STATE OF MICHIGAN

COURT OF APPEALS

FOREST WOLFROM and CHARLOTTE WOLFROM,	UNPUBLISHED February 12, 2002
Plaintiffs-Appellants,	
V	No. 204746 Shiawassee Circuit Court
HILLCREST MEMORIAL GARDENS ASSOCIATION,	LC No. 96-060280-NO
Defendant-Appellee.	ON REMAND

Before: Jansen, P.J., and Holbrook, Jr., and Griffin*, JJ.

GRIFFIN J. (*dissenting*).

I agree with and adopt Judge MacKenzie's prior dissenting opinion:

> I respectfully dissent because I conclude (1) that any danger associated with the step was open and obvious, and (2) that the step did not pose an unreasonable risk of harm despite the obviousness of the danger.
>
> Although the step and the ground level were painted the same color, the area in question was well-lit. Therefore, even while descending the step, an average person of ordinary intelligence, upon casual inspection, would recognize a 5 ¼-inch elevation change. See *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Moreover, a typical person descending the step would have earlier ascended the step to access defendant's business, and plaintiffs admit that the step was readily apparent upon ascent. The undisputed obviousness of the step to those ascending, combined with the adequate lighting, leads me to conclude that any danger associated with the step was open and obvious as a matter of law.
>
> This conclusion is reinforced by *Maurer v Oakland County Parks & Recreation Dep't (After Remand)*, the companion case to *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). In *Maurer*, as in the instant case, the plaintiff alleged that she was unable to discern the change in elevation

* On remand, Judge Griffin has been substituted for former Court of Appeals Judge Barbara B. MacKenzie.

between two different levels of a walkway and that the defendant was negligent for, among other things, "failing to mark the step with a contrasting color." *Id.* at 618. This Court held that there was a question of fact regarding whether the danger associated with the step was open and obvious because, just as plaintiff alleges in the instant case, a user of the step easily got the impression that the entire area was flat. *Maurer v Oakland County Parks & Recreation Dep't,* 201 Mich App 223, 227; 506 NW2d 261 (1993), rev'd sub nom *Bertrand, supra* at 621. The Supreme Court reversed, implicitly concluding that the danger associated with similarly-painted floor levels of different elevations was open and obvious. *Bertrand, supra* at 618-621.

The *Bertrand* Court, after implicitly concluding that the danger associated with the step was open and obvious, focused on whether the danger associated with the step was unreasonable in spite of its obvious nature. *Id.* at 618-621. If an obvious risk of harm remains unreasonable – in other words, if an invitor anticipates harm in spite of the obviousness of the danger – the invitor may be obligated to take steps intended to enhance the protection of invitees. See *Bertrand, supra* at 611, and *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992). In *Hottmann v Hottmann,* 226 Mich App 171, 176; 572 NW2d 259 (1997), our Court framed this inquiry as whether "the risk of falling . . . is eliminated by awareness of the hazard." Here, awareness of the hazard indisputably eliminates the risk of falling, since the risk results only from *a failure to see* the step and not from any inherent defect in the step. Once a person sees the step, a safe descent can be assumed. For this reason, I disagree with the majority's implication that even if the danger associated with the step was open and obvious, there would still be a question of fact regarding whether the risk of harm was unreasonable. As indicated in *Bertrand, supra* at 621, where the plaintiff's "only asserted basis for finding that the step was dangerous was that she did not see it," the risk of harm posed by the steps in question was not unreasonable as a matter of law.

I conclude that the open and obvious risk of harm was not unreasonable as a matter of law and would therefore affirm.

On remand for reconsideration in light of *Lugo v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001), I conclude that Judge MacKenzie's analysis of the issues is strengthened and supported by the Supreme Court's decision in *Lugo*. In *Lugo,* our Supreme Court reiterated the general rule that a possessor of land has no duty to warn of open and obvious dangers. In this regard, the court quoted with approval from *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992):

> [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.

In the present case, the alleged danger was known to plaintiff because he ascended the step a mere five minutes before his fall descending from the same step. As noted in his deposition, the condition caused plaintiff no difficulty during his initial encounter:

> *Q.* You did walk up the step apparently without a problem on the way in.
>
> *A.* I didn't fall going up.

In my view, defendant had no duty to warn because the alleged danger was known to plaintiff. Further, based on my review of the photographs and for the reasons stated in Judge MacKenzie's prior dissent, I would hold that the condition was open and obvious as a matter of law.

The majority also concludes that even if the condition was open and obvious there are "special aspects" inherent in the danger which create a genuine issue of material fact whether the risk was unreasonably dangerous. Again, I respectfully disagree. As we recently noted in *Woodbury v Bruckner*, ___ Mich App ___; ____ NW2d ___ (Docket No. 204411, issued 12/14/2001), the term "special aspects" as utilized in *Lugo*, *supra* at 519, are those conditions "that give rise to the *uniquely high* likelihood of harm or severity of harm if the risk is not avoided." (Emphasis added.) Further, "typical open and obvious dangers (such as ordinary potholes in a parking lot) do not give rise to these special aspects." *Id.* at 520.

Following my review of the record, I conclude that the danger at issue (an ordinary step painted the same color as the surrounding floor) was a common and typical open and obvious condition, which does not possess "special aspects." In this regard, plaintiff has failed to present any evidence that the condition gave rise to a *uniquely high* likelihood of harm or severity of harm if the risk is not avoided. Cf. *Woodbury*, *supra*. For these reasons, I would hold that a genuine issue of material fact does not exist regarding whether the step was unreasonably dangerous. The lower court correctly granted summary disposition in favor of defendant.

I would affirm.

/s/ Richard Allen Griffin