STATE OF MICHIGAN

COURT OF APPEALS

DIANA MARCUM and GEORGE MARCUM,

Plaintiff-Appellants,

v

WILLA, INC d/b/a COUNTRY CLUB USA and SEYMOUR BRAY, JR.,

Defendant-Appellees.

UNPUBLISHED
May 27, 1997

No. 184085

Monroe Circuit Court
LC No. 94-002466-NO

Before: Saad, P.J., and Griffin and M.H. Cherry,* JJ.

SAAD, J.

I respectfully dissent.

Defendants had a legal duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the defendants knew or should know their invitees would not discover or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, the landowner's duty may be limited where a condition is open and obvious. *Id,* 449 Mich at 610.

A danger is open and obvious if an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Therefore, to have their claim survive defendants' motion for summary disposition, plaintiffs had to produce sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the existence of the gap. *Id,* 198 Mich App at 475. This plaintiffs failed to do.

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

Although plaintiffs represent in their brief (pp 16-17) that Mrs. Marcum testified that the club was dark and that she was unable to see the floor that night, the record reveals that this is not entirely accurate. To be precise, though both plaintiffs testified that the lighting was dim, Mrs. Marcum nonetheless admitted that she failed to look down at the floor at the gap, and Mr. Marcum testified that the lighting was "about like that of a night-light." This testimony is particularly relevant, not because it shows what Mrs. Marcum actually saw that night, but because it shows that an average user with ordinary intelligence would have been able to discover the alleged two-inch gap that night, had such an average person actually looked at the floor. There was also significant uncontroverted testimony that this was the only "tripping" incident to occur at this "gap" in the six years that defendants owned the club. Also, plaintiffs visited this club many times and walked across this gap without incident save the incident in issue. Because of this evidence, I conclude that the trial court was correct in finding that a typical reasonable customer of average intelligence would have perceived the existence of the gap; it was "open and obvious."

Though a condition is open and obvious, the invitor may nonetheless be required to exercise reasonable care to protect the invitee if the risk of harm remains unreasonable. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). However, this duty to protect an invitee from an *unreasonable* risk of harm does not make an invitor an absolute insurer of the safety of his invitees. *Id.*, 449 Mich at 614. After reviewing the cases discussed in *Bertrand*, 449 Mich at 614-617; 618-625, I must disagree with the majority and instead conclude that the gap at issue here did not present an unreasonable risk of harm. The fact that Mrs. Marcum did not see it is immaterial. *Id.*, 449 Mich at 618-621. What is significant is that there have been no other tripping incidents in the six-year period that defendants owed the facility. Furthermore, I should think it important to our analysis that these plaintiffs visited this club numerous times, and they had crossed this particular gap several times, including at least twice before Mrs. Marcum tripped on the evening of the incident. These uncontroverted facts belie the assertion that the gap was an unreasonable risk. As the Court noted in *Bertrand*, it is an important public policy to encourage people to take reasonable care for their own safety, and this policy precludes imposing a duty on the possessor of land to make ordinary steps [and, here, an ordinary gap] foolproof. *Id.*, 449 Mich at 616. Under Michigan law, the gap here did not present an unreasonable risk of harm and, accordingly, I would affirm the trial court.

/s/ Henry William Saad