STATE OF MICHIGAN

COURT OF APPEALS

AVIS A. BOUCHARD and ALEX A. BOUCHARD,

Plaintiffs-Appellants,

v

DELTA BEVERAGE, INC., doing business as STONEHOUSE RESTAURANT,

Defendant-Appellee.

UNPUBLISHED
July 7, 1998

No. 197295
Delta Circuit Court
LC No. 95-012502 NO

Before: Markman, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal by right from a circuit court order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). We affirm.

I

This case stems from a trip and fall incident outside defendant's restaurant. On August 24, 1992, at approximately 1:00 p.m., plaintiff Avis Bouchard and members of her family exited defendant's restaurant, having just finished lunch. Avis Bouchard testified that she and her husband had dined at this restaurant "several times a year" since the 1970's. While making her way toward the parking lot, plaintiff descended on steps from the restaurant's entrance to a two-tiered sidewalk (the upper level being one step higher than curb level) which ran parallel to the building. The bottom tier of the sidewalk "funneled" out into the parking area, with no designated walkway providing pedestrian access to the parking lot from the entrance/exit stairs. At the time of the accident, a large pickup truck with extended side mirrors was parked in the space immediately at the bottom of the steps and blocked any egress between the truck and the other vehicles parked around it. Avis Bouchard, leading other members of her family, therefore proceeded left on the upper tier of the sidewalk in order to reach her vehicle which was parked around the corner. As she walked, she attempted to avoid brushing her clothing against the dirty bumpers of vehicles parked perpendicular to the sidewalk. The bumpers protruded into the lower tier of the sidewalk and allegedly partially projected into the upper tier as well. The upper tier of the

sidewalk, painted bright yellow the entire length of the step edge and bordered on the building side by decorative rocks and shrubbery, narrowed to a point and ended. A large bush was at the end of the sidewalk. Avis Bouchard, mistakenly believing that the bush concealed a continuation of the sidewalk, attempted to step over or through the bush, tripped, and fell off the edge of the sidewalk onto the rocks, injuring herself.

Plaintiffs[1] brought suit against defendant, alleging that defendant negligently maintained and permitted the sidewalk, parking lot, and growing shrubbery to create and constitute a dangerous and unsafe condition. Following discovery, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant argued that the condition allegedly causing plaintiff's fall was open and obvious, and that there was no evidence suggesting the condition posed an unreasonable risk of harm despite its open and obvious nature. The trial court agreed and granted defendant's motion. Plaintiffs now appeal from the order granting summary disposition in favor of defendant.

II

This Court reviews a trial court's determination regarding motions for summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests whether factual support exists for the claim. The court must view the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Although the court should be liberal in finding genuine issues of material fact, summary disposition is appropriate when the nonmoving party fails to provide evidence, beyond mere allegations or denials in the pleadings, to establish a material factual dispute. *Id*. at 362-363; *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

The threshold issue of duty of care in negligence actions is a matter of law to be decided by the trial court. *Riddle v McClouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992). "A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Id*. at 96. If, as in the instant case, the plaintiff is a business invitee, the premises owner has a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitee will not discover or protect himself against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). "A claim that the invitor has breached the duty to exercise reasonable care to protect invitees from unreasonable risks of harm has traditionally been premised on three theories: failure to warn, negligent maintenance, or defective physical structure." *Id*. at 610.

When a condition is open and obvious, the scope of the invitor's duty may be limited. *Bertrand, supra* at 610.[2] What is "open and obvious" has been defined as (1) what is visible, (2) what is a well-known danger, or (3) what is discernible upon casual inspection by an average person of ordinary intelligence. *Glittenberg v Doughboy Recreational Industries, Inc*, 436 Mich 673, 695; 462 NW2d 348 (1990) (opinion by Griffin, J.); *Novotney v Burger King Corp (On Remand)*, 198 Mich App

470, 474-475; 499 NW2d 379 (1993). However, the obviousness of a danger does not relieve the invitor of his general duty of reasonable care:

> [T]he rule generated is that if 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. The issue then becomes the standard of care and is for the jury to decide. [*Bertrand, supra* at 611 (emphasis in original.)]

Applying this rule to the specific context of a trip and fall on a step, the *Bertrand* Court, *supra* at 614, 616-617, explained:

> With the axiom being that the duty is to protect invitees from *unreasonable* risks of harm, the underlying principle is 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 invitees. . . .Consequently, because the danger of tripping and falling on a step is generally open and obvious, the failure to warn theory cannot establish liability. However, there may be special aspects of these particular steps that make the risk of harm unreasonable, and, accordingly, a failure to remedy the dangerous condition may be found to have breached the duty to keep the premises reasonably safe.
>
> * * * *
>
> In summary, because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable. However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of land to exercise reasonable care remains. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide. [Emphasis in original.] [Footnotes omitted.]

See also, *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997) (opinion of Weaver, J.).

In the instant case, plaintiffs assert on appeal that the trial court erred in granting defendant's motion for summary disposition because the alleged dangerous condition was latent and concealed, not open and obvious.[3] We disagree. The measure of an open and obvious danger is whether an average

user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Novotney*, *supra* at 475; *Glittenberg*, *supra* at 695. In her deposition, plaintiff Avis Bouchard described the circumstances of her fall as follows:

> *Q.* Now, this day you didn't see it [the step down on the sidewalk]?
>
> *A.* No.
>
> *Q.* And you fell?
>
> *A.* Yeah.
>
> *Q.* One of the reasons that you didn't see it was, as you said, you felt your vision was obscured by the brush?
>
> *A.* Uh-huh.
>
> *Q.* And by the cars, right?
>
> *A.* The cars didn't take away the vision of the – where we were walking. It was that bush, and, because the cars were parked up so close, there was no room between where we were walking and where the bumpers of the cars come. And we had fairly good clothes on, and I didn't feel like rubbing against the bumpers of the car.
>
> *Q.* Okay. So you walked down the area in between the bush and the car, right?
>
> *A.* Uh-huh.
>
> *Q.* In that area, there was enough room to walk through where you didn't have to run into the bush, wasn't there?
>
> *A.* No, there wasn't.
>
> *Q.* Did you walk into the bush?
>
> *A.* Almost.
>
> *Q.* Okay. But you didn't. You were trying to avoid that –
>
> *A.* That's when I fell because the bush was right there. And we were walking there, and I figured this would continue going around. And it didn't, and I fell.

The following significant testimony was then elicited from plaintiff Avis Bouchard:

Q. Okay. What I'm asking you is if you had looked in that area or even stood there for an instance before you stepped off, you're not telling me, are you, that there was no way you could have seen, even casually, that the step dropped off, are you?

A. Well, I tell you, if I would have known or would have stopped and looked, I wouldn't have fallen. [Emphasis added.]

Reviewing the evidence in the light most favorable to plaintiffs, we conclude that the open and obvious doctrine precludes the imposition of a duty on the part of defendant. The configuration of the sidewalk, steps, curbs, decorative rocks, and shrubbery are clearly shown in three photographs of the accident scene contained in the record and reviewed by the trial court. Although plaintiffs maintain that the admission of these photographs was error because they do not accurately depict the conditions which existed when plaintiffs exited the restaurant (no parked cars are visible), the record below indicates that defendant apprised the trial court of the absence of vehicles from the photographs and the trial court acknowledged this variation before it rendered its decision. The photographs otherwise constitute a fair and accurate representation of the scene and were therefore properly admitted by the trial court. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 133; 492 NW2d 761 (1992). As the court noted, strong visual cues, evident in these photographs, should have alerted plaintiff Avis Bouchard to the fact that the sidewalk ended. The decorative rocks, of "good size" and "certainly different . . . texture . . . than the sidewalk," coupled with the bush and the yellow marking on the edge of the step – all in place where the sidewalk narrowed to a point – are plainly visible and prominent and flag the terminus of the sidewalk.

In any event, plaintiff's own testimony indicates that a more observant plaintiff would have discovered the alleged danger upon casual inspection. Plaintiff Avis Bouchard conceded that she would not have fallen had she stopped and looked where she was going. Based on this testimony and the other evidence of record, we conclude that there was no genuine issue of material fact concerning the open and obvious danger posed by the sidewalk's end. *Bertrand, supra*; *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358; 561 NW2d 500 (1997); *Novotney, supra*.

Plaintiffs argue that even if the danger was open and obvious, a question of fact exists as to whether the risk of harm was unreasonable because the character of defendant's sidewalk was "unusual." *Bertrand, supra* at 616-617. Plaintiffs argue that defendant provided a cramped, car-lined entranceway to its restaurant. These conditions allegedly caused plaintiff Avis Bouchard to experience great difficulty in exiting and required that she navigate her way around this obstruction, walking along a sidewalk narrowed by the cars' protruding bumpers and falling where a bush encroached upon and allegedly concealed the end of the sidewalk.

However, plaintiffs have failed to produce any evidence that the "character, location, or surrounding conditions" posed an unreasonable risk of harm. Avis Bouchard testified in her deposition that she did not want her good clothing to graze against the bumpers of cars, so she walked away from the available and most logical exiting points between the parked vehicles. Although the parked cars evidently affected her decision as to what route to follow in returning to her car in the parking lot, she

conceded that the vehicles did not interfere with her vision or view of the sidewalk at the location of the fall.

Moreover, although Avis Bouchard claims that the large bush somehow deceived her into believing that the sidewalk continued beyond the bush, it is evident by virtue of her own testimony that she either climbed through the shrub or pushed its branches out of the way in order to continue on her way. Defendant could not have reasonably anticipated that an invitee who encountered the rocks, bush, and painted curb edge prominently demarcating the end of the sidewalk would, despite its obviousness, continue on and attempt to navigate over or through the bush onto the decorative rocks. We conclude that no genuine issue of material fact existed regarding whether defendant breached its duty to protect plaintiffs against an unreasonable risk of harm, in spite of the obviousness of the danger. Summary disposition was therefore appropriate pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] Plaintiff Alex Bouchard, husband of plaintiff Avis Bouchard, alleges loss of consortium as a result of the injuries sustained by his wife.

[2] "[T]he 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle, supra* at 95-96.

[3] Plaintiffs' tangential argument that the open and obvious danger doctrine is incompatible with principles of comparative negligence has been directly addressed and soundly rejected by the Court in *Riddle, supra* at 95.