STATE OF MICHIGAN

COURT OF APPEALS

JEAN TEMPLE,

Plaintiff-Appellant,

v

SAMUEL SALEM, DDS,

Defendant-Appellee.

UNPUBLISHED
December 7, 1999

No. 203835
Genesee Circuit Court
LC No. 96-044355 NO

Before: Gage, P.J., and MacKenzie and White, JJ.

MacKENZIE, J. (dissenting).

I respectfully dissent because I conclude (1) that any danger associated with the stairs was open and obvious, and (2) that the stairs did not pose an unreasonable risk of harm despite the obviousness of the danger, if any.

Plaintiff argues that the allegedly dangerous condition was not open and obvious and that she did not notice the absence of a handrail until she had already begun to fall. In determining whether something is open and obvious, the relevant inquiry is whether an average person of ordinary intelligence, upon casual inspection, would recognize the condition. *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). I conclude that such a person would indeed recognize the absence of a handrail, as well as any corresponding danger, on a set of stairs. This conclusion is reinforced by *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995), in which the Court indicated that "the danger of tripping and falling on a step is generally open and obvious."

The next inquiry is whether the danger associated with the stairs was unreasonable in spite of its obvious nature. See *Bertrand, supra* at 618. If an obvious risk of harm remains unreasonable -- in other words, if an invitor anticipates harm in spite of the obviousness of the danger -- the invitor may be obligated to take measures for invitees' protection. See *Bertrand, supra* at 611, and *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). In *Hottman v Hottman*, 226 Mich App 171, 176; 572 NW2d 259 (1997), the Court framed this inquiry as whether "the risk of falling . . . is eliminated by awareness of the hazard." Here, awareness of the hazard would indeed eliminate the risk of falling. A reasonable person, after noticing the absence of a handrail, would

proceed cautiously so as to maintain proper balance while traversing the stairs, which were not alleged to be either unusually steep or in disrepair.

Contrary to the majority, I do not believe that the violation of a BOCA handrail provision would influence the outcome of this case. The existence of a building code violation, even if established, does not necessarily mean that an unreasonably dangerous condition exists, since building codes may require stricter safety guidelines than those required by our state's common-law tort jurisprudence. In other words, an invitor may be liable to the city or state for a code violation while at the same time remaining free from liability toward its invitees. Although this Court in *Mills v AB Dick Co*, 26 Mich App 164, 168; 182 NW2d 79 (1970), held that the violation of a handrail ordinance was evidence of negligence toward invitees, I conclude that this holding was effectively overruled by the Supreme Court in *Bertrand*, *supra* at 616-617, which indicated that the risk of harm posed by stairs is *presumptively reasonable* and will support a negligence claim only "where there is something unusual [and dangerous] about the steps because of their character, location, or surrounding conditions. . . ." Here, the absence of a handrail was not so unusual that the presumption of reasonableness was overcome.

I conclude that the stairs' open and obvious risk of harm was not unreasonable as a matter of law and would therefore affirm.

/s/ Barbara B. MacKenzie