NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

PAUL E. QUIGLEY, Plaintiff/Appellant, vs. JAMESTOWN EXECUTIVE CENTER OFFICE CONDOMINIUMS OWNERS' ASSOCIATION, INC., an Oklahoma Corporation, and KAREN BLACK, Individually, Defendants/Appellees.	Case No. 119,191

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE NATALIE MAI, TRIAL JUDGE

AFFIRMED

Paul E. Quigley QUIGLEY LAW FIRM Oklahoma City, Oklahoma	Appellant *Pro Se*
George Gibbs Charles A. McSoud Caroline M. Shaffer Siex GIBBS ARMSTRONG BOROCHOFF, P.C. Tulsa, Oklahoma	For Defendant/Appellee Jamestown Executive Center Office Condominiums Owners' Association, Inc.
Peter L. Wheeler John C. Lennon PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P. Oklahoma City, Oklahoma	For Defendant/Appellee Karen Black

OPINION BY GREGORY C. BLACKWELL, JUDGE:

The plaintiff, Paul E. Quigley, appeals a summary judgment granted in favor of defendants, Jamestown Executive Center Office Condominiums Owners' Association, Inc. and Karen Black. Quigley claims that the trial court erred by applying the applicable statute of repose, 12 O.S. 2011 § 109, which limits claims of negligent design and construction made against a property owner ten years after substantial completion. We find that Quigley's claim rests, unavoidably, upon a theory that his injuries were caused by the defective design or construction of the premises in question. As such, the trial court's grant of summary judgment is affirmed.

BACKGROUND

In 2018, Quigley was approaching, for the first time, a massage clinic located in a condominium unit owned by Black. The clinic was in an office complex where the common areas were owned and operated by Jamestown. The exterior entryway to the clinic consisted of three concrete steps with no support rails on either side. The entryway and steps were constructed in 2004, without a railing. As Quigley reached the top step, he lost his balance and fell backwards. He claims he was unable to recover himself because there were no handrails available. He fell onto the concrete below and alleges serious injuries as a result.[1]

Quigley sued both Black and Jamestown for negligently failing to provide and maintain safe ingress to the clinic. The defendants answered and filed mo-

[1] According to his petition, Quigley's fall resulted in a spinal injury that required two corrective back surgeries and caused permanent nerve damage to his right leg.

tions for summary judgment on grounds that Quigley's claim was barred by Oklahoma's ten-year statute of repose for design and construction defects, being 12 O.S. 2011 § 109.

Quigley filed a joint response brief to the defendants' motions arguing that 12 O.S. 2011 § 109 does not extinguish a property owner's active duty to maintain safe ingress and that the stairs were not "improvements to real property" as required by § 109. The trial court granted the defendants' motions for summary judgment, finding that 12 O.S. 2011 § 109 barred Quigley's claims. Quigley appeals.

STANDARD OF REVIEW

Because summary judgments settle only questions of law, they are reviewed *de novo*. *Lowery v. Echostar Satellite Corp.*, 2007 OK 38, ¶ 11, 160 P.3d 959, 963. Both this Court and the court below, must view all facts and inferences presented by the evidence in the light most favorable to the nonmoving party. *Miller v. David Grace, Inc.*, 2009 OK 49, ¶ 10, 212 P.3d 1223, 1227. Summary judgment is appropriate only when there is no substantial controversy as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

ANALYSIS

The overriding issue on this appeal is whether § 109 applies to what, in all relevant aspects, are agreed-upon facts. The statute states as follows:

> No action in tort to recover damages
>
> (i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,

(ii) for injury to property, real or personal, arising out of any such deficiency, or

(iii) for injury to the person or for wrongful death arising out of any such deficiency,

shall be brought against any person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

12 O.S. 2011 § 109.

Quigley argues generally that, because this is a basic premises liability case, the repose offered under § 109 does not apply. He argues that the statute of repose does not extinguish a property owner's ongoing duty under common law to keep his or her premises safe for invitees. While this statement is generally true, it ignores the fact that the legislature significantly amended the common law with the passage of § 109 and its subsequent amendment.[2] Although Quigley is correct that a property owner is still under a duty to *maintain* a safe premises, and must still, indefinitely, reasonably *warn* of hidden dangers, a property owner (for good or ill) no longer faces liability for harm caused by construction or design

[2] As a matter of historical interest, we note that, as originally enacted in 1967, the statute did not apply to the owners of real property *at all*, but only to those performing design or construction services. 1967 Okla. Sess. Laws. 581 (West). Indeed, under the original statute, owners were *explicitly forbidden* from invoking the statute as a defense to liability. *Id.* § 4 ("The limitation prescribed by this act shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.") (formerly codified as 12 O.S. 1971 § 112). However, for reasons unknown, the legislature amended the statute in 1978 to its present form, which includes owners and possessors of real property as those parties under the statute's considerable protection. 1978 Okla. Sess. Laws. 380 (West).

defects ten years after substantial completion of an improvement to real property.

This rule was examined in *Gorton v. Mashburn*, 1999 OK 100, 995 P.2d 1114, which is quite similar in its facts, and which Quigley is unable to distinguish. In *Gorton*, an office tenant was injured after falling on a wooden bridge located in the office complex's property during a rainstorm. *Id.* ¶ 3. When considering the purpose and scope of the statute of repose, the Supreme Court noted:

> Section 109 evinces in clear language legislative intent that persons who own, lease or possess property which has been structurally enhanced not be liable for design and construction defects in the built improvement more than ten years after "substantial completion" of the same. Were we to hold that a plaintiff could impose liability upon an improvement's owner for such a defect (*i.e., one more than ten years old*) under the guise of a negligent-maintenance theory of recovery based upon negligence per se, we would have to ignore the legislative intent evinced in § 109.

Id. ¶ 8. The Court further noted that while the plaintiff "phrases his alleged building code violation in terms of 'negligent maintenance,' his claim in essence charges [the defendant] with responsibility for failure to build the allegedly defective bridge in compliance with building code standards applicable when the bridge was first constructed." *Id.* ¶ 9. In other words, the claim of harm was inextricably linked to design and construction of the bridge in question. Quigley correctly notes that though *Gorton* barred a negligent maintenance claim as to the bridge, the Court explicitly states that its holding does *not* abrogate the com-

mon law duty to maintain safe common areas. *Id.* ¶ 12. However, the Court specifically states that the common law duty "does not extend to design and construction defects *more than ten years old.*" *Id.*

Quigley also seeks support from the case of *Smedsrud v. Powell*, 2002 OK 87, ¶ 8, 61 P.3d 891. In *Smedsrud,* the Supreme Court reversed a summary judgment for the defendant based on § 109. *Id.* ¶ 30. Unlike the case at hand, however, *Smedsrud* presented the Court with an unusual procedural posture. In a prior appeal, the plaintiff in *Smedsrud* had succeeded in reversing a prior summary judgment that the defendant had secured on the basis of an "open and obvious" defense. *Id.* ¶ 5. On remand, the defendant successfully raised the statute of repose for the first time. *Id.* ¶ 7. When the plaintiff appealed, the Supreme Court ruled for the plaintiff on the grounds that the plaintiff's first appeal entitled him to pursue his case on a negligent maintenance theory. *Id.* ¶ 13. In essence, *Smedsrud* simply affirmed that the settled-law-of-the-case doctrine prevented the defendant from raising the statute of repose for the first time on remand. *Id.* Because no such facts are presented here, *Smedsrud* is inapplicable.

While Quigley is correct that the defendants owed him an ongoing duty to provide safe ingress to their places of business, no matter how he characterizes his claim, it ultimately rests on the theory that the entrance to the clinic, built in 2004, was designed or constructed negligently for want of a handrail. Indeed, the primary evidence he submitted in response to the request for summary judgment was an engineer's report noting that the lack of a handrail violated city building codes, and possibly federal law, when the entrance was constructed,

during a remodel unrelated to the steps in 2013, and at the time of the injury in 2018. This evidence, as in *Gorton*, inevitably relates back to the safety of the design and construction of the steps. Because the improvement in question[3] was completed more than ten years prior to Quigley's injury, his claims are barred. If defendants were negligent for failing to install a handrail onto the entry steps, then the steps must have been unsafe because they were *designed* or *constructed* without the handrails in the first instance. As such, 12 O.S. 2011 § 109 bars Quigley's claim.

AFFIRMED.

WISEMAN, P.J., and BARNES, J., concur.

December 3, 2021

[3] Quigley argued in his response to the defendants' motion for summary judgment that the addition of a handrail would not have qualified as an improvement to real property under existing precedent. Although Quigley appears to abandon this argument by failing to reference it in his petition in error, we note that the applicable improvement is not the addition of a handrail, which the defendants apparently made in 2020, after the accident. Rather the question is whether the construction of the steps in 2004 was an improvement to real property. It unquestionably was, and Quigley does not make any compelling argument to the contrary below or in this appeal.