STATE OF MICHIGAN

COURT OF APPEALS

TERRI MODZELEWSKI,

Plaintiff-Appellant/Cross Appellee ,

v

SEARS ROEBUCK & COMPANY,

Defendant-Appellee/Cross Appellant.

UNPUBLISHED
February 3, 1998

No. 196972
Wayne Circuit Court
LC No. 94-425716-NO

Before: Markman, P.J., and McDonald and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting summary disposition to defendant on plaintiff's slip and fall claim on the ground that the risk of harm from the open and obvious hole in the walkway was not unreasonable. Defendant cross-appeals from the circuit court order which denied its motion for summary disposition on the issue of whether defendant had actual or constructive notice of the defect. We affirm.

Plaintiff was injured when her foot caught in the hole while exiting from one of defendant's stores. She was employed as a cosmetologist at a concession operating a hair salon inside the store. The accident occurred in the afternoon of February 9, 1993, as plaintiff was leaving the employee entrance after finishing her work shift. When asked whether she had ever seen any cracks or breaks in the pavement before, plaintiff replied that she "never paid attention."

In *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96-97; 485 NW2d 676 (1992), the Supreme Court held, in pertinent part:

> [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 . . . If the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the

> danger . . . What constitutes reasonable care under the circumstances must be determined from the facts of the case.

More recently, in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995), the Supreme Court revisited this question. It stated:

> While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions. Thus, the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care . . . [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 require to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide.

After citing to *Riddle*, the *Bertrand* Court concluded:

> Thus, even though there may not be an *absolute* obligation to provide a *warning*, this rule does not relieve the invitor from his duty to exercise reasonable care to protect his invitees against known or discoverable dangerous conditions. [*Id*., at 613.]

This issue was further clarified in *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997). In *Singerman*, the plaintiff was hit in the eye by a hockey puck on the ice hockey rink. The plaintiff was an experienced hockey player and was wearing no protective equipment. He claimed that because of poor lighting, he was unable to react as he normally would and avoid the puck that struck him. On initial appeal, this Court found that the defendant should have foreseen the harm to the plaintiff despite the fact that the condition of the lighting constituted an open and obvious danger. The defendant should have anticipated that patrons will not follow the safety rules (to wear protective equipment) and that they are in danger if the lighting is not adequate. On further appeal, however, the Supreme Court disagreed:

> We disagree with the panel's reasoning in this matter. The Court of Appeals incorrectly held that defendants owed a duty to plaintiff because the harm was *foreseeable*, despite the open and obvious nature of the hazard. The question is not the foreseeability of harm. Rather the question for the courts to decide is whether the risk of harm remains unreasonable, despite its obviousness or despite the invitee's knowledge of the danger. If the court finds that the risk is still unreasonable, then the court will consider whether the circumstances are such that the invitor is required to undertake reasonable precautions. If so, then the issue becomes the standard of care

> and is for the jury to decide. See *Bertrand, supra* at 611. [*Singerman, supra*, at 142-43.]

The *Singerman* Court referred to the facts in *Bertrand, supra*, at 614, where that Court found that there were unusual aspects of the particular steps that made the risk of harm unreasonable. However, the *Singerman* Court found there were not any "unusual aspects" about the hockey rink. The Court held:

> [H]ere there was nothing unusual about the inadequate lighting in the hockey rink to cause such a duty to remain. Plaintiff was an adult and an experienced hockey player. The lighting in the rink is alleged to have been consistently inadequate, not subject to unexpected fluctuations or other changes. There was nothing to prevent plaintiff from realizing that the rink was inadequately lighted. Nor was there any chance that he would forget the potentially hazardous condition, because the condition was constantly before him. Finally, plaintiff was not compelled to use the rink for work, or profit, or any other overriding or substantial motivation. He chose to participate in a dangerous sport under conditions that he knew to be dangerous. [*Singerman, supra*, at 144.]

In *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 360; 561 NW2d 500 (1997), this Court further clarified *Bertrand*. This Court held:

> In *Bertrand*, the Supreme Court established that the risk of harm from steps is presumptively reasonable. *Id*. at 616-617. Only when there is something "unusual" about the "character, location, or surrounding conditions" of steps does the duty of a premises owner to exercise reasonable care come into play. *Id*. Further, such "reasonable care" would only be implicated if the risk of harm would remain *despite* knowledge of it by an invitee. *Id.* at 611. [*Spagnuolo, supra*, 221 at 360-61.]

Plaintiff here stipulates that the hole in the sidewalk was open and obvious to even a casual observer but argues that defendant should have foreseen the danger to an invitee despite the open and obvious nature of the defect. However, the question is not the foreseeability of the harm but rather whether the risk of harm remains unreasonable, despite its obviousness. *Singerman, supra*. Here, the risk of harm from the hole in the walkway was not unreasonable. The hole was open and obvious and would have been easily noticed if a pedestrian had been looking where she was walking. Had a pedestrian noticed the hole, there would have been no further risk of harm because it was small enough in size so that she could have easily walked around it. *Spagnuolo, supra,* at 360. For a pedestrian who failed to notice the hole, the risk of injury was not great and, if incurred, was not likely to be severe.

Further, there were no unusual aspects here about the hole in the walkway. It is understandable that cracking or chipping of cement occurs in February (when the accident took place) from the ice and snow and salt that is placed over walkways during the winter. Hundreds of people entered and exited

the Sears store by that walkway on that day without incident. Nor had defendant created displays at the entrance which would have distracted a pedestrian's attention so that she could not observe the danger. The area was clear of snow and ice and adequately lit. Plaintiff used that entrance daily and was familiar with it. She should reasonably have been expected to observe the hazard and take suitable precautions.

Accordingly, in our judgment, the circuit court did not err in granting summary disposition pursuant to MCR 2.116(C)(10). *Paul v Lee*, 455 Mich 204, 210-211; 568 NW2d 510 (1997). Reviewing all the evidence before the court de novo, and drawing all reasonable inferences in plaintiff's favor, we conclude there is no genuine issue of material fact as to whether the risk of harm was unreasonable, despite its obviousness.

Because the circuit court correctly granted summary disposition as to the openness and obviousness of the danger, defendant's cross-appeal as to the court's denial of its motion for summary disposition based on actual or constructive notice is moot. See *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Mark J. Cavanagh