STATE OF MICHIGAN

COURT OF APPEALS

TERRI SINGLETON, Plaintiff-Appellant,	UNPUBLISHED September 20, 2012
v MID MICHIGAN INVESTMENT COMPANY d/b/a OMARS OF LANSING, Defendant-Appellee.	No. 306011 Ingham Circuit Court LC No. 10-000713-NO

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

TALBOT, J (*dissenting*).

I respectfully dissent. I believe that the wet substance that allegedly caused Terri Singleton to fall was open and obvious. Terri Singleton testified that before she fell she did not see the substance on the staircase. Singleton, however, also testified that when she looked up after the fall, she was able to see a wet substance on the staircase. The test used when considering whether a condition is open and obvious is not whether Singleton saw that the stairs were wet before she fell. Rather, for the defense to apply, it must be demonstrated that an "average user with ordinary intelligence" would have been able to discover the wet substance on the staircase and the risk it presented on "casual inspection."[1] Because Singleton's testimony establishes that she was able to discover the substance under the same dimly lit conditions in which she fell, I would find that the wet substance was open and obvious.

Therefore, I would affirm the trial court's grant of summary disposition in favor of Mid Michigan Investment Company d/b/a Omars of Lansing.

/s/ Michael J. Talbot

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[1] *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475-476; 499 NW2d 379 (1993).