STATE OF MICHIGAN

COURT OF APPEALS

WARREN R. BROWN,

Plaintiff-Appellant,

v

MT. PLEASANT HOUSING COMMISSION,

Defendant-Appellee.

UNPUBLISHED

No. 201472
Isabella Circuit Court
LC No. 96-009282-NO

Before: Markey, P.J., and Kelly and Whitbeck, JJ.

WHITBECK, J (dissenting).

I respectfully dissent.

I. The Common Law of Steps

The majority opinion treats this matter as being one more case, albeit an aberrant one, in a long line of Michigan cases dealing with steps. Certainly this is understandable; there *are* any number of cases imposing, or declining to impose, liability resulting from slip and fall type injuries involving steps. See, e.g. *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358; 561 NW2d 500 (1997), *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995).

Indeed, when viewed through the narrow prism of what might be called the common law of steps, the majority's view is both logical and consistent. Briefly summarized, that view is:

> (1) Due to the "open and obvious" danger of tripping and falling on a step, a slip and fall involving a step is not ordinarily actionable absent "unique circumstances" making the situation "unreasonably dangerous."
>
> (2) However, this case presents a *very* unique, indeed an aberrant, circumstance because the "step" in question was created, for a moment in time, by the elevator in defendant's housing project stopping approximately six to eight inches above the floor

level so that, when plaintiff stepped out of the elevator he tripped, fell and twisted his ankle.

(3) This situation was so unique that the risk of harm was not so open and obvious that reasonable minds could not differ as to that conclusion.

(4) Therefore, the trial court erred when it granted summary disposition to defendant under MCR 2.116(C)(10) (no genuine issue of material fact) finding that, "Having reviewed the evidence in the light most favorable to Plaintiff, this Court finds that no factual development is possible in the case at bar to render this risk not to be open and obvious."[1]

My first problem with the majority's analysis is that it views the factual situation here as a single terrain feature, without reference to the larger geography of premises liability of which the common law of steps is only a part. In *Bertrand, supra* at 609, *et seq.*, Justice Cavanaugh provided a tour of this landscape. Justice Cavanaugh noted, as an initial proposition, that social policy imposes on possessors of land a legal duty to protect their invitees on the basis of the special relationship that exists between them. Justice Cavanagh then stated, citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988), that, "The rationale for imposing liability is that the invitor is in a better position to control the safety aspects of his property when his invitees entrust their own protection to him while entering his property."[2] *Bertrand, supra* at 609.

Williams dealt with the issue of whether a store owner must provide armed, visible security guards to protect customers from the criminal acts of third parties. In affirming this Court's holding[3] that as a matter of law the defendant's duty of reasonable care did not extend to providing the degree of protection plaintiffs claimed was due, the Michigan Supreme Court, with Justice Cavanaugh writing the opinion, stated:

> Owners and occupiers of land are in a special relationship with their invitees and comprise the largest group upon whom an affirmative duty to protect is imposed. The possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land [citing to 2 Restatement Torts, 2d § 343, pp 215-216]. *Consequently, a landlord may be held liable for an unreasonable risk of harm caused by a dangerous condition in the areas of common use retained in his control such as lobbies, hallways, stairways and elevators* [citing to 2 Restatement Torts, 2d, § 360, p 250 and to *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972)[4]; emphasis supplied]. Likewise, a business invitor or merchant may be held liable for injuries resulting from negligent maintenance of the premises or defects in the physical structure of the building [citing to 3 Speiser, Krause & Gans, The American Law of Torts, §§ 14:14-14:47, pp 937-1187]. [*Williams, supra* at 499-500; emphasis supplied.]

Having described the general principles of premises liability in *Bertrand*, Justice Cavanaugh then moved to three "theories"[5] upon which a claim of breach of duty could be premised:

> A claim that the invitor has breached the duty to exercise reasonable care to protect invitees from unreasonable risks of harm has traditionally been premised on three theories: failure to warn, negligent maintenance, or defective physical structure. Consequently, invitors may be held liable for an invitee's injuries that result from a failure to warn of a hazardous condition or from the "negligent maintenance of the premises or defects in the physical structure of the building." *Williams, supra* at 499-500. [*Bertrand, supra* at 610.]

Here, plaintiff premises his argument on appeal upon the first of the three "theories," failure to warn. Plaintiff asserts that, "Under the conditions existing on June 5, 1994, [the date of plaintiff's injury] it is certainly possible that a jury would conclude that there should have been posted warnings on every floor, in the main lobby and within each elevator to use caution due to the frequency of recent repair problems with these elevators."[6]

Some commentators have accused judges on the Court of Appeals of mistakenly extending the open and obvious defense in duty to warn cases to cases involving allegations of violation of the duty to abate a danger, or "make safe."[7] Here, however, the majority appears to have applied a different twist; the majority moves immediately to the unreasonably dangerous rubric and finds a jury question as to whether the momentary "step" creating by the elevator's stopping above the floor level made the "situation unreasonably dangerous." In the process, I contend, the majority entirely omits the initial, and required, duty to warn analysis.

As plaintiff has explicitly argued this matter as a duty to warn case, I submit that the proper analytical model that must be used is that set out by the Michigan Supreme Court in *Bertrand*, a duty to warn case.

II. The Duty To Warn

Bertrand actually involved two cases. In the first, *Maurer v Oakland Co Parks Recreation Dep't*, the plaintiff alleged that she stumbled and fell on an unmarked cement step at Addison Oaks County Park. *Bertrand, supra* at 618. The plaintiff testified at her deposition that she saw the first step, turned around to make sure that her children also saw the step and then tripped on the second step:

> *Q.* So you had an accident that you claim is attributable to some problem with the step, is that correct?
>
> *A.* Yes.
>
> *Q.* What is the problem, as you perceive it?

A. I just didn't see the step there.

Q. You just didn't see the step. And is there any reason you didn't see the step?

A. I don't know. I just—it just didn't—you know how you spot things; I just did not see it.

Q. What time of day was this, do you remember?

A. 12:00 noon.

* * *

Q. Referring to the step that's shown on the top picture in Exhibit No. 1, what is it about that step that you feel is dangerous or defective?

A. I just didn't see it.

Q. And that's the only thing you feel about this step that is dangerous or defective, is the fact that you didn't see it?

A. Right. [*Id.* at 619.]

In *Bertrand* itself, the plaintiff fell backwards off a step at the defendant's place of business in Bloomfield Hills. *Id*. at 621. The plaintiff testified at her deposition that she exited the door of the lounge area facing backward as she held the door open for others to enter:

Q. Okay. Do you know what caught—as I understand it, you fell; is that right?

A. Yes. I was holding the door open for those people to come in, and when they got in, I had to step back to let the door close to go back down the walk.

Q. You were going to go back down the walk rather than going into the drive, is that it?

A. Right, yes. And if the candy machine hadn't been there, I could have stepped over, but I had to step back and I fell down the step.

Q. Looking at [photograph] number two, I see there is a candy machine there, and if I understand your testimony, you were letting the door close and you were not able to step back, but you had to step out toward the service drive; is that it?

A. Yes.

Q. And when you stepped or when you went into the service drive, is it my understanding that you lost your balance or something or something happened to you?

A. Yes, I was stepping back.

Q. I see. You were stepping back, and as a result you stepped on the curb edge and lost your balance; is that right?

A. Yes. [*Id.* at 622-623.]

In *Maurer*, the Court found no liability:

> Here, viewing the facts in the light most favorable to the plaintiff, we conclude that there was no genuine issue of material fact for the jury and that summary disposition was appropriate. *The plaintiff's only asserted basis for finding that the step was dangerous was that she did not see it*. We hold that the plaintiff has failed to establish anything unusual about the step that would take it out of the rule of *Garrett*[8] and *Boyle*.[9] Because the plaintiff has not presented any facts that the step posed an *unreasonable* risk of harm, the trial court properly granted summary disposition.[10] [*Id.* at 621; first emphasis supplied; second emphasis in original.]

In *Bertrand*, by contrast, the Court found liability:

> As in *Maurer*, we agree with the trial court that the plaintiff did not allege a jury submissable claim for liability based on a failure to warn theory because no reasonable juror would disagree that the danger of falling was open and obvious. *However, the premises still may be unreasonably dangerous, but not for want of a warning*. In contrast to *Maurer*, when we view the plaintiff's allegations in the light most favorable to her, we find a genuine issue regarding whether the construction of the step, when considered with the placement of the vending machines and the 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. [*Id.*, 623-624; emphasis supplied.]
>
> * * *
>
> We cannot find as a matter of law that the risk of harm was reasonable. Because a genuine issue existed regarding whether the defendant breached its duty to protect the plaintiff against an *unreasonable* risk of harm, in spite of the obviousness or of the plaintiff's knowledge of the danger, summary disposition was inappropriate. Whether this risk of harm was unreasonable and whether the defendant breached a duty to exercise reasonable care by failing to remedy the danger are issues for the jury to consider. [*Id.* at 624-625; emphasis in the original.][11]

Thus, we appear to have a two-step analysis in these types of cases. If there is an admission that the reason a plaintiff fell and sustained injury was that he or she simply didn't see the step, then there will be no liability. If, however, the evidence is equivocal on this point, then a reviewing court is free to depart from a strict duty to warn analysis to consider whether the situation contained an unreasonable risk of harm.[12]

Here, I believe the deposition testimony of plaintiff is unequivocally that he simply didn't see the "step" created by the elevator's stopping above the floor level:

> *Q.* And if the elevator stops 8 inches, your best estimate, above the floor, you don't agree that –
>
> *A.* Yes.
>
> *Q.* Had you been looking, you would have able to see that it was stopped other than with the floor?
>
> *A.* It's a possibility.
>
> *Q.* Well, when you stop an elevator above the floor, and you look up above, actually there is a portion of the ceiling that's showing through the elevator door, is there not?
>
> *A.* There should be, yes.
>
> *Q.* You didn't see that?
>
> *A.* No. I was looking straight ahead.
>
> *Q.* Had you been looking there, you would have to agree that –
>
> *A.* Oh, yes.
>
> *Q.* – you would have been able to see that, would you not?
>
> *A.* Yes.

This testimony is eerily similar to the testimony of the plaintiff in the *Maurer* portion of *Bertrand, supra*. Simply put, the only reason the "step" created by the elevator's stopping above the floor level was dangerous was that plaintiff didn't see it. I conclude, therefore, that we should not go beyond a duty to warn analysis in this case and that we should affirm on this ground alone.[13] As the Court said in *Bertrand, supra* at 617, "If the plaintiff alleges that the defendant failed to warn of the danger, yet no reasonable juror would find that the danger was not open and obvious, then the trial court properly may preclude a failure to warn theory from reaching the jury by granting partial summary judgment."

III. Risk of Harm

Even, however, if a risk of harm analysis—the second step in the *Bertrand* two-step process—is required, I still conclude that summary judgment in favor of defendant was appropriate.[14] As the majority notes, the Michigan Supreme Court recently evenly divided in *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997),[15] over whether a risk of harm analysis should focus on whether the risk of harm was *unreasonable* or whether it was *foreseeable*. Justice Weaver would have adopted the reasonableness test:

> The Court of Appeals [in *Singerman v Municipal Service Bureau, Inc*, 211 Mich App 678; 536 NW2d 547 (1995)] incorrectly held that defendants owed a duty to plaintiff because the harm was *foreseeable*, despite the open and obvious nature of the hazard. The question is not the foreseeability of harm. Rather the question for the courts to decide is whether the risk of harm remains unreasonable, despite its obviousness or despite the invitee's knowledge of the danger. If the court finds that the risk is still unreasonable, then the court will consider whether the circumstances are such that the invitor is required to undertake reasonable precautions. If so, then the issue becomes the standard of care and is for the jury to decide. See *Bertrand*, *supra* at 611. [*Singerman, supra* at 142-143 (Weaver, J., joined by Boyle and Riley, JJ.); emphasis in original.]

Chief Justice Mallett would, however, in reliance upon *Riddle*, *supra*, and 2 Restatement Torts, 2d, §343A(1), p 218, apparently have adopted a foreseeability test. He stated:

> Thus, the fact that a hazard is open and obvious does not absolutely absolve the possessor of land of liability. A possessor of land may still be liable to invitees if he should anticipate that the hazard will cause injury. [*Singerman, supra* at 146 (Mallett, C.J., joined by Brickley and Cavanagh, JJ.)]

To heighten the confusion, the Michigan Supreme Court has yet to define, under either formulation, what level of uniqueness is required. In *Bertrand*, the Court, citing *Garrett v Butterfield Theaters*, 261 Mich 262, 263-264; 246 NW 57 (1933), and *Williams, supra* at 500, stated that:

> However, where there is something unusual about the steps, because of their "character, location, or surrounding conditions," then the duty of the possessor of 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 617.]

The majority enters in the void caused by this lack of definitional clarity to find a number of subjective "unique circumstances" upon which to posit an unreasonable/foreseeable risk of harm to plaintiff. Were the factual circumstances somewhat different here, I might be persuaded. In other words, if plaintiff, rather than exiting the elevator six inches *upward* to the ninth floor of the housing project, had exited the

ninth floor ten feet (or, to be truly dramatic, 110 feet) *downward* to the roof of the elevator, then I would agree that the risk of harm was both unreasonable and foreseeable.[16]

Under the facts as we have them, however, I cannot agree that the risk of harm to plaintiff, exiting as he was from the elevator, was either unreasonable or foreseeable. I would therefore affirm.

/s/ William C. Whitbeck

[1] The majority does not find that the trial court applied the *wrong* standard to the MCR 2.116(C)(10) motion, nor could it since the rule is that the trial court must review the record evidence, make all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists, giving the non-moving party the benefit of reasonable doubt. *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994).

[2] The passage from *Williams* states:

> Social policy, however, has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. Thus, a common carrier may be obligated to protect its passengers, an innkeeper his guests, and an employer his employees. The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams, supra* at 499.]

[3] *Williams v Cunningham Drug Stores, Inc.*, 146 Mich App 23; 379 NW2d 458 (1985).

[4] *Johnston* involved the mugging of an elderly tenant at the front door of a small apartment building in inner city Detroit in which the tenant resided. *Johnston, supra* at 571-572. As stated by the Court, the crux of the tenant's case was that "[I]n a high crime district it is reasonably foreseeable that inadequate lighting and unlocked doors would create conditions to which criminals would be attracted to carry out their nefarious deeds." *Id.* at 573. Relying heavily on the element of foreseeability (i.e. that the premises owner at the time of his negligent conduct realized or should have realized the likelihood that a third party might avail himself of the opportunity to commit a tort or a crime), the Court, citing, *inter alia*, to § 448 of the Second Restatement of Torts, found that "[A]ctionable negligence may lie in these circumstances." *Johnston, supra* at 573-75.

[5] In passing, I note that the reference to "theories" avoids the interesting dispute in *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). There, Justice Mallett, writing for majority, stated that, "While the jury may conclude that the duty to exercise due care requires the premises owner to warn of a dangerous condition, there is no absolute duty to warn invitees of known or obvious dangers." *Id.* at 97. In footnote 11, Justice Mallett, quoting 2 Restatement Torts, 2d, § 343A, emphasized the *duty* of reasonable care. *Id.* Justice Levin in dissent advanced the proposition that, "Whether an invitor is negligent because he fails to warn an invitee of an open and obvious danger

is a question of the standard of care required in a given set of circumstances, rather than a question of duty." *Id.* at 120 (Levin, J., joined by Cavanagh, C.J., dissenting).

[6] I do note, however, that plaintiff's complaint alleged that defendant owed plaintiff "a duty to maintain the premises in a safe condition" and "a duty to maintain the public elevators in a safe manner, free of defects and safe for use."

[7] See Braden, *The "Open and Obvious Danger" Defense: Recent Cases*, 75 Mich Bar J 669: "Although Glittenberg [*Glittenberg v Doughboy Recreational Industries*, 441 Mich 379; 491 NW2d 208 (1992), a products liability case] and *Riddle* [*Riddle v McLouth Steel, supra*, a premises liability case] purported to limit only the duty to warn, conservatives on the Court of Appeals and in the federal courts have asserted that the open and obvious danger defense applies also to the duty to abate or 'make safe.'"

[8] In *Garrett v Butterfield Theaters*, 261 Mich 262, 263; 246 NW 57 (1933), the plaintiff fell off a step where a ladies' lounge adjoined a toilet room and was injured. The Court held that, "A reasonably prudent person, watching where he was going, would have seen the step." *Garrett, supra* at 264.

[9]In *Boyle v Preketes*, 262 Mich 629, 631-632; 247 NW 763 (1933), the plaintiff failed to see steps in a restaurant, fell and was injured. The plaintiff testified that she fell because she simply did not see the steps. *Id.* at 633. The Court found no negligence, quoting *Garrett* to the effect that, "'A reasonably prudent person, watching where he is going, would have seen the step.'" *Id.* at 635-636.

[10]Justice Levin dissented in the *Maurer* portion of *Bertrand*. Recognizing that *Maurer* was a duty to warn case, Justice Levin stated:

> A reasonable juror might find that the nature of these premises required a warning sign. Plaintiffs have demonstrated that the sun shines into the doorway at certain times of day. The change in light might make it difficult for some invitees to see the second step. The location of this building in a public park at which picnics are held might also be significant. A reasonable juror might conclude that the park district should have anticipated the presence of picnickers who might fail to notice the second step.
>
> Determining whether a risk is unreasonable requires weighing the harm caused by the risk against the cost of preventing the harm. *In this case, a warning sign might have prevented this harm at little cost to defendant*. A reasonable juror might find that not to take such an inexpensive precaution was unreasonable. [*Bertrand, supra* at 627-628 (Levin, J., dissenting in part); emphasis supplied.]

One commentator has observed that:

> Reviewing these theories one can almost hear the Supreme Court majority screaming "Enough" While warnings may have their place, they may have concluded that it overstepped the bounds of reason to have every step marked "DANGER: steps!" [See Herstein, *Real Property*, 43 Wayne L R, 1121; emphasis in original.]

[11] Justice Weaver dissented from the *Bertrand* holding, stating:

> Cases finding that the risk of harm is unreasonable despite its obviousness or despite the invitee's awareness of the condition are rare and typically involve hazardous natural conditions such as accumulations of snow and ice or excessive mud. The risk to the invitee in such conditions has been held to be somehow more unavoidable than other conditions, thereby creating an exception to the open and obvious defense. I believe that this exception, when extended to the facts in *Bertrand*, threatens to swallow the open and obvious defense and render summary disposition impossible. [*Bertrand*, *supra* at 625-626 (Weaver, J., concurring and dissenting in part).]

[12] Arguably, this two-step analysis permits precisely the same confusion between duty to warn cases and duty to make safe cases decried by Braden at footnote 6, *supra*.

[13]To put it colloquially, I believe defendant should be a rare winner in the premises liability lottery. See Herstein, *supra* at 1122:

> The facts in *Maurer* were so perfect that they could have come from a law school exam. Most cases will be far more like *Bertrand* than *Maurer*. From the landowner's standpoint, while the court may have finally defined a limit on liability, it is more chimerical than real. One probably has a better chance of winning the lottery than replicating the facts in *Maurer*.

[14] Apparently, it is "heretical" (See *Braden*, footnote 6, *supra*) to extend the open and obvious defense to non-duty to warn cases but perfectly appropriate to apply a risk of harm analysis in duty to warn cases. The resulting construct is, to say the least, somewhat analytically misshapen.

[15] Justice Kelly, who had previously sat on the case as a judge in this Court, took no part in the decision in the case.

[16] I concede that the *size* of the gap is logically irrelevant to the question of whether the *existence* of the hazard was foreseeable. However, the size of the gap *is* relevant to the question of whether the hazard will cause injury.