STATE OF MICHIGAN

COURT OF APPEALS

FLORENCE RECTOR and HAROLD W. RECTOR,

Plaintiffs-Appellants,

v

ART VAN FURNITURE,

Defendant-Appellee.

UNPUBLISHED
March 21, 1997

No. 184772
Oakland Circuit Court
LC No. 94-471910-NO

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiffs appeal by right the order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) to defendant and dismissing plaintiffs' premises liability action. We affirm.

Plaintiff[1] Florence Rector slipped[2] on a step and injured herself while exiting a store of defendant Art Van Furniture. Plaintiff claimed that she did not anticipate or notice the single step, which was at the door of the store between the showroom floor and the sidewalk. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it had not breached a duty owed to plaintiff because the step was open and obvious. Defendant asserted that plaintiff clearly knew about the step because she had used it to enter the store. The circuit court granted defendant's motion.

Plaintiff argues that the court erred in ruling that the step was open and obvious. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Ladd v Ford Consumer Finance Co, Inc*, 217 Mich App 119, 124; 550 NW2d 826 (1996). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim and permits summary disposition when, except as to the amount of damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. When deciding the motion, the court considers the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in a light most favorable to the opposing party. *Id.* at 124-125.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The parties agree that plaintiff was a business invitee on defendant's property. An invitee is a person who enters the land of another on an invitation that carries with it an implication that reasonable care has been used to prepare and make safe the premises. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). An invitor must warn of hidden defects, but has no duty to warn of open and obvious dangers unless the invitor anticipates harm to the invitee despite the invitee's knowledge of the defect. *Id.* at 263-264. Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Id.*

Bertrand v Alan Ford, Inc, 449 Mich 606; 537 NW2d 185 (1995), represents the most recent case from our Supreme Court to address open and obvious dangers. The Court stated that a step is something that people encounter every day. Thus, under most circumstances, a reasonably prudent person will look where he is going, will observe 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 harm is not unreasonable. *Id.* at 616-617. Where the steps are unusual because of their character, location, or surrounding conditions, then the possessor of land must exercise reasonable care. *Id.* at 617. If the proofs create a question of fact that the risk of harm was unreasonable, the existence of a duty and its breach become questions for the jury to decide. *Id.*

Viewing the facts in the light most favorable to plaintiff, summary disposition was appropriate. Plaintiff asserts that the step was dangerous because she did not realize the step was there when she exited the store. Plaintiff, however, had entered the store through the same door and had not slipped on the step. Plaintiff has not asserted that the step's character or location caused her injury. She essentially avers that she forgot the step existed. She acknowledges that she was speaking with a salesperson as she exited the store. Plaintiff thus did not take reasonable care for her own safety on account of her distraction. Plaintiff has not established that the step was unusual or that it posed an unreasonable risk of harm. *Bertrand, supra* at 621. Moreover, the photographs in the record show that the step was open and obvious. This is not a case where the placement of the step and surrounding conditions created an unreasonable risk of harm. *Bertrand, supra* at 624.

Additionally, the analysis whether a danger is open and obvious does not revolve around whether action could have been taken to make the danger more open or more obvious. Rather, the equation involved is whether the danger, as presented, is open and obvious. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The pertinent question is: would an average user with ordinary intelligence have been able to discover the danger and the risk presented upon casual inspection? *Id.*

It is not unreasonable for an invitee to expect a step when entering a store. The step was in plain view. Despite the affidavits presented by plaintiff, an ordinary user could have ascertained, upon casual inspection, the nature of the step. The evidence from plaintiff was not sufficient to create a dispute of fact. The step and the dangers posed by the step were so obvious that plaintiff reasonably should have discovered them. Plaintiff has not raised a genuine issue of material fact regarding the open and obvious danger of the step.

The following passage from *Novotney* is instructive:

> A sidewalk . . . is for all practical purposes a simple product. Its nature, as well as any dangers present, is apparent upon casual inspection by an average user with ordinary intelligence. That is, a person can observe in what direction a sidewalk goes, and what incline the sidewalk presents, upon casual inspection. [*Id.* at 474.]

The Court also stated that it was irrelevant whether the plaintiff in *Novotney* actually saw the handicap ramp that caused her fall. *Id.* at 475. Correspondingly, it is not relevant whether plaintiff here saw the step. The Court in *Bertrand* quoted that an expectation of harm "`may arise . . . where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. . . .'" *Bertrand, supra* at 611-612 (citing 2 Restatement Torts 2d, § 343A, comment f, p 220). We decline to rule that defendant should have expected harm when plaintiff had used the same step in entering the store.

Affirmed. As the prevailing party, defendant may tax costs under MCR 7.219.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard Ryan Lamb

[1] Because plaintiff Harold Rector's claims are derivative, in this opinion "plaintiff" will refer to only Florence Rector.

[2] Although the parties have labeled this case as a "slip and fall," plaintiff's statement of facts in her appellate brief reflects that she did not actually fall: "[Plaintiff] therefore stepped down very hard on her right foot and was prevented from falling by the salesperson who grabbed her as she fell."