

STATE OF MICHIGAN  
COURT OF APPEALS

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JEAN TEMPLE,

Plaintiff-Appellant,

v

SAMUEL SALEM, DDS,

Defendant-Appellee.

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UNPUBLISHED

December 7, 1999

No. 203835

Genesee Circuit Court

LC No. 96-044355 NO

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

WHITE, J. (concurring).

We all, I believe, agree that the danger presented by the steps and the absence of a hand rail was open and obvious. I agree with the lead opinion that, notwithstanding the open and obvious nature of the danger, *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995), does not foreclose plaintiff's claim. While the open and obvious doctrine is not confined to failure to warn claims, and applies as well to claims that a defendant breached a duty by allowing the underlying dangerous condition to exist in the first place, *Millikin v Walton Manor Mobile Home Park*, 234 Mich App 490, 495; 595 NW2d 152 (1999), its operation in the latter context is limited. The doctrine protects against liability when injury would have been avoided had the open and obvious danger been observed. I do not agree with the dissent that simply observing the absence of a handrail would enable a reasonable person to avoid the danger by proceeding cautiously so as to maintain proper balance. As the lead opinion observes, not all persons are able to navigate steps safely without the safeguard of a handrail. Further, many persons who recognize that steps pose a potential hazard under any circumstance habitually use or stay close to a handrail as an extra precaution. Thus, I agree with the lead opinion's determination that the trial court erred in determining that because the absence of a handrail was open and obvious, and the stairs were not otherwise defective, the condition was not unreasonably dangerous as a matter of law. Whether there is genuine issue regarding proximate causation is a separate issue that will be addressed on remand.

I agree that the existence of a BOCA violation does not automatically create a question of fact regarding the existence of an unreasonably dangerous condition. Rather, the standards

expressed in *Bertrand, supra* and *Millikin, supra* are controlling. The presence or absence of a violation is simply evidence that may be relevant to the determination. Lastly, I do not rely on *Mills v AB Dick Co*, 26 Mich App 164, 167; 182 NW2d 79 (1970), in reaching my conclusions.

/s/ Helene N. White