STATE OF MICHIGAN

COURT OF APPEALS

DORIS BEJMA and BERNARD BEJMA,

Plaintiffs-Appellants,

v

CLANCY BROWN, INC., d/b/a ELIZABETHS BRIDAL MANOR,

Defendant-Appellee.

UNPUBLISHED
July 1, 1997

No. 192655
Wayne Circuit Court
LC No. 95-508557-NO

Before: White, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

In this premises liability action involving steps, plaintiffs appeal as of right from an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs first argue on appeal that summary disposition was improperly granted to defendant because a question of fact existed concerning whether the dangerous condition on defendant's premises was unreasonable. We disagree.

A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995). In deciding such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence, and must give the nonmoving party the benefit of every reasonable doubt. *Id.* Although the court should be liberal in finding genuine issues of material fact, summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute. *Id.*

Plaintiffs allege that defendant breached its duty to protect plaintiff Doris Bejma against foreseeable dangerous conditions at defendant's premises. We disagree. The "open and obvious" doctrine is defensive and attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average user with

ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). A premises owner owes an invitee a duty to exercise due care to protect them from dangerous conditions. *Bertrand, supra* at 612-613. However, 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. *Id*. at 613. There is no absolute obligation for invitors to warn of open and obvious dangers. *Id.*

After reviewing the evidence presented to the trial court, we conclude that the danger of slipping on the stairs when walking in cotton socks was so open and obvious that Doris would be reasonably expected to discover it upon casual inspection. Although this was Doris' first visit to defendant's premises, she immediately noticed the sign that read "Please remove your shoes" when she entered the store. Even though shoe removal was requested, it was not required, and customers who refused to take off their shoes were allowed upstairs with their shoes on. Doris voluntarily chose to comply with this request. Further, Doris testified that she did not think it was unsafe to take her shoes off to walk upstairs, and that she walks around her own house without shoes. Doris had walked on carpeted steps in the past without her shoes and had not fallen.

We conclude that walking up and down carpeted steps without shoes on was not a hidden or latent defect thereby obligating defendant to warn plaintiff of this danger. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 535; 542 NW2d 912 (1995). Doris had walked up and down carpeted steps many times before the day of the incident, and she was able to anticipate the risk of possibly tripping, falling or slipping on the steps as she walked up and down them. Because the danger was so obvious to Doris that she would reasonably be expected to discover it, defendant owed Doris no duty to warn. *Bertrand, supra* at 617.

However, plaintiffs argue that even if the danger was open and obvious, a question of fact exists concerning whether the condition was unreasonable. We disagree. In general, if the particular activity or condition creates a risk of harm only because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. *Id*. at 611. However, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. *Id*.

The Michigan Supreme Court has frequently addressed the issue of premises liability where steps or differing floor levels are involved. See, e.g., *Bertrand, supra*. The general rule that has emerged is that steps and differing floor levels are not ordinarily actionable unless unique circumstances surrounding the area in question make the situation unreasonably dangerous. *Id*. at 614. In other words, where there is something unusual about the steps because of their "character, location, or surrounding conditions," the duty of the possessor of land to exercise reasonable care remains. *Id.*

Applying *Bertrand*, we conclude that plaintiffs have failed to establish any unusual circumstances surrounding the steps involved in this case that made them unreasonably dangerous.

Although Doris claimed that the steps were very slick because they were marble, at her deposition, Doris testified that she fell because of the slickness of her socks against the carpeting. Doris never commented on the slickness of the marble at her deposition. She did not see any foreign objects or substances on the steps when she fell, and could not identify anything different about the stairs at Elizabeth's that caused her to fall. We conclude that carpeted stairs, with approximately six inches of marble on each side, are not so unusual as to present unique circumstances. Cf *id*. at 615-616.

At her deposition, Doris testified that she was hanging onto the handrail while she walked both up and down the stairs. She did not indicate having any problems grasping the handrail and could not remember exactly which step she slipped on. We conclude that plaintiffs have failed to establish anything unusual about the handrails that posed an unreasonable risk of harm or unique circumstances that made the handrails unreasonably dangerous. Doris had no difficulty using the handrail on either her way up or way down the staircase, and did not mention anything about not being able to fully grasp the handrail at the location where it intersected with the second floor. We therefore hold that in light of plaintiff's testimony, the court did not err in concluding that plaintiffs failed to establish that the handrail posed an unreasonable risk of harm.

Next, plaintiffs argue that Doris' affidavit was improperly disregarded by the trial court. We disagree. This Court has long recognized the principle that parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition. A trial court that disregards such testimony does not err. *Kaufman & Payton, PC, v Nikkila,* 200 Mich App 250, 256-257; 503 NW2d 728 (1993).

In this case, there were dramatic differences between Doris' deposition testimony and the statements contained in her affidavit. A review of her affidavit demonstrates that it is merely a restatement of Reynolds' letter in more formal language. At her deposition, Doris contended that she slipped on the carpeting on the stairs because she was wearing socks. She did not mention anything about marble on the stairs. She also discussed how she held onto the handrail and did not mention any problems in grasping it. Doris did not discuss anything about a ramp at the top of the stairs except for the fact that she noticed it in passing. We conclude that the trial court did not err in disregarding the allegations contained in the affidavit because they were contradictory to Doris' earlier testimony. Since parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition, *Kaufman, supra,* we hold that Doris' affidavit failed to raise sufficient genuine issues of material fact necessary to survive defendant's motion for summary disposition.

Next, plaintiffs argue that the trial court erroneously disregarded Reynolds' letter. We disagree. We hold that the trial court properly rejected Reynolds' letter because it was not in proper affidavit form and it did not raise a genuine issue of material fact sufficient to survive defendant's motion for summary disposition. MCR 2.113(A); MCR 2.119(B); *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Finally, plaintiffs argue that the trial court abused its discretion in failing to grant a continuance so that they could transpose Reynolds' letter into affidavit form. We disagree. Trial counsel failed to move for a continuance to secure an affidavit from Reynolds. Moreover, we have already concluded that the trial court properly disregarded Reynolds' letter. Accordingly, we conclude that the trial court did not abuse its discretion in failing to grant plaintiffs a continuance to procure such an affidavit. *Bonelli v Volkswagen*, 166 Mich App 483, 505-506; 421 NW2d 213 (1988).

Affirmed.

/s/ Helene N. White
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski