STATE OF MICHIGAN

COURT OF APPEALS

FRANK W. ANDERSON, Personal Representative of the ESTATE OF DOROTHY ANDERSON, Deceased,

Plaintiff-Appellant/Cross-Appellee,

v

JACKSON COUNTY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
October 9, 1998

No. 203225
Jackson Circuit Court
LC No. 96-076330 NO

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

PER CURIAM.

Plaintiff Frank W. Anderson, as personal representative of his deceased wife's estate, appeals as of right a final order granting summary disposition in favor of defendant Jackson County and dismissing plaintiff's action with prejudice. Defendant cross-appeals as of right the same order. We affirm in part, reverse in part, and remand.

This case concerns a fall that occurred on some steps leading from a sidewalk to a side door in a building owned by defendant. Plaintiff's expert stated that the recommended ideal dimensions for such steps are a riser height of seven inches and a tread width of eleven inches.

With respect to the bottom step, plaintiff's expert noted that the sidewalk and surrounding ground had subsided six or seven inches, making the total riser height for the bottom step thirteen or fourteen inches. Plaintiff's expert calculated that the tread width of the bottom step was eleven inches.

With respect to the middle step, plaintiff's expert calculated that the riser height was seven inches and the tread width was eleven inches. With respect to the top step, plaintiff's expert calculated that the riser height was seven inches. The top step was actually a landing leading to the door.

The door had at one time provided public access to defendant's building. However, at the time the fall in this case occurred, the door did not provide public access to the building, although this fact

was not posted or otherwise publicly indicated. Defendant has alleged that there was a clearly marked public entrance at the front of the building.

In July, 1993, plaintiff's wife fell on the steps. No one saw her fall. However, the parties appear to agree that plaintiff's wife fell as she was descending the steps. Plaintiff testified that his wife told him that she had ascended the steps believing she could enter the building through the door. Plaintiff testified that his wife told him that when she noticed through the glass doorway some books or desks piled against the inside of the door she knew immediately that the door did not provide access to the building. Plaintiff testified that his wife told him that she then descended the steps and fell. Plaintiff testified that his wife told him that she misjudged the bottom step. A nurse who attended to plaintiff's wife at the scene of the fall testified that plaintiff's wife stated that "she came off the last step, missed the last step and tripped forward."

In May, 1996, plaintiff's wife filed a complaint against defendant alleging in count one a claim entitled "Premises Liability/Negligence."[1] Defendant's answer asserted the affirmative defenses of, among others, governmental immunity and the open and obvious doctrine. In July, 1996, plaintiff's wife died and the complaint was amended to name plaintiff, as the personal representative of his wife's estate, as the plaintiff for purposes of this case. Plaintiff filed a first amended complaint that alleged in count one the same "Premises Liability/Negligence" claim as alleged in the original complaint. Defendant again asserted in its answer the affirmative defenses of governmental immunity and the open and obvious doctrine.

Defendant subsequently moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10). In response, plaintiff offered an expert's affidavit opining that the disparity in height between the bottom step and the other two steps was unreasonably dangerous for any child or adult and violated the requirements of the BOCA National Building Code. The expert stated that the BOCA National Building Code requires handrails to extend at least twelve inches plus the width of one tread beyond the bottom riser and that the handrail in this case "stopped a foot and a half short."

At oral argument on the motion, the trial court ruled that the defective condition at issue was not the sidewalk, as was contended by defendant, but was the disparity in riser height between the bottom step and the other two steps, as contended by plaintiff. Defendant then argued that summary disposition was appropriate under *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), because the condition of the steps was open, obvious and ordinary. Plaintiff contended that summary disposition was not appropriate under *Bertrand* because the risk of harm posed by the steps remained unreasonable despite their open and obvious condition.

Plaintiff also contended that the premises liability claim in his complaint was based on defendant's statutory duty under the public building exception to repair and maintain its public buildings. Plaintiff contended that the open and obvious doctrine, while applying to a failure to warn theory, did not apply to defendant's statutory duty to repair and maintain its public buildings. In making this latter contention, plaintiff relied on *Walker v City of Flint*, 213 Mich App 18; 539 NW2d 535 (1995), in which this Court held that while the open and obvious doctrine is a defense to a common-law negligence

claim based on a failure to warn theory, the open and obvious doctrine is not a defense to a claim based on a governmental agency's duty under the highway exception to governmental immunity to maintain its highways in reasonable repair.

After taking a brief recess to read *Bertrand* and *Walker*, the trial court appeared to have trouble reconciling these cases, noting that "these cases appear to have different holdings [sic] how this affects a municipality." The court noted that under *Walker* it would appear that the open and obvious doctrine would not apply to a government defendant's statutory duty to maintain its public buildings. The court noted that although *Bertrand* did not specifically discuss this issue, it nevertheless impliedly indicated that the open and obvious doctrine was available as a defense to a government defendant. The court stated that it would look to *Bertrand* to decide this case and that the issue before it under *Bertrand* was

> whether there's enough of a factual dispute to submit this to the jury as to whether the—there's something unusual about the steps because of their character, location, or surrounding conditions [sic] make them unreasonably dangerous.

With respect to plaintiff's expert's opinion that the steps were unreasonably dangerous, the court stated

> I think that obviously helps the Plaintiff, but I don't know that it helps—
>
> I mean, I think this is not a question of an expert as to whether this is unreasonably dangerous. I think it's something that you can look at and decide whether—I mean, they talk about steps being an everyday occurrence. I mean, this isn't something unusual that you can say, I've never done it before as a judge or jurors have never done it before. I don't know that you need expert testimony on that issue to assist the jury in deciding whether it's unreasonably dangerous. I don't know that a judge needs it either.

The court concluded:

> I just don't think these are steps—I don't see anything about their character, location or surrounding conditions that would suggest that difference in height wasn't open and obvious.
>
> I think that applies both to the failure to warn and to the failure to maintain because if it's open and obvious, it isn't unreasonably dangerous.
>
> For that reason, I'm granting the motion for summary disposition on the basis of MCR 2.116(C)(10).

On appeal, plaintiff raises several grounds for his contention that the trial court erred in granting summary disposition in favor of defendant. Specifically, plaintiff first argues that the trial court erred in

ruling that the open and obvious doctrine applies to a government defendant's statutory duty to repair and maintain its public buildings. Plaintiff contends that in rendering this erroneous ruling, the court ignored the clear holding to the contrary in *Walker*. Plaintiff also contends that the court misread and misapplied *Bertrand* to this case. Plaintiff contends that *Bertrand* is inapplicable to this case because it does not address the issue whether the open and obvious doctrine applies to a statutory duty to maintain and repair, but rather it "dealt with a duty to warn issue" involving "a private business not governed by the statute involved in this case." However, we believe that plaintiff confuses the separate inquiries into the issues of immunity and negligence.

When a plaintiff brings a negligence claim arising out of an alleged building defect against a governmental entity, a two-question analysis is warranted. *Johnson v Detroit*, 457 Mich 695, 710 (Mallett, C.J.), 713-714 (Taylor, J., with Boyle and Weaver, JJ. concurring); 579 NW2d 895 (1998). One question involves whether plaintiff's claim invokes the public building exception to governmental immunity. *Id*. Another question involves whether the plaintiff can establish the elements of the underlying tort claim. *Id*. If a plaintiff fails to establish either question, summary disposition is appropriate and it is unnecessary to address the other question. See, e.g., *Horace v City of Pontiac*, 456 Mich 744, 754-755; 575 NW2d 762 (1998).

The public building exception to governmental immunity provides in relevant part as follows:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring such knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. [MCL 691.1406; MSA 3.996(106)(1).]

In order to plead a public building exception claim in avoidance of governmental immunity, the courts have stated that a plaintiff must establish the following five-part test:

> (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time. [*Sewell v Southfield Pub Schools*, 456 Mich 670, 675; 576 NW2d 173 (1998).]

However, simply because a plaintiff satisfies the five-part test and is therefore able to invoke the public building exception to governmental immunity does not necessarily mean that the government defendant is liable. *Johnson*, *supra* at 710 (Mallett, C.J.), 713 (Taylor, J., with Boyle and Weaver, JJ. concurring). Rather, a conclusion that the public building exception applies to a plaintiff's claim merely establishes that the government defendant undertook a duty to maintain its public building in good repair.

Id. This duty is only a general duty owed to the general public. *Id*.; see also *Brown v Genessee Co Bd Of Commr's*, 222 Mich App 363, 366; 564 NW2d 125 (1997). Thus, the fact that a governmental entity has a general duty to repair and maintain its public buildings does not necessarily establish a duty owed to a particular plaintiff. *Johnson*, *supra*. In other words, invoking the public building exception to governmental immunity does not negate traditional tort law principles. *Id*. Rather, a plaintiff must still demonstrate the elements of the underlying negligence claim, including a duty owed to the particular plaintiff under the circumstances of the case. *Id*. at 710-711 (Mallett, C.J.), 713 (Taylor, J., with Boyle and Weaver, JJ. concurring).

In *Bertrand* and its companion case, *Maurer v Oakland Co Parks and Recreation Dep't (After Remand)*, our Supreme Court considered the duty element of a negligence claim, specifically the duty owed by a landowner to a business invitee who is injured in a fall on steps on the landowner's premises. *Id*. at 609. The Court stated that the general rule is that a landowner has a legal duty to exercise reasonable care to protect business invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize or protect themselves against. *Id*. The Court explained that a claim that a landowner has breached the duty to exercise reasonable care to protect invitees from unreasonable risks of harm is traditionally premised on three theories: failure to warn, negligent maintenance or defective physical structure. *Id*. at 610.

The Court stated that the open and obvious doctrine provides an exception to this general rule, i.e., a landowner will generally have no duty to protect or warn an invitee where a dangerous condition is known to the invitee or so obvious that the invitee may reasonably be expected to discover the dangerous condition. *Id*. at 613. The Court explained that the open and obvious doctrine is a defense that attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Id*. at 612. The Court then noted an exception to the exception, i.e., a landowner will generally have no duty to protect or warn an invitee where the dangers are known or obvious to the invitee unless the landowner should anticipate the harm despite the known or obvious nature of the danger. *Id*. at 610-613. In other words, where a landowner can and should anticipate that a dangerous condition will cause harm despite its known or obvious nature, then the landowner is not relieved of the duty of reasonable care that is owed to an invitee, which duty may require the landowner to warn or take other reasonable steps to protect the invitee. *Id*. at 611.

As applied to steps, the Court stated as follows:

> With the axiom being that the duty is to protect invitees from *unreasonable* risk of harm, the underlying principle is that even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitees. . . . Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be special aspects of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe.

* * *

> In summary, because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent persons will look where he is going, will observe the steps, and will take appropriate care for his own safety. 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 land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable. However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. . . . If the jury determines that the risk of harm was unreasonable, then the scope of the defendant's duty to exercise reasonable care extended to this particular risk. At any rate, the trial court may appropriately consider the specific allegations of the breach of the duty of reasonable care, such as failure to warn, negligent maintenance, or dangerous construction. If the plaintiff alleges that the defendant failed to warn of the danger, yet no reasonable juror would find that the danger was not open and obvious, then the trial court properly may preclude a failure to warn theory from reaching the jury by granting partial summary disposition. [*Id*. at 614-617.]

In *Maurer*, the Court held that the plaintiff had failed to establish anything unusual about the step on which she fell where her only asserted ground for alleging that the step was dangerous was that she did not see it. *Id*. at 621. The Court affirmed the grant of summary disposition in favor of the defendant, a governmental agency, on the ground that the plaintiff had failed to create a question of fact concerning whether the risk of harm posed by the step was unreasonable. *Id*. at 621. The Court therefore found no need to address the governmental immunity issue also raised in *Maurer*. *Id*.

In *Bertrand*, the Court held that no question of fact existed concerning whether the danger of falling on the defendant's step was open and obvious. *Id*. at 623. The Court thus held that the plaintiff had failed to allege a jury submissible claim for liability based on a failure to warn theory. *Id*. However, the Court nevertheless found that the plaintiff's proofs concerning the character, location and surrounding conditions of the step had created a question of fact concerning whether the risk of falling remained unreasonable despite the open and obvious nature of the danger. *Id*. at 624. In making this determination, the Court found the following illustration from the Restatement applicable:

> "The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to

> liability to B." [*Id*. (quoting 2 Restatement Torts, 2c, § 343A, comment f, illustration 3, p 221).]

The Court thus reversed the grant of summary disposition in favor of the defendant, a private business, on the ground that it was for the jury to determine whether the risk of harm was unreasonable and whether the defendant's failure to remedy the danger had breached its duty of reasonable care. *Id*. at 624-625.

In this case, our review of plaintiff's complaint reveals that in the count entitled "Premises Liability/Negligence" plaintiff simply pleaded a common-law negligence claim, i.e., that defendant breached its duty to use reasonable care to protect plaintiff's wife, a business invitee, from an unreasonable risk of harm posed by the steps, and that this breach caused damage to plaintiff's wife. Plaintiff's claim that defendant breached its duty to use reasonable care appears to be premised on the traditional theories of failure to warn, negligent maintenance and defective physical structure.

When defendant asserted the defenses of governmental immunity and the open and obvious doctrine to this claim, the two-question analysis discussed in *Johnson* was implicated, i.e., whether plaintiff's claim invoked the public building exception to governmental immunity and whether plaintiff could establish the elements of the underlying negligence claim.

At oral argument, the trial court initially resolved the dispute whether the defect at issue was the sidewalk or the steps by finding that the relevant defect was the disparity in riser height between the bottom step and the other two steps. However, we cannot say that this finding constituted a finding that the bottom step was part of the building itself for purposes of the public building exception. Nor did the trial court address the other aspects of the test formulated by the courts for determining whether a plaintiff has invoked the public building exception. Thus, we cannot say that the trial court made any ruling with respect to the question whether plaintiff had invoked the public building exception to governmental immunity.

Rather, the court turned to a consideration of defendant's argument concerning the open and obvious doctrine under *Bertrand*. Because the open and obvious doctrine is a defense that attacks the duty element a plaintiff must establish in a negligence claim, this argument implicated the question whether plaintiff could establish the elements of his underlying negligence claim, specifically the element of duty.

At this point, plaintiff argued in reliance on *Walker* that the open and obvious doctrine did not apply to defendant's statutory duty under the public building exception to repair and maintain its public buildings. Although the trial court had trouble reconciling *Walker*, the court chose to not rely on *Walker* in deciding the open and obvious doctrine issue. This was not error. As explained in *Johnson*, defendant's statutory duty under the public building exception is only a general duty owed to the general public and does not necessarily establish a tort-based duty owed to plaintiff's wife in this case. Because defendant's general duty to repair and maintain its public buildings does not necessarily establish a tort-based duty to plaintiff's wife, the issue whether the open and obvious doctrine applies to defendant's

statutory duty is a non-issue. In other words, because plaintiff cannot rely on defendant's general statutory duty under the public building exception to establish the duty element of his tort-based negligence claim, the issue whether the open and obvious doctrine applies to defendant's statutory duty is irrelevant. To any extent that *Walker* holds to the contrary, we distinguish that case as decided before *Johnson* and in the context of the highway exception to governmental immunity.

Instead, the trial court applied *Bertrand* to the open and obvious doctrine issue. We find no error. Defendant's raising the open and obvious doctrine invoked the issue whether plaintiff could establish the duty element of his tort-based negligence claim. Where this case involves steps, *Bertrand* is binding authority for deciding the issues raised in this case with respect to the element of duty. The trial court noted that it believed that the open and obvious doctrine "applies both to the failure to warn and the failure to maintain . . . ." Again, we find no error. As explained in *Bertrand*, a claim that a landowner has breached the tort-based duty to exercise reasonable care to protect an invitee from unreasonable risks of harm may be premised on either a failure to warn theory or a failure to maintain theory. *Id*. at 610. However, as further explained in *Bertrand*, where the dangerous condition is open and obvious, the landowner will generally have no tort-based duty to either warn or protect. *Id*. at 613. Accordingly, we conclude that the trial court did not misinterpret or misapply *Bertrand*.

Next, plaintiff argues that the trial court erred in ruling that an open and obvious condition cannot be an unreasonably dangerous condition. In making this argument, plaintiff relies on the trial court's isolated statement that "if it's open and obvious, it isn't unreasonably dangerous." We agree that under *Bertrand* such a ruling would be erroneous. However, the trial court also correctly recognized during oral argument that the issue before it under *Bertrand* was

> whether there's enough of a factual dispute to submit this to the jury as to whether the—there's something unusual about the steps because of their character, location, or surrounding conditions [sic] make them unreasonably dangerous.

Thus, it is unclear whether the trial court was under the erroneous impression that an open and obvious danger can never be unreasonably dangerous or whether the court simply mispoke. However, we need not decide this issue because the ultimate issue raised by plaintiff throughout his brief on appeal is that his proofs created a question of fact concerning whether the condition of the steps constituted an unreasonable risk of harm despite the open and obvious nature of the danger of falling off the step. We review de novo this issue. *Paul v Lee*, 455 Mich 204, 210; 568 NW2d 510 (1997). When reviewing a trial court's decision concerning a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider the documentary evidence submitted by the parties and determine whether a genuine issue of material fact exists. *Id*. We will draw all reasonable inferences in the nonmoving party's favor and give that party the benefit of any reasonable doubt. *Id*. If the nonmoving party fails to establish that a material fact is at issue, the motion for summary disposition is properly granted. *Id*.

In this case, plaintiff does not dispute that the danger of falling on the step was open and obvious. We agree. The danger of tripping and falling on a step is generally open and obvious. *Bertrand*, *supra* at 614. In this case, no reasonable juror would disagree that the disparity in riser

height between the bottom step and the other two steps was not known or obvious to plaintiff's wife where she approached and apparently ascended the steps without incident. Thus, we conclude that, at least in the context of this case,[2] plaintiff did not allege a jury submissible claim for liability based on a failure to warn theory. *Id*. at 623.

However, "the premises still may be unreasonably dangerous, but not for want of a warning." *Id*. In this case, as noted by plaintiff, there was no sign or barricade indicating that the door at the top of the steps was not open to the public. Thus, plaintiff's wife ascended the steps apparently assuming that she could enter the door. The character of the steps was unusual in that the riser height of the bottom step was approximately twice that of the other two steps. When plaintiff's wife discovered that she could not enter the building through the door she had no alternative but to descend the steps where she "missed" or "misjudged" the bottom step. Like the customer in the Restatement illustration who ascends a step and, after finishing her ice cream, misses the step because she forget about it, there was a chance that plaintiff's wife could have forgotten about the steps' unusual disparity in riser height after ascending them. *Id*.; see also *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 144 (Weaver, J., with Boyle and Riley, JJ., concurring); 565 NW2d 383 (1997) (no chance that the plaintiff could have forgotten open and obvious condition of inadequate lighting in hockey rink because this condition was constantly before the plaintiff). In the light most favorable to plaintiff, one can reasonably argue that defendant should have anticipated that persons would ascend the steps believing they could enter the building, forget the condition of the steps and then miss the bottom step when forced to descend the steps. *Bertrand, supra*. We conclude that questions of fact exist concerning whether the risk of harm posed by the steps, because of their character, location or surrounding conditions, was unreasonable and whether the defendant breached a duty to exercise reasonable care by failing to remedy the danger.[3] *Id*. at 625.

On cross-appeal, defendant invites this Court to nevertheless affirm the grant of summary disposition on alternative grounds. Specifically, defendant first argues that the defect at issue is a sunken sidewalk. Defendant contends that plaintiff's claim is therefore barred by governmental immunity because a sidewalk does not come within the public building exception. However, the trial court ruled that the defect alleged by plaintiff was the steps and we find no error in this regard. As explained previously, the trial court made no ruling with respect to whether the steps in this case were part of the building itself for purposes of the public building exception and we decline to consider this unpreserved issue on appeal. *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 326; 565 NW2d 915 (1997); *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). Defendant also argues on cross-appeal that any alleged defective condition in the steps did not proximately cause plaintiff's wife's injuries. However, defendant did not raise this issue below and we therefore decline to consider this unpreserved issue on appeal. *Vander Bossche v Valley Pub*, 203 Mich App 632, 641; 513 NW2d 225 (1994).

In summary, we hold that plaintiff failed to establish a jury submissible claim for liability based on a tort-based failure to warn theory. We thus affirm in part the trial court's grant of summary disposition. We further hold that questions of fact exist concerning whether the risk of harm posed by the steps was

unreasonable and whether defendant breached its tort-based duty to exercise reasonable care by failing to remedy the danger. We thus reverse in part the trial court's grant of summary disposition and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski

[1] The complaint also asserted a nuisance claim. The trial court granted summary disposition of this claim. Plaintiff does not challenge this ruling on appeal.

[2] We express no opinion on whether a different conclusion might have been warranted if plaintiff's wife had fallen while descending the steps without having first ascended them.

[3] Because we conclude that questions of fact exist, we decline to consider plaintiff's argument that the trial court erred in failing to consider plaintiff's expert's affidavit.