# STATE OF MICHIGAN

# COURT OF APPEALS

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| SHERYLEE DOUGHERTY,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>June 4, 1999 |
| v | No. 211540<br>Gogebic Circuit Court |
| THOMAS HERFORT, P.C. and WOODLAND PROFESSIONAL GROUP,<br><br>Defendants-Appellees. | LC No. 97-000173 NO |

Before: Whitbeck, P.J., and Markman and O'Connell, JJ.

PER CURIAM.

This is a negligence action alleging premises liability arising from the slip and fall of plaintiff-appellant Sherylee Dougherty ("Dougherty") when a floor mat in the foyer of a building owned and managed by defendant-appellee Woodland Professional Group, a professional corporation consisting of defendant-appellee Thomas Herfort, D.D.S. (collectively, "Woodland") and Dean & O'Dea, P.C., unexpectedly slid underneath Dougherty. Finding that the allegedly dangerous condition was open and obvious and that there was no unreasonable risk of harm, the trial court ruled, pursuant to MCR 2.116(C)(10), that there was no genuine issue of material fact and granted summary disposition. Dougherty appeals as of right. We affirm.

## I. Basic Facts And Procedural History

In mid-July 1996, Dougherty tripped and fell in the entranceway to the Woodland Professional Building. In her subsequent suit, Dougherty asserted that the injuries she sustained from the slip and fall were caused by Woodland's negligence and the breach of several legal duties, specifically, its (1) failure to keep the premises reasonably safe when Woodland knew or should have known of dangerous conditions; (2) failure to inspect, maintain, or design the floor to insure its safety; (3) failure to warn Dougherty of the existing danger; (4) failure to design and construct a safe entranceway; (5) failure to remove water and snow from the entranceway; (6) carelessness, recklessness and negligence around the premises; (7) failure to have correctly sized and properly placed mats and carpets on the entranceway floor; and (8) application of wax or other slippery substances to the floor. Dougherty claimed that she suffered permanent injury and incurred special damages from her fall.

After answering, Woodland subsequently moved for summary disposition pursuant to MCR 2.116(C)(8). A hearing was held on the motion for summary disposition in early March, 1998. At the hearing, the trial court first observed that all floor mats like the one in question were capable of movement; that is, they are meant to be portable and are not securely fastened to the floor. The trial court stated that this fact was not something that established that Woodland could reasonably anticipate any danger arising from the use of the floor mat. The trial court then noted that Dougherty's uncontradicted testimony established that the danger was open and obvious since she had stated that she saw the "ripple" in the carpet, believed it could be dangerous, and attempted to correct the condition. The trial court rejected the idea that one who observed and attempted to correct a dangerous condition could be "immune" from the application of the open and obvious doctrine and concluded that to rule otherwise would make a landowner strictly liable. The trial court noted that under the open and obvious doctrine, a premises owner was still liable if the owner had knowledge of a condition that posed an unreasonable risk of harm and permitted that condition to continue. The trial court concluded:

> Under the circumstances here, again, believing there is no genuine issue as to the material facts of how Ms. Daugherty [sic] fell, this is uncontradicted and no reason to believe that any other further evidence will ever be deduced to suggest to the contrary. I must conclude first that any Danger [sic] to her by virtue of that mat was open and obvious to her. And I must conclude secondly that that mat did not, in spite of being open and obvious, carry with it an unreasonable risk of harm to the public. Therefore, the motion for summary disposition is granted on (C)(10) grounds.

A written order granting summary disposition was entered in late March, 1998. Dougherty then moved for reconsideration, arguing that the open and obvious doctrine could limit liability arising from a failure to warn invitees, but it did not relieve Woodland of responsibility to protect invitees from known or discoverable dangerous conditions.[1] The trial court denied reconsideration in mid-April, 1998, observing first that generally the motion for reconsideration simply raised the same issues on which it had already ruled. The trial court rejected Dougherty's contention that the open and obvious doctrine only applied to Woodland's duty to warn invitees of a potentially dangerous condition. The trial court acknowledged that despite the fact that a dangerous condition may be open and obvious, liability will still exist if it was nevertheless unreasonably dangerous. The trial court rejected Dougherty's contention that sand and salt could have caused the mat to slip as "only a matter of idle speculation" and noted that Dougherty had previously claimed that she undertook to rectify a perceived problem in the mat by stepping on it and moving it around and that this action allegedly precipitated that accident. The trial court also stated that Woodland could not be expected to anticipate that an invitee would enter the building, attempt to straighten out the mat, and injure herself in the course of doing so. The trail court rejected Dougherty's claim that discovery had not been sufficiently completed because she discovered another person who had fallen in the entranceway; the trial court noted that the subsequent incident occurred many months later in a completely different manner and therefore was irrelevant. An order denying reconsideration was entered on April 21, 1998.

## II. Standard Of Review

This Court reviews a trial court's decision regarding a motion for summary disposition de novo as a legal issue. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Spiek, supra* at 337. This Court examines the entire record and, construing all reasonable inferences arising from the evidence in the light most favorable to the nonmoving party, will uphold the trial court's grant of summary disposition where "there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Marcelle v Taubman*, 224 Mich App 215, 216-217; 568 NW2d 393 (1997). "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995).

## III. The General Rule And The Open And Obvious Exception

"The general rule is that a business invitor owes a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care and prudence to keep the premises reasonably safe." *Schuster v Sallay*, 181 Mich App 558, 565; 450 NW2d 81 (1989). A premises owner "does not owe a duty to protect his invitees where conditions arise from which an unreasonable risk cannot be anticipated or of dangers that are so obvious and apparent that an invitee may be expected to discover them himself." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94; 485 NW2d 676 (1992). Thus, in determining whether Woodland owed a duty to Dougherty, the trial court had to first determine whether an open and obvious danger existed and, then, if the danger was open and obvious, to determine whether Woodland should have anticipated harm to Dougherty despite the open and obvious nature of the danger. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995). The question of whether a danger is open and obvious depends on whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In this case, Dougherty claimed that she entered the vestibule of Woodland's building, attempted to straighten out a "ripple" in the floor mat by stepping on it, and when she did so (or immediately thereafter), the whole rug "gave way," "slipped," or "turned." Thus, at least for the purposes of the summary disposition motion, it was not disputed that Dougherty slipped on the floor mat in the entryway, fell and struck her head. However, "the mere occurrence of a fall is not enough to raise a legitimate inference of negligence." *Andrews v K Mart Corp*, 181 Mich App 666, 669; 450 NW2d 27 (1989).

The rubber-backed floor mat placed on a tile entryway floor was observable upon casual inspection. Dougherty not only admitted that she observed the floor mat, but further acknowledged that she specifically observed the "ripple." Therefore, the trial court correctly concluded that the dangerous

condition presented by the floor mat was open and obvious because it was readily apparent to a person of ordinary intelligence, *Novotney, supra* at 475, and, in fact, was recognized as such by Dougherty.

IV. Unreasonable Risk Of Harm

The question remains, however, whether Woodland should have anticipated that the conditions in the entryway presented an unreasonable risk of harm to invitees despite the fact that the risk was open and obvious since "the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions." *Bertrand, supra* at 611. In *Bertrand,* the Michigan Supreme Court stated:

> [T]he rule generated is that 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. On the other hand, 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. The issue then becomes the standard of care and is for the jury to decide. [*Id.*; emphasis in original.]

Here, the very purpose of the floor mat was to prevent invitees from slipping on the tile floor when it was wet. The use of such mats is "among the commonplaces of our day and time." *Nash v Lewis*, 352 Mich 488, 492-493; 90 NW2d 480 (1958). The Supreme Court in *Nash* concluded that the existence of such a mat, even one that had collected "grit and little pebbles," did not represent "an unsafe condition, the failure to remedy which would be negligence on the part of the defendant." *Id.* at 493. The trial court therefore correctly concluded that the existence of the floor mat in the foyer area would not suggest to any reasonable person a risk of unreasonable harm.[2]

V. Known Dangers

Citing *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3; 279 NW2d 318 (1979), Dougherty argues that Woodland can be held liable for dangerous conditions that have existed long enough that it should have known about them, and that Woodland therefore had a duty to inspect their premises for possible dangerous defects. However, in this case, Dougherty failed to present any evidence establishing how long the floor mat had constituted a hazardous condition. The evidence indicated that there had not been any prior accidents in the foyer, that the one subsequent accident occurred nine months after Dougherty's accident, and that the subsequent accident appeared to involve the door rather than the floor mat. Under these facts, it would be unreasonable to rule that Woodland had either actual or constructive awareness of a dangerous condition. *Nash, supra* at 493.

VI. Failure to Maintain

Dougherty also contends that the open and obvious doctrine does not apply to this case because her theory of negligence was not solely based on a failure of defendants to warn invitees of a known danger. In the recent case of *Millikin v Walton Manor Mobile Home Park, Inc,* ___ Mich

App ___; ___ NW2d ___ (Docket No. 207051, issued 3/19/99), slip op, the plaintiff tripped over an exposed support wire near the base of a utility pole. She argued that the open and obvious doctrine only applied to limit liability for a failure to warn and that it was inapplicable to allegations – such as she had made – that a defendant has failed to maintain reasonably safe premises. This Court examined the background of the doctrine, especially with respect to the *Riddle, supra*, 440 Mich 85, and *Bertrand, supra*, 449 Mich 606, decisions, and held "that the open and obvious doctrine applies both to claims that a defendant failed to warn about a dangerous condition and to claims that the defendant breached a duty in allowing the dangerous condition to exist in the first place." *Millikin, supra*, slip op at 3. This Court therefore concluded that the logic and language of those cases "demonstrates that the doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability." *Id.* at 4. Thus, the trial court in this case properly considered first whether the alleged dangerous condition was open and obvious, and then, having found that it was, further determined that no liability would lie because the risk of danger was not unreasonable.

Dougherty's reliance on *Walker v City of Flint*, 213 Mich App 18; 539 NW2d 535 (1995), is also misplaced since the *Walker* decision was based largely on the fact that the city government had a *statutory duty* to maintain the sidewalk in a reasonably safe condition. *Id.* at 23.

VII. "Hidden Defects"

Analogizing to this Court's decision in *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 265; 532 NW2d 882 (1995), Dougherty contends that the trial court failed to appreciate that the risk of harm in this case was that the whole mat would move when she attempted to smooth out the "ripple" and that this risk was not open and obvious. This Court held in *Eason* that although the risk of harm posed by an extension ladder is generally open and obvious, the plaintiff claimed that the ladder lacked a safety latch or that its latch malfunctioned and this danger was not obvious. *Id.* at 265. In *Eason*, however, this Court determined that the trial court had improperly granted summary disposition under MCR 2.116(C)(8). *Eason, supra* at 266. In this case, summary disposition was granted under MCR 2.116(C)(10). Dougherty failed to present any evidence that supported her speculative theories that the floor mat slipped because it was too large for the foyer or because there was an accumulation of salt and sand. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994); *Hasselbach v T G Canton, Inc*, 209 Mich App 475, 482-483; 531 NW2d 715 (1994).

Furthermore, Dougherty's argument that there was, in effect, a "hidden defect" in the floor mat returns this analysis to the consideration of whether the risk of harm posed by the floor mat was something Woodland could or should have been able to foresee. "[A] premises owner does not owe a duty to protect his invitees where conditions arise from which an unreasonable risk cannot be anticipated." *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 537; 542 NW2d 912 (1995). Given that there had not previously been any accidents in the ten years that the mat had been used in the foyer, and that Dougherty acknowledged awareness not only of the danger posed by the "ripple" in the mat, but also awareness that the mat was capable of movement since she expected that it would move when she pushed down on the "ripple," this Court concludes that any risk of harm was open and

obvious and was not unreasonable, *Novotney, supra* at 476-477. The trial court correctly found that there was no genuine issue of material fact.

Affirmed.

/s/ William C. Whitbeck
/s/ Stephen J. Markman
/s/ Peter D. O'Connell

[1] Dougherty further asserted that the open and obvious doctrine did not absolve Woodland from liability under her alternate theory of liability, Woodland's failure to maintain the premises. Dougherty asserted that the open and obvious danger posed by the "ripple" in the floor mat was separate from the dangerous condition that had actually caused her accident: the fact that the mat slipped on the floor. According to Dougherty, the trial court did not recognize that the danger that the floor mat would slip on the floor was a distinct danger to invitees that was not open and obvious. Finally, Dougherty pointed out that several recent depositions in the case disclosed another fall nine months after her fall and this subsequent fall indicated that accumulated sand and salt could have caused the mat to become slippery.

[2] Based on evidence that indicated that the floor mat might have been somewhat larger than the foyer area, and that sand and blue salt were used to clear snow outside the door and might be tracked inside, Dougherty speculated that she fell because the mat was too large for the foyer area and its edges extended up onto the wall, or because an accumulation of tracked-in sand and salt might have made the mat slip on the floor. However, Dougherty presented no evidence to support the supposition that these conditions had anything to do with her slip and fall. Furthermore, Dougherty acknowledged that the area was cleaned once a week, and this Court notes that the accident occurred in the middle of July, long after ice and snow would have disappeared. While circumstantial evidence can be used to establish a causal link between a condition and an injury, "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). Dougherty's unsupported speculation is insufficient to establish a genuine issue of material fact. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482-483; 531 NW2d 715 (1994).