# STATE OF MICHIGAN

# COURT OF APPEALS

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NANCY J.E. YORK and WILLIAM E. YORK,

Plaintiffs-Appellants,

v

GREY-MICH, INC., d/b/a CAROL'S CAR WASH,

Defendant-Appellee.

UNPUBLISHED
March 20, 1998

No. 194931
Oakland Circuit Court
LC No. 95-489998-NO

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Before: O'Connell, P.J., and Gribbs and Smolenski, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendant in this premises liability action. We affirm.

Plaintiff Nancy York (hereafter "plaintiff") stumbled and fell while walking from the waiting area of defendant's premises into a work area. There was a one- to two-inch difference in the floor levels and the floors were connected by an inclined "walkway" of approximately four inches in width. Plaintiff brought suit, alleging that the "walkway" was unreasonably dangerous. Her proposed expert identified two alleged hazards: the inclined area should have been painted yellow, or otherwise made to stand out, and the slope of the incline was too steep.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing both that the alleged hazard was "open and obvious" and that the incline itself was not unreasonably dangerous. The trial court granted the motion, holding that "reasonable minds . . . [could not] differ" on the question of whether the walkway was an unreasonable hazard.

The trial court's disposition of a motion for summary disposition is reviewed de novo. *Sanchez v Lagoudakis (On Remand)*, 217 Mich App 535, 539; 552 NW2d 472 (1996). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. *Id*. When this Court reviews a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), it considers all relevant affidavits, depositions, admissions, and other documentary evidence submitted by the parties MCR 2.116(G)(5), in a light most favorable to the nonmoving party.

*Id*. It then determines whether there exists a genuine issue of material fact on which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law. *Id*.

It is undisputed that plaintiff was a business invitee. In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), our Supreme Court held 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."

The Court modified the "open and obvious danger" defense somewhat in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). In *Bertrand*, the plaintiff had fallen backwards off a step at a car dealership. The Court wrote that, "[w]hile there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions." *Id*. at 610-611.

As to stairs and steps, the Court said, "the danger of tripping and falling on a step is generally open and obvious." *Id*. at 614. The rule remains, however, that, "under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps 'foolproof.'" *Id*. at 616-617.

In *Maurer v Oakland Co Parks Dep't*, the companion case to *Bertrand*, the plaintiff tripped on the steps outside a restroom at a public park. This Court reversed summary disposition for the defendant, 201 Mich App 223; 506 NW2d 261 (1993), but the Supreme Court held that summary disposition should have been affirmed. *Supra*, 449 Mich 606. The decision was based primarily on the plaintiff's deposition testimony that the only "hazard" she identified was that she "just didn't see" the step she fell on. *Id*. at 619. The Court concluded that "the plaintiff has failed to establish anything unusual about the step . . . ." *Id*. at 621.[1]

This Court's opinion in *Spagnolo v Rudds #2, Inc*, 221 Mich App 358; 561 NW2d 500 (1997), is relevant. The plaintiff had attempted to maneuver her wheelchair around a trash barrel on a sidewalk outside a restaurant. This Court affirmed summary disposition for the defendant, holding: "In *Bertrand*, the Supreme Court established that *the risk of harm from steps is presumptively reasonable*. [449 Mich] at 616-617. . . . Further, *such "reasonable care" would only be implicated if the risk of harm would remain despite knowledge of it by an invitee*." 221 Mich App 360-361 (emphasis added).

The pre-*Bertrand* case of *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470; 499 NW2d 379 (1993), is parallel factually to the present case, but must be considered in light of the *Bertrand* limitations on *Riddle*. The plaintiff fell while leaving a restaurant and alleged that the accident occurred because the ramp where she fell was the same color as the sidewalk. This Court originally reversed summary disposition for the defendant, which the trial court had granted based on the "open and obvious danger" rule, but the case was remanded, for reconsideration in light of *Riddle*, *supra*.

In its opinion on remand, the panel "conclude[d] that defendants had no legal duty to warn plaintiffs of the handicap access ramp." 198 Mich App 473.

> The question is: Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, *is it reasonable to expect that the invitee would discover the danger?* With respect to an inclined handicap access ramp, we conclude that it is. [*Id*. at 475, emphasis added.]

Post-*Bertrand*, however, the courts must also determine whether the alleged hazard could be considered "unreasonably dangerous," even if the plaintiff was fully aware of it. That was the task before the trial court in the case at hand. Plaintiff had proposed both failure-to-warn and "unreasonable hazard" theories of negligence. At her deposition, however, she testified that only failure to warn was applicable. The trial court, in turn, found that walkway, with or without a warning sign, was not an unreasonable danger.

All possible bases for summary disposition, then, were included. Either the alleged hazard was not unreasonable, in which case the absence of a warning was irrelevant, or the danger was obvious to "an average user with ordinary intelligence," *Novotney*, *supra* at 475, and defendant had no duty to warn of it.

Where, as here, all reasonable persons would agree that "the injury caused [to] plaintiff was too insignificantly connected to or too remotely affected by the defendant's negligence," summary judgment is proper. *Berry v J & D Auto Dismantlers*, 195 Mich App 476, 479; 491 NW2d 585 (1992), quoting *Davis v Thornton*, 384 Mich 138, 142-143; 180 NW2d 11 (1970). The trial court correctly granted defendant's motion.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] Most recently, the Supreme Court attempted to clarify the *Riddle/Bertrand* rule in *Singerman v Municipal Services Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), where the plaintiff alleged that defective lighting contributed to his injury. There was, however, no plurality opinion. Rather, the Court affirmed, by an equally divided vote, this Court's decision at 211 Mich App 678; 536 NW2d 547 (1995). The opinion of an equally divided Court does not create a precedent. *Corporation & Securities Comm'n v McLouth Steel Corp*, 7 Mich App 410, 412; 151 NW2d 905 (1967). In addition, *Singerman* is not quite on point with the present matter, because "some of the hazardous conditions were not inherent to the premises itself." 211 Mich App 681-682.