and had thus assumed no duty. *Id*. at 231-232. We disagree with the trial court that the same situation exists in the present case, because Woudenberg did in fact take steps toward assuming a duty. However, there is no question of fact regarding whether Woudenberg breached this duty. Indeed, he asked his employee to lock and barricade the door. As noted by Woudenberg, "Such a request is what an ordinarily prudent person would do." We find no basis on which to disturb the trial court's ruling. See *DeSaele v Sterling Heights*, 123 Mich App 610, 614; 333 NW2d 496 (1982) (we may affirm a trial court that reaches the correct result for the wrong reason).

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey