STATE OF MICHIGAN

COURT OF APPEALS

LINDA BOYD,

Plaintiff-Appellee,

v

WARREN RESTAURANTS, INC., a/k/a COUNTRY BOY DELI DELIGHTS,

Defendant-Appellant.

UNPUBLISHED
July 3, 2001

No. 217029
Oakland Circuit Court
LC No. 98-004157-NO

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's denial of its motion for summary disposition in this premises liability action. We reverse.

Plaintiff Linda Boyd fractured her wrist when she tripped and fell on a cracked and raised portion of concrete on a ramp while leaving defendant's restaurant. Plaintiff estimated that the raised surface was one-half to three-quarters of an inch higher than the adjacent surface. According to plaintiff, the weather was overcast, but not raining and the ground was dry. Plaintiff stated that although she had safely walked over the area many times before, she had not noticed the alleged defect. Finally, plaintiff acknowledged that had she been looking down, she probably would have noticed it on the day in question.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), on the ground that the hazard was open and obvious. The court ruled that summary disposition premised upon the open-and-obvious rule was not appropriate because the alleged defect was located in the only passageway where customers could exit the restaurant. According to the trial court, a question of fact therefore existed as to whether the defect created an unreasonably dangerous condition. We disagree.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also the depositions, affidavits, admissions and other documentary evidence. MCR 2.116(G)(5). The trial court must give the benefit of any

reasonable doubt to the non-moving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co,* 440 Mich 446, 455; 597 NW2d 28 (1999).

There is no dispute that plaintiff entered defendant's premises as an invitee of that establishment, and retained that status as she departed on the walkway designated for that purpose. An "invitee" is a person:

> [W]ho enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception. The landowner has a duty of care, not only to warn the "invitee" of any known dangers, but to also make the premises safe, which requires the landowner to actually inspect the premises, and depending upon the circumstances, to make any necessary repairs or to warn of any discovered hazards. (*Wymer v Holmes,* 429 Mich 66, 71 n 1; 412 NW2d 213 (1987), citing Prosser & Keeton, Torts (5th ed), § 61, and Restatement Torts, 2d §§ 332, 341A, 343, 343A).

A business invitor may avoid liability for injuries arising from open and obvious conditions: "[W]here the dangers are known to the invitee or are *so obvious* that the invitee might reasonably be expected to discover them . . .". Indeed, "an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (emphasis added); see also *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; 595 NW2d 152 (1999) ("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.")[1]

However, the open and obvious doctrine is not an absolute bar to liability. In *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), our Supreme Court stated that "the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care." *Id.* at 611. Citing 2 Restatement of Torts, 2d, §§ 343, 343A, with approval, the Court stated:

> [I]f 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. (*Bertrand, supra* at 611; emphasis in the original).

[1] Plaintiff cites *Phillips v Travelers Ins Co*, 451 Mich 924; 549 NW2d 539 (1996), for the proposition that our Supreme Court has effectively overruled *Millikin*. However, the language on which plaintiff relies was simply a dissent from the Court's denial of leave to appeal, and thus does not disturb the precedential effect of *Millikin*.

Thus, business invitors are not liable to invitees for injuries resulting from open and obvious hazards, except where the invitors should expect their invitees to confront the hazards despite their open and obvious nature, e.g., defects rendering such passageways as stairs, hallways, or entrance/exit ramps unavoidably dangerous.

In this case, the trial court concluded that where an alleged defect exists on a surface that a business invitee must be expected to traverse, the reasonableness of the open and obvious hazard poses a question that must necessarily be resolved at trial by the trier of fact. We respectfully disagree with the trial court's conclusion.

The question here is not whether the alleged defect was open and obvious, but whether it posed an unreasonable hazard to plaintiff despite its openness and obviousness. In concluding that a question existed for jury resolution, the trial court failed to appreciate the distinction between a passageway that is wholly defective, such that one encountering it cannot avoid the hazard despite noticing the danger, and a passageway whose open and obvious defect, once noticed, can easily be avoided as one navigates the area in question. The critical issue is whether the invitor can reasonably expect invitees to protect themselves against the hazard. See *Bertrand*, Supra at 614 (recognizing that "even though invitors have a duty to exercise reasonable care in protecting their invitees, they are not absolute insurers of the safety of their invitiees.") (Citation omitted.)

In this case, the condition in question was not akin to an ice-covered walkway or flooded lobby which an invitee must walk upon if he or she is to enter the building at all. Rather, it was a discrete hazard in an otherwise safe walkway of which plaintiff could have easily avoided by stepping over it or walking around it.

Because plaintiff tripped over a defect which was an open and obvious condition that could easily have been avoided, no interpretation of the evidence could render that defect an unreasonable hazard. To place liability upon defendant in the instant case would be tantamount to making defendant the absolute insurer of plaintiff's safety; a result incongruent with the current state of the law. Accordingly, summary disposition in defendant's favor was thus appropriate. See *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 603; 362 NW2d 844 (1984).

Accordingly, we reverse the trial court's order denying defendant's motion for summary disposition.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell