STATE OF MICHIGAN

COURT OF APPEALS

FOREST WOLFROM and CHARLOTTE WOLFROM,

Plaintiffs-Appellants,

v

HILLCREST MEMORIAL GARDENS ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
April 6, 1999

No. 204746
Shiawassee Circuit Court
LC No. 96-060280 NO

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a June 26, 1997 order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings.

This is a premises liability case arising out of an incident in which plaintiff Forest Wolfrom[1] fell after descending a step while exiting defendant's office. Specifically, on July 27, 1995, plaintiff went to defendant's offices to conduct business concerning his mother-in-law's tombstone. As plaintiff was exiting the office, he failed to realize that there was one step from the office floor to the ground level and, failing to anticipate the step, fell as he walked out of the office level, injuring his left knee. The step and the ground floor level were both made of concrete and painted the same gray color.

Plaintiffs filed suit, contending that the step constituted a hazardous and dangerous condition, that defendant failed to provide a safe exit, and that defendant failed to warn of the dangerous condition. Plaintiff's primary allegation is that because the step and ground level were painted the same color, the step was indistinguishable from the floor and constituted a dangerous condition. Defendant moved for summary disposition and the trial court granted the motion, ruling that the step presented an open and obvious condition.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court is to consider all record

evidence, make all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of any material fact exists to warrant a trial. *Skinner v Square D Co,* 445 Mich 153, 161; 516 NW2d 475 (1994).

Our Supreme Court's latest pronouncement concerning the scope of the duty owed by an owner or occupier of land to business invitees regarding steps on its premises is *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). Invitors may be held liable for an invitee's injuries that result from a failure to warn of a hazardous condition or from the negligent maintenance of the premises or defects in the physical structure of the building. *Id.* at 610. Where a condition is open and obvious, however, the scope of the possessor's duty may be limited. *Id.* Although there may be no duty to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions. Therefore, the open and obvious doctrine does not relieve the invitor of the general duty of reasonable care. *Id.* at 610-611.

In *Bertrand,* the Supreme Court concluded:

> [B]ecause steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person 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 of 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. . . . [T]he 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 judgment [*Id*. at 616-617.]

In the present case, we believe that the evidence creates a question of fact as to whether the danger was open and obvious and whether the risk of harm was unreasonable. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person of ordinary intelligence would discover the danger upon casual inspection. *Hughes v PMG Bldg, Inc,* 227 Mich App 1, 10; 574 NW2d 691 (1997). This test is an objective one and we look not to whether the plaintiff should have known that the condition was dangerous, but whether a reasonable person in the plaintiff's position would foresee the danger. *Id.* at 11. Here, the evidence is uncontroverted that the step and the ground level were painted the same gray color. According to plaintiff's expert, Judith Keiser (an architectural engineer), there is a 5 ¼ inch change in elevation from the door threshold to the ground level. Keiser stated that the step and the ground level were of the same monotone color and that it is "extremely difficult to notice changes in level when a monotone of color of stepping surfaces

occurs when descending steps as Plaintiff was because of the sight angle." According to Keiser, this is because the vertical riser portion of the step is completely hidden when descending a step when the step is of the same monotone color. Moreover, plaintiff testified that he fell because he did not see the step as he exited because the step was of the same color as the ground level.

Under these circumstances, we conclude that there is a question of fact as to whether the step constituted an open and obvious condition. Here, because of the same monotone paint color used on the step and on the ground level and the expert's affidavit, there is a question of fact regarding whether the step was an open and obvious danger. Compare *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993) (this Court indicated that the plaintiff's expert did *not* opine that the handicap ramp was not noticeable by the ordinary user, unlike plaintiff's expert in the present case). Further, because of this character of the step and ground level, being painted with the same monotone color, there is a question of fact regarding whether the risk of harm was still unreasonable. Viewed in a light most favorable to plaintiff, a genuine issue exists regarding whether the maintenance of the step (painting it the same color as the ground level) created an unreasonable risk of harm. See, e.g., *Bertrand, supra* at 623-624.

Accordingly, the trial court erred in granting summary disposition in favor of defendant. There are questions of fact regarding whether the step constituted an open and obvious danger and whether the risk of harm was unreasonable.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.

[1] In this opinion, "plaintiff" will refer solely to Forest Wolfrom because Charlotte Wolfrom's claim is wholly derivative. Plaintiff's wife asserts a claim for the loss of love, affection, society and conjugal fellowship, in addition to the loss of services and financial support, as a result of defendant's alleged negligence.