STATE OF MICHIGAN

COURT OF APPEALS

RUTH WOODBURY, Plaintiff-Appellant,	UNPUBLISHED
v	No. 204411 Monroe Circuit Court
CHARLES I. BRUCKNER and ALICE BRUCKNER, Defendants-Appellees.	LC No. 95-003133 NO

Before: Griffin, P.J., and Gage and R. J. Danhof*, JJ.

DANHOF, J. (dissenting).

I respectfully dissent.

Invitors are not absolute insurers of the safety of their invitees. Invitors owe a duty to protect their invitees from *unreasonable* risks of harm. That is, only where the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, is a duty imposed on an invitor to undertake reasonable precautions. *Bertrand v Alan Ford Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995). Thus, in a case such as this, the critical question is whether the invitor can reasonably expect invitees to protect themselves against the hazard. *Perry v Hazel Park Harness Raceway*, 123 Mich App 542, 549-550; 332 NW2d 601 (1983).

Relying on *Hottmann v Hottmann*, 226 Mich App 171; 572 NW2d 259 (1997), the majority concludes that a genuine issue of fact exists whether the risk of plaintiff falling from the roof remained unreasonable, despite its obviousness and despite her knowledge of the hazard. In dissent in *Hottmann*, Judge Sawyer posited the following post-*Bertrand* interpretation of the "open and obvious" doctrine:

> The open and obvious danger doctrine does not apply where, despite the danger being open and obvious, the invitee is nevertheless obligated to face the danger and cannot

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

> take reasonable means to protect himself from the danger. [*Hottmann, supra* at 182 (Sawyer, J, dissenting).]

Here, plaintiff attempted to clean rugs by shaking them over the edge of a nine-foot roof at 11:45 p.m. on a cold February night when there was an inch of snow on the roof. The dangers of such an activity were open and obvious. By imposing a duty on defendants, as nonpossessory landlords, to anticipate such activity and to make the roof foolproof for tenants such as plaintiff undermines the social policy of encouraging people to take reasonable care for their own safety. This is particularly so where plaintiff never sought, nor was she given, permission by defendants to use the roof for such activities. Indeed, Mr. Bruckner testified that he had never seen plaintiff on the roof and that the only use he anticipated for it was as an emergency fire escape. Thus, the evidence is clear that nothing prevented plaintiff from assessing the danger presented and either avoiding it entirely or enlisting whatever safety measures she felt appropriate. *Id.*

In granting summary disposition to defendants, the learned trial judge stated:

> This Court determines Defendant[s] did not owe Plaintiff a duty to protect her from such a fall. Plaintiff used the roof-top throughout the course of her tenancy for miscellaneous purposes without incident. Standing alone, the absence of prior accidents means little. However, it does infer Plaintiff was aware of the characteristics of the roof-top. In other words, for seven years she knew the roof-top did not have rails to prevent the fall that ultimately occurred.
>
> The Defendant Bruckners could not anticipate Plaintiff would fail to protect herself from this type of incident. She proceeded to use the roof-top despite the obvious danger of falling from it. This Court will not impose a duty upon a party when none should exist.

I agree with this reasoning, and therefore would affirm.

/s/ Robert J. Danhof