STATE OF MICHIGAN

COURT OF APPEALS

MAXINE WEISS and ALAN RAKE, Plaintiffs-Appellants,	UNPUBLISHED May 2, 2000
v	No. 212035 Mackinac Circuit Court
MISSION POINT RESORT, INC., Defendant-Appellee.	LC No. 96-004001 NO

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Plaintiffs Maxine Weiss and Alan Rake appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs' claim resulted from a slip and fall accident that took place on a stairway located on defendant's resort property. We reverse and remand.

Plaintiffs Weiss and Rake are married and operate a vending machine sales company. The two were at defendant resort in order to conduct sales to bowling alley operators who were at the resort for a convention. Weiss slipped and fell while coming down a set of stairs. Weiss stated that she was distracted by the "wet paint" signs posted on one side of the stairway and by painters in the area. Rake was the only witness to the fall and he did not see what caused Weiss to trip. Weiss testified that she felt her left foot catch on something on the steps, that her foot rolled under, and that she subsequently fell, sustaining severe damage to her ankle.

Rake testified that he returned to the resort later the afternoon of the accident to retrieve their luggage and convention exhibits. Rake examined the stairs where Weiss fell and observed that the bricks on the first and second steps had settled, causing the concrete apron to be a quarter of an inch to half an inch higher than the bricks. Photographs of the stairs, taken shortly after the fall, showed the difference in heights described by Rake as a "lip" between the bricks and concrete. Plaintiffs and their experts were of the opinion that this "lip" caused Weiss' fall.

The trial court granted summary disposition to defendant finding that the stairway was an open and obvious danger. Plaintiff appeals as of right. We review an order granting summary disposition de

novo. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). The record must be reviewed to determine whether the successful party was entitled to judgment as a matter of law. *Id.*

Whether an allegedly dangerous condition is open and obvious is preliminarily a question of law. *Knight v Gulf & Western*, 196 Mich App 119, 126; 492 NW2d 761 (1992), citing *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-97 n 11; 485 NW2d 676. In determining whether a danger is open and obvious, the applicable inquiry is: "Would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? That is, is it reasonable to expect that the invitee would discover the danger?" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995), the Supreme Court held that an invitor's failure to warn cannot ordinarily establish liability when an invitee falls on steps, since the danger of tripping and falling on a step is generally open and obvious. However, where special aspects of particular stairs make the risk of harm unreasonable, failure to remedy the dangerous condition may constitute a breach of the duty to keep the premises reasonably safe. *Id*. Thus, where there is something unusual about a set of steps, because of their character, location, or surroundings, the possessor of land has a duty to exercise reasonable care to make the steps safe. *Bertrand, supra* at 617.

Here, the trial court concluded that the steps were not unreasonably dangerous because Weiss had traversed the steps several times without incident prior to the accident. However, plaintiffs allege that the "wet paint" signs posted on the handrail of the stairway and the presence of painters in the area, together with the uneven "lip" on the steps, posed the sort of unique circumstances that rendered the stairs unreasonably dangerous. *Bertrand, supra*. Weiss testified that she was distracted by the painters and she did not hold onto the handrail while descending the stairs because the "wet paint" signs and the presence of painters led her to believe that the railing was wet with fresh paint. While the trial court noted that the "wet paint" signs should have heightened Weiss' awareness and caused her to exercise greater caution as she descended the steps, it is equally plausible that the signs drew her attention away from the steps and toward the guardrails and painters.

We find this case to be factually similar to *Bertrand, supra*, where the Supreme Court found that there was "a genuine issue regarding whether the construction of the step, when considered with the placement of the vending machines and cashier's window, along with the hinging of the door, created an unreasonable risk of harm, despite the obviousness or the invitee's knowledge of the danger of falling off the step." *Bertrand, supra* at 624. We find that the trial court erred in granting summary disposition under an open and obvious danger theory. Despite the open and obvious nature of a set of stairs, a genuine and material question of fact exists whether the lip in the steps and the distractions created by the painters and the wet paint signs rendered the steps unreasonably dangerous under the circumstances.[1]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] Because the trial court failed to specifically rule on the causation issue, we decline to review that issue on appeal. However, the trial court is not precluded from deciding the causation issue on remand.