STATE OF MICHIGAN

COURT OF APPEALS

EVELYN MALLOY,

Plaintiff-Appellant,

V

FOREST ROW LIMITED PARTNERSHIP, CORMORANT COMPANY, INC., and DAVID TINSDALE & COMPANY,

Defendants-Appellees.

UNPUBLISHED
March 22, 2002

No. 229112
Oakland Circuit Court
LC No. 99-015482-NO

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition for defendants in this premises liability case. We affirm.

Defendants own and manage an office building at 3100 Lahser Road, Beverly Hills. On July 15, 1996, plaintiff went to the building to meet with a family counselor. After that meeting, plaintiff claims she was emotionally upset. Plaintiff exited the building through the same door she had entered approximately one hour prior. Plaintiff observed one step at the threshold of the door, which she negotiated without incident. Plaintiff claims that as she walked several feet toward the parking lot, her foot stepped partially off a second step, and she fell onto her left knee. Plaintiff claims that she never saw the second step because the bright sunlight made the concrete appear to be all one level. Plaintiff filed this premises liability action, alleging that defendants failed to properly maintain the premises and failed to warn her of dangerous and defective conditions on the premises. Defendants moved for summary disposition, arguing that the step was open and obvious and that no dangerous condition existed on the premises. The trial court ruled that the step was open and obvious and granted summary disposition for defendants.

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579

NW2d 118 (1998). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

On appeal, plaintiff first argues that the danger associated with the steps was not open and obvious because characteristics of the steps made them unreasonably dangerous. We disagree.

Generally, an invitor owes a duty to his invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). That duty involves inspecting the premises and making any necessary repairs or warning of discovered hazards. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). The duty does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers that are known to an invitee or so obvious that an invitee can be expected to discover them himself. *Lugo, supra* at 516, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). An "open and obvious" danger is one that a person of ordinary intelligence would discover upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). However, even in the event that the danger is open and obvious, if "special aspects" of a condition make an open and obvious risk unreasonably dangerous, the possessor has a duty to take reasonable precautions to protect invitees from the risk. *Lugo, supra* at 517, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995).

In *Bertrand*, our Supreme Court established that "the danger of tripping and falling on a step is generally open and obvious." *Bertrand, supra* at 614. The Court explained:

> [B]ecause 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 the 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. [*Bertrand, supra* at 616-617 (footnotes omitted), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).]

Here, plaintiff claims that the concrete above and below the step on which she fell appeared the same in bright sunlight. Plaintiff's safety expert testified that markings on the steps were necessary to safely delineate the changes in elevation. We conclude that the alleged similar appearance of the concrete did not make the steps unreasonably dangerous. The absence of painted edges or other markings on the steps did not render them unreasonably dangerous. See *Bertrand, supra* at 618-621. Moreover, the fact that the area above and below the step could appear similar in bright sunshine does not take these steps out of the category of an everyday occurrence that people encounter. See *id*. at 616. Regardless of the degree of light, any

unmarked step, when viewed from above, has a similar appearance to the area at the base of the step. In spite of this fact, *Bertrand* made clear that the dangers associated with steps are generally open and obvious. *Id*. at 614. Therefore, we do not view the presence of bright sunlight as a special aspect that made the steps unreasonably dangerous.

Plaintiff also asserts that the approximate one-inch difference in height between the step at the base of the doorway and the step on which she fell constituted an unreasonable danger. Plaintiff's expert testified that consistent elevations of steps is important because a person makes consistent "stepping actions" when descending stairs. We conclude that the approximate one-inch difference in the height of these steps is not an unusual characteristic or special aspect that made them unreasonably dangerous. The steps are several feet apart and are not encountered in immediate succession. Therefore, a consistent "stepping action" is not employed when descending these steps.

Plaintiff's additional claims regarding the proximity of the steps to the parking lot and defendants' knowledge that emotionally upset people would encounter the steps lack merit. There is no evidence that plaintiff's attention was distracted by the parking lot.[1] Also, there is nothing to suggest that the characteristics of the steps were such that they presented an unreasonable risk to an emotionally upset person. An invitee is not under a duty to account for every possible emotional state of every invitee. Under these circumstances, where plaintiff encountered the steps approximately one hour prior, any danger associated with the steps was open and obvious and there were no special aspects that made the steps unreasonably dangerous. *Lugo, supra* at 517

Plaintiff's further argument on appeal that the open and obvious doctrine only applies to failure to warn claims is directly contrary to this Court's holdings in *Joyce v Rubin*, __ Mich App __; __ NW2d __ (Docket No. 223908, issued January 15, 2002), slip op p 2, and *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Therefore, plaintiff's assertion that the open and obvious doctrine cannot apply to bar her failure to maintain claim lacks merit.

Finally, we reject plaintiff's public policy argument. *Joyce* and *Millikin* make clear that application of the open and obvious doctrine to claims that do not involve a failure to warn is not against public policy. See *Joyce, supra* at slip op p 3 and *Millikin, supra* at 494-497; see also *Bertrand, supra* at 616 (stating that the "overriding public policy" in regard to steps is to encourage people to take reasonable care for their own safety).

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[1] On appeal, plaintiff claims that the proximity of the steps to the parking lot is distracting. However, plaintiff had not cited any evidence suggesting she was, in fact, distracted by the presence of the parking lot or activity in the parking lot at the time of her fall. In fact, during her deposition, plaintiff cited only the bright sunlight and similar appearance of the concrete as the cause of her fall.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra