STATE OF MICHIGAN

COURT OF APPEALS

JENNIE WOLAK,

        Plaintiff-Appellant,

v

ARBOR DRUGS, INC.,

        Defendant-Appellee.

UNPUBLISHED
December 20, 1996

No. 187924
LC No. 95-505204-NO

Before: Jansen, P.J., and Saad and M. D. Schwartz,* JJ.

PER CURIAM.

The circuit court granted defendant's motion for summary disposition in plaintiff's trip and fall case; plaintiff now appeals and we affirm.

As plaintiff was walking toward defendant's store, she tripped and injured herself on a small portion of the sidewalk, where the sidewalk and the parking lot meet. She then sued and alleged negligent failure to warn, and failure to properly maintain the premises. Defendant moved for summary disposition, and asserted that there was no question of fact precluding entry of judgment in its favor, because there was no duty to warn because the condition was open and obvious, and the condition was not unreasonably dangerous. Defendant's motion was granted, and plaintiff appeals.

I

Plaintiff argues that the circuit erred in concluding as a matter of law that any danger arising from the difference in elevation between the sidewalk and the parking lot at the corner where plaintiff tripped was "open and obvious." Viewing the evidence in the light most favorable to plaintiff, as we are required to do, we find no error. "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, 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,* 440 Mich 85, 96; 485 NW2d 676 (1992); see also *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 474-475; 499 NW2d 378 (1993). Given the

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* Circuit judge, sitting on the Court of Appeals by assignment.

photographs which are part of the record, the trial court did not err in concluding that the "seam" on which plaintiff caught her left foot was an open and obvious danger. The fact that plaintiff did not subjectively appreciate the danger is not determinative.

<div align="center">II</div>

Plaintiff's argument in the alternative relies principally upon *Bertrand v Alan Ford, Inc,* 449 Mich 606; 537 NW2d 185 (1995). For this argument, plaintiff concedes that the danger of tripping and falling on a step is generally open and obvious (hence precluding liability on an a failure to warn theory), but asserts that there remains a question of fact whether some "special aspect" of this particular seam made the risk of harm unreasonable. See *id.,* 449 Mich at 614. Although this issue was not expressly addressed below, the circuit court nonetheless ruled that defendant owed no duty to plaintiff on the facts of this case. We agree with this ruling.

The problem with plaintiff's alternative argument is that plaintiff failed to offer any evidence sufficient to create a dispute of fact about whether the risk of harm arising out of this particular seam was unreasonable. Also, no evidence was offered to show any "special aspect" that made the risk of harm at this location unreasonable. The facts: (1) that plaintiff subjectively found the seam's appearance "deceptive," and (2) that she was walking a slightly different route to the door than she was accustomed to walking, are insufficient to show that the seam presented an unusual risk of harm. Plaintiff presents no evidence that the seam's location, consistency, or surrounding conditions were unusual. Therefore, even mindful that on an appeal from a summary disposition our obligation is to view the evidence in the light of the non-moving party (plaintiff here), we find no dispute of fact.

Finally, we give no credence to the portion of plaintiff's appeal that is premised upon Dearborn municipal ordinances, because: (1) this argument was not pleaded below, and (2) the ordinances purport to apply to owners, and there is no record evidence that defendant *owned* (i.e. rather than leased) the property at issue. Accordingly, we affirm.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz