

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS CIPOLLONE,

Plaintiff-Appellant,

v

HELLEN HAYNES,

Defendant-Appellee.

UNPUBLISHED

January 17, 2006

No. 264789

Wayne Circuit Court

LC No. 03-330992-NO

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant. We reverse and remand.

Plaintiff is defendant's son. He was, and apparently still is, in the daily or almost daily practice of going to defendant's house before work to make her breakfast and to perform other household tasks, because defendant is no longer able to take care of herself. The parties have tacitly agreed that plaintiff's presence at the house for this purpose makes him a business invitee.¹ Plaintiff grew up in the house but had not lived there for some time. During one of plaintiff's visits, he opened a door from the kitchen leading down to the basement and began to descend. He noticed a piece of cloth on a step at about the same time he began stepping down onto it. He was unable to change the movement of his foot, slipped on the cloth, fell down the stairs, and was injured. He testified that he had been aware that the stairs lacked a guard railing. He also testified that he had been familiar with the stairs while he lived in the house, but was less

¹ We express no opinion whether this view of plaintiff's status is correct. The parties may wish to reconsider their position in light of our Supreme Court's recent order in *McKim v Forward Lodging, Inc*, ___ Mich ___ (Docket No. 128777, entered December 8, 2005), stating that a plaintiff is not an invitee of a defendant where the defendant "did not derive a business or commercial benefit from plaintiff's provision of medical services on its property." However, because the parties treat plaintiff as a business invitee, we will presume *arguendo* that he is, at least for the purposes of this motion. Further, the trial court began its analysis under the open and obvious doctrine with the observation that the parties agreed that "the plaintiff in this case was a business invitee."

so since moving out. He testified that he was unsure whether he turned on the light. The trial court concluded that plaintiff's familiarity with the stairs gave him actual notice of the dangers present, so defendant owed no duty under the open and obvious danger doctrine. We review motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff first argues that the trial court erred in applying a subjective standard to find no duty. We agree.

Our Supreme Court has indicated that "where the dangers *are known to the invitee* or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (emphasis added). We have followed the same standard. *Arias v Talon Development Group, Inc*, 239 Mich App 265, 267; 608 NW2d 484 (2000). Under this rule, plaintiff's actual awareness of the dangers posed by the stairwell would make those dangers "open and obvious" for the purpose of excusing defendant's duty as a landowner.

However, more recently, our Supreme Court explained that the proper standard was purely objective, so when determining "whether a condition is 'open and obvious,' or whether there are 'special aspects' that render even an 'open and obvious' condition 'unreasonably dangerous,' in a premises liability action, the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004). In other words, the "determination is not dependent on the characteristics of a particular plaintiff, but rather on the characteristics of a reasonably prudent person." *Id.*, n 10. Thus, we concluded that that "[a] plaintiff's knowledge and level of care used are irrelevant in determining whether a condition that was either created or allowed to continue by a premises possessor was unreasonably dangerous." *Laier v Kitchen*, 266 Mich App 482, 498; 702 NW2d 199 (2005), citing *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). Indeed, in *Mann*, our Supreme Court clarified that an "invitee" must be a "'reasonably prudent' invitee" under *Lugo*, and therefore "this term refers to an objective invitee." *Mann, supra* at 332 n 11.

The rule articulated by *Mann* and *Laier* is irreconcilable with the rule articulated in *Riddle* and *Arias*. but we find that *Riddle* and *Arias* have never been explicitly overruled. A plaintiff's personal awareness is necessarily a "condition of the plaintiff." Therefore, *Mann* necessarily overruled *Riddle* and *Arias* to the extent that they held an invitee's actual, subjective knowledge of a danger relevant to whether that danger is "open and obvious." We note that under comparative negligence, a plaintiff's subjective awareness will bear on his or her ability to recover. *Laier, supra* at 498. However, it does not relieve defendant landowners of their duties. The trial court erred in so finding and applied the wrong legal standard. The trial court did not articulate on the record whether the condition of the stairway was *objectively* openly and obviously dangerous.

Plaintiff also argues that defendant owed a duty irrespective of the open and obvious doctrine because she violated an independent statutory duty to maintain the premises. In light of our analysis above, we find it unnecessary to address this issue.

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

/s/ Stephen L. Borrello

/s/ Alton T. Davis

I concur in result only.

/s/ Pat M. Donofrio