[Cite as *McDonald v. Martin* , 2010-Ohio-5083.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael J. McDonald et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 10AP-315 (C.P.C. No. 09CVC-02-1727)
Wendie Martin,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on October 19, 2010

Innis & Barker Co., L.P.A., and *Richard L. Innis*, for appellants.

Hollern & Associates, Edwin J. Hollern and *Jane S. Arata*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, P.J.

{¶1} Michael J. McDonald is a plumber who was at Wendie Martin's house on January 21, 2008 repairing her kitchen sink. After fixing the kitchen sink, Ms. Martin asked him to look at another problem sink in the basement. As they were heading down the basement stairs, Ms. Martin warned McDonald that one of the steps was broken, and that he should be careful. Ms. Martin went down the stairs first—followed by McDonald—without incident. After several trips up and down the stairs, however, the broken stair

gave way, causing McDonald to fall. McDonald and his wife filed suit against Ms. Martin alleging negligence and loss of consortium.

{¶2} Ms. Martin filed a motion for summary judgment, arguing that McDonald's claim(s) failed because he had assumed the risk by proceeding up and down the stairs even after being warned of the potential danger. The trial court granted summary judgment to Martin on December 11, 2009, and on December 23, 2009, the McDonalds filed a motion to reconsider, arguing that because the defense of primary assumption of risk merged with Ohio's comparative negligence statute, the dispositive question at issue was a matter of fact for the jury to decide.

{¶3} The trial court granted the motion to reconsider, but after further review, granted summary judgment to the defendant, based on the court's finding that the duty of care that defendant owed to plaintiff was to warn him of any potential dangers, which defendant fulfilled, and which plaintiff acknowledged. In this appeal, we must decide whether a premises owner's verbal warning to an invitee regarding a known, potential hazard, discharges the owner's duty to the invitee. We answer that question in the affirmative, and affirm the decision of the trial court.

{¶4} Appellant presents a single assignment of error for our consideration:

> THE TRIAL COURT ERRED IN SUSTAINING THE DEFENDANT-APPELLEE'S MOTION FOR SUMMARY JUDGMENT IN THIS CASE.

{¶5} The sole issue before us is whether the landowner's verbal warning to the plumber was sufficient to discharge the landowner's duty to warn him of a defective step on the staircase to the landowner's basement.

{¶6} Premises liability is a landowner's liability in tort, incident to the their right and power to admit or exclude people to or from the premises, which stems from failure to exercise ordinary or reasonable care for the protection of the landowner's invitees. *Wolfe v. Bison Baseball, Inc.*, 10th Dist. No. 09AP-905, 2010-Ohio-1390, ¶8 (citing *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 1992-Ohio-42, syllabus; *Jackson v. Kings Island* (1979), 58 Ohio St.2d 357, 359 (per curiam)). This duty of care notwithstanding, a landowner is not the absolute insurer of an invitee's safety. See *Jackson* (citing *S.S. Kresge Co. v. Fader* (1927), 116 Ohio St. 718, syllabus; *Cincinnati Baseball Club Co. v. Eno* (1925), 112 Ohio St. 175, syllabus). Nevertheless, "the obligation of reasonable care is an extensive one, applicable to everything that threatens an invitee with an unreasonable risk of harm." *Jackson* (citing Prosser on Torts 393 (4th ed.1971), Section 61). The landowner's obligation includes the duty to warn invitees of any known dangerous condition(s), which is predicated upon the landowner's superior knowledge of his own premises. Since a warning eliminates the disparity between the landowner's knowledge and the knowledge of the invitee, a warning is usually sufficient to discharge the landowner's duty.

{¶7} The trial court granted summary judgment to the landowner, based on credible evidence that the landowner sufficiently warned the invitee about the potentially dangerous condition, and that the invitee had notice of the warning.

{¶8} When a trial court grants summary judgment, we review those decisions de novo, using the same standard that the court used below. See, e.g., *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105; *Wolfe* at ¶4. This de novo standard of review effectively provides for a new trial by this court of the legal issues in the case

and, in doing so, we are required to give no deference whatsoever to the trial court's decision. See *Hicks v. Leffler* (1997), 119 Ohio App.3d 424, 427 (citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8).

{¶9} The summary judgment criteria is set forth in Civ.R. 56(C), which provides that summary judgment may not be granted unless: (1) there are no material facts at issue, or in dispute; (2) the moving party is entitled to judgment as a matter of law; and (3) based on the facts and record, and viewing that evidence and the inferences drawn therefrom in a light most favorable to the opposing party, reasonable minds can only come to one conclusion-that conclusion being adverse to the nonmoving party. *Bisons Baseball* at ¶5; *Hicks*, supra. Summary judgment must not be granted unless and until the movant sufficiently demonstrates the absence of any genuine issue of material fact. Id. And if, or when, reasonable minds could arrive at differing conclusions about the facts and evidence in the case, the court must overrule the motion for summary judgment. *Hounshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427, 433.

{¶10} The facts in this case are relatively simple, and not in dispute. Defendant's motion for summary judgment was supported by the deposition testimony of Wendie Martin, the defendant-landowner, and McDonald, the plaintiff-invitee.

{¶11} On January 21, 2008, McDonald's employer, "Drain Openers," dispatched McDonald to Ms. Martin's house at 2558 Minerva Lake Road, to fix a kitchen sink. (McDonald Depo., at 12, 16–17.) After McDonald successfully fixed the kitchen sink, Ms. Martin asked McDonald if he would look at another plumbing problem in the basement. (Id. at 19; Martin Depo., at 6.) He agreed. Ms. Martin then led appellant downstairs to the basement. As Ms. Martin began to go down the stairs, McDonald says

that she warned him of a "wobbly" step. (McDonald Depo., at 19.) Ms. Martin stated in her deposition that when she went down ahead of him, she said, "1,2,3, careful, fourth step is broken." (Martin Depo., at 8.) The steps were carpeted, so the purported defect was not visible. (McDonald Depo., at 19–20; Martin Depo., at 10.) McDonald figured that since the landowner was going down the stairs in front of him, the defective step must not be too dangerous. He went down the stairs without incident, and proceeded to diagnose the plumbing problem in the basement. (McDonald Depo., at 20.) He then went back upstairs, to get his tools to repair the problem, and came back down again. (Id. at 21, 23.) McDonald stated that he made, possibly one more trip up and down, and that on his final trip down the stairs, the broken step gave way, causing him to fall, and rupture his quadriceps tendon. Id. at 27–28, 32.

{¶12} The issue in this case is not fault, causation, or damages, the only issue is whether Ms. Martin warned McDonald about the dangerous stair in a manner sufficient to discharge her common-law duty. The only material fact in dispute is the exact language or content of Ms. Martin's warning about the dangerous step. McDonald stated that she merely warned him of a "wobbly" step. (McDonald Depo., at 19.) Ms. Martin recalled telling McDonald "1,2,3, careful * * *." (Martin Depo., at 8.)

{¶13} Under certain circumstances, such a discrepancy between the recollections of the only two witnesses could be a material issue of fact, which would ordinarily be left to a jury to decide. The specific circumstances here, however, are that in addition to McDonald's acknowledgement of Ms. Martin's warning, he also went up and down the stairs on more than one occasion, which meant that his knowledge regarding the potential hazard was perhaps close, if not equal, to the landowner's. Having said that knowledge

regarding a known or potential hazard is the very premise for a landowner's liability in tort, there is no question left for a jury to decide.

{¶14} Given that there was no question of material fact as to whether appellant had knowledge of the hazard that caused his injury, appellee was entitled to judgment as a matter of law, and summary judgment was therefore proper. This is not to say that appellant's injury is irrelevant, only that his injury is not compensable in tort.

{¶15} We accordingly overrule the sole assignment of error, and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and SADLER, JJ. concur.