IN THE FLOYD CIRCUIT COURT
STATE OF INDIANA

JOHN BURBANK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE 22C01-1902-CT-000245
	)	
ROY PARSONS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendant, Roy Parsons ("Parsons"), hereby files his Memorandum in Support of his Motion for Summary Judgment on the grounds that he did not owe Plaintiff, John Burbank ("Burbank"), a duty to protect from him from a danger he was unaware of, which relieves him of any liability for damages suffered by the Plaintiff, pursuant to Indiana law.

STATEMENT OF FACTS

This case stems from an incident that occurred on February 18, 2018, in Floyd County, Indiana, wherein the Plaintiff, Burbank, alleges he fell down a flight of stairs at the Defendant, Parson's, residence. *See* Plaintiff's Complaint ¶ 3. Burbank alleges he suffered injuries when he fell down the stairs and that Parsons, as the homeowner, is liable because he negligently maintained the stairs and negligently permitted those same stairs to exist in a hazardous condition for a variety of alleged improprieties. *See Id.* Plaintiff further alleges an ambiguous negligence per se action against the Defendant for alleged building code and/or ordinance violations, which purportedly led to the injury. *See Id.* at ¶ 5. Further, Plaintiff states Defendant is liable for his damages, namely his

medical expenses, physical injuries, pain, and lost wages. *See Id.* ¶ 6. Defendant denies all Plaintiff's allegations as he was unaware of any dangerous or hazardous condition on his property, specifically in relation to the steps where the incident which gives rise to this litigation took place. *See* Defendant's Answer, generally.

According to the attached Affidavits of the Defendant, Roy Frank Parsons, and the Defendant's wife, Doris Kathleen Parsons, Exhibits A and B respectively, the Parsons did not know of any defect or hazardous condition related to the stairs where the incident took place. Mr. and Mrs. Parsons purchased their home in 1976 and are the original owners. In their Affidavits, Roy and Doris both state they have never had any issues with the stairs at issue and use them often. They both testify that they are unaware of any defect or dangerous condition related to the subject stairs and have no knowledge of any person falling down those stairs, before or after the incident which gives rise to this litigation. Further, they testify that the Plaintiff used those same stairs multiple times that day and did not have any issues whatsoever.

STANDARD OF REVIEW

The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. *Zawistoski v. Gene B. Glick Co.*, 727 N.E.2d 790, 792 (Ind. Ct. App. 2000). Specifically, Ind. Trial Rule 56(C) provides that summary judgment "shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C). Despite conflicting facts and inferences on some elements of a claim, **summary judgment is proper where there is no dispute regarding a dispositive fact**. *Blackwell v. Dykes Funeral Homes, Inc.,* 771 N.E.2d 692 (Ind. App. 2002)(emphasis added).

"Argument is not evidence upon which to base a denial of summary judgment." *Scherer v. Rockwell Intern. Corp.*, 975 F.2d 356, 361 (7th Cir. 1992). Likewise, opinions expressing mere possibilities with regard to hypothetical situations do not establish a genuine issue of material fact. *See Watson v. Medical Emergency Servs., Corp.*, 532 N.E.2d 1191, 1195-96 (Ind. App. 1989), transfer denied.

The Indiana Supreme Court has defined the summary judgment standard by ruling that once the party seeking summary judgment demonstrates the absence of any genuine issue of fact as to a determinative issue, the non-movant then has the burden to demonstrate the existence of an issue of fact. *See Jarboe v. Landmark Community Newspapers of Indiana,* 644 N.E.2d 118 (Ind. 1994). If the trial court's entry of summary judgment can be sustained **on any theory or basis in the record, it will be affirmed**. *See Ledbetter v. Ball Mem'l Hosp.*, 724 N.E.2d 1113, 1116 (Ind. Ct. App. 2000), trans. denied (emphasis added).

ARGUMENT

The cause of action which forms the basis of Plaintiff's Complaint is a negligence action. "We have long recognized that the tort of negligence is comprised of three elements: (1) a duty on the part of the defendant in relation to the plaintiff; (2) a breach of duty, that is, a failure on the part of the defendant to conform his conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff resulting from that failure." *Miller v. Griesel*, 308 N.E.2d 701 (Ind. Ct. App. 1974). "The question of whether a duty to exercise care arises is governed by the relationship of the parties and is an issue of law within the province of the court." *Gariup Const. Co. v. Foster*, 519 N.E.2d 1224 (Ind. 1988) *see also Neal v. Home Builders, Inc.,* 111 N.E.2d 280 (Ind. 1953) reh'g denied.

As the Court is aware, Indiana premises liability law establishes three separate categories of individuals and the duties landowners owe to each of those groups. "A person entering upon the land of another comes on to the land either as an invitee, a licensee, or a trespasser. The status of the person on the land determines the duty owed by the landowner to him." *Barbre v. Indianapolis Water Co.,* 400 N.E.2d 1142, 1145 (Ind. Ct. App. 1980). "If the visitor has a purpose that is related to the occupant's pecuniary interest or advantage, an invitation to use the premises is inferred, and a duty of reasonable care is imposed on the occupant." *Wright v. Int'l Harvester Co*., 528 N.E.2d 837, 839 (Ind. Ct. App. 1988).

Plaintiff, Burbank, admits in his Complaint that he was an invitee at the Defendant's home at the time the incident took place, *See* Plaintiff's Complaint at ¶ 4. Indiana courts adopted the Restatement (Second) of Torts analysis on liability of a landowner to an invitee, "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land, **but only if, he (a) knows or by the exercise of reasonable care would discover the condition**, **and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.**" *Douglass v. Irvin*, 549 N.E.2d 368, 370 (Ind. 1990)(emphasis added).

The key component to impose a duty on a landowner is knowledge of the condition or defect or reasonable care to discover, "With regard to the condition of property, a landowner's duty of care to an invitee is a known or should have known standard." *Wellington Green Homeowners' Ass'n v. Parsons*, 768 N.E.2d 923, 929 (Ind. Ct. App.

2002). A landowner is subject to liability for an invitee's injury by a condition on the land if the landowner, "knows or by the exercise of reasonable care would discover the condition." *Howerton v. Red Ribbon, Inc.*, 715 N.E.2d 963, 968 (Ind. Ct. App. 1999). Simply put, a landowner can only be held liable for injuries suffered by an invitee if the landowner either knew of the condition or defect or would discover the condition or defect by exercising reasonable care.

Indiana courts examined cases very similar to the one at hand and reached the same conclusion this Motion for Summary Judgment requests. In *Howerton v. Red Ribbon*, the Court of Appeals found a hotel chain could not be held liable for a defective towel bar that fell while Mr. Howerton was attempting to exit the bathtub. *See Howerton* at 968. The court ruled that the hotel chain was unaware of the defect and could not have reasonably discovered the defect as they had no means of inspecting the back of the towel rod, thus Red Ribbon had no duty to the Plaintiff and they could not be held liable for the injuries suffered by Mr. Howerton. *See Id.* The Court ruled that knowledge was the key component to establish a duty, without actual knowledge no duty could possibly exist. *See Id.*

In *Wellington Green Homeowners' Ass'n v. Parsons*, the Court of Appeals examined a very similar premises liability case and found that absent any evidence that the landowner knew or should have known of the defect which caused the injury, the landowner could not be held liable. *See Wellington Green Homeowners' Ass'n* at 929. The *Wellington Green* case involved a mailman delivering mail to a multi-box mailbox, as he was delivering that mail the mailbox came free and almost struck Mr. Parsons. *See Id.* The Court of Appeals examined the exact issue which brought about this cause of action and found there was no evidence to support the fact that the Appellants knew, or by the

exercise of reasonable care would have discovered, the condition that allegedly caused the injuries, thus no duty could be established and they could not be held liable. *See Id.* Again, the Court ruled that actual knowledge was paramount to the establishment of a duty and without that knowledge a landowner could not be held liable to an invitee.

According to the attached Affidavits, neither the Defendant nor his wife were aware of any defect related to the stairs at the center of this litigation. According to the Defendant's testimony, he has lived in the home for over forty years, uses the stairs at issue on a regular basis, and he has never found the stairs to be a hazardous condition or a defect. According to Mrs. Parsons Affidavit, she has also lived at the home where the incident took place for over forty years, she uses the stairs at issue on a regular basis, and she has never found the stairs to be defective, dangerous, or hazardous. Neither homeowner has fallen down the subject stairs, nor are they aware of any other person falling down those same stairs, other than the Plaintiff's allegations. It is clear from the attached Affidavits the Defendant was unaware of any defect related to the subject stairs at the time incident took place, which would relieve him from any liability.

According to Indiana law and decisions made by Indiana courts, the Defendant, Parsons, does not have a duty to an invitee if he was unaware of the alleged dangerous condition or defect and it is clear from the evidence he was unaware. A negligence action fails as a matter of law when no duty exists and that is the case at hand. It is clear from the record and evidence, the homeowners were unaware the stairs were defective or dangerous and this is a material fact that simply cannot be disputed. Mr. Parsons used the subject stairs regularly and never found them to be an issue, he clearly exercised reasonable care and did not discover a defect. Pursuant to Indiana law, if Mr. Parsons did

not have actual knowledge of a defect, he does not have a duty to the Plaintiff and without the element of duty, a negligence action cannot survive summary judgment.

CONCLUSION

Indiana courts established the essential elements for a negligence claim to survive: duty, a breach of that duty, and damages resulting from that breach. Whether a duty exists is an issue for a court to decide and if there is no duty, the action must fail as a matter of law. Indiana courts decided a landowner has no duty to protect an invitee from a defect they are not aware of or should have been aware of through the exercise of reasonable care. Mr. Parsons was obviously unaware of the defect in the stairs which caused the alleged injuries and did not possess the requisite knowledge necessary to maintain the action against him. Due to these facts, Mr. Parsons did not have a duty to Plaintiff, Burbank, and this cause of action must fail as a matter of law, rendering summary judgment appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she has this 22nd day of August, 2019, either served through the Court's e-filing system or mailed a copy of the foregoing document by first-class mail, postage prepaid, to:

Kevin Sciantarelli
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/s/Marc Tawfik
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