# STATE OF MICHIGAN

# COURT OF APPEALS

MARY MURDOCK,

Plaintiff-Appellant,

v

CITY OF WAYNE,

Defendant-Appellee.

UNPUBLISHED
August 16, 1996

No. 179926
LC No. 93-336217

Before: Hood, P.J., and Griffin and J.F. Foley*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition in favor of defendant. We affirm.

On November 30, 1992, plaintiff was walking on the sidewalk leading from the 29th District Court to the city jail, in the city of Wayne, where her son was incarcerated. The sidewalk also led to a driveway. While walking on the sidewalk, she fell as she stepped down a step which she did not see, sustaining injury. Plaintiff admitted that there was nothing hiding or covering the step. Plaintiff, however, indicated that there were no warning signs of any nature to alert pedestrians of the step.

Plaintiff alleged, in her complaint, that defendant breached its duty to maintain its sidewalks in a reasonably safe condition under the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102). Defendant subsequently moved for summary disposition, arguing that the highway exception was not applicable. Additionally, defendant argued that it owed no duty to plaintiff because the alleged dangerous condition was open and obvious. Plaintiff filed a response, alleging that the public building exception was also applicable. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116 (C)(7) and (10). The trial court held that neither the public building exception nor the highway exception applied in this case.

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

Plaintiff's sole argument on appeal is that the trial court erred in granting summary disposition in favor of defendant. We review the trial court's grant of summary disposition de novo to determine if a party was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Township*, 209 Mich App 484, 486; 532 NW2d 183 (1995). When reviewing a grant of summary disposition based on a finding that the claim is barred by governmental immunity, MCR 2.116(C)(7), all documentary evidence submitted by the parties is to be considered, and all well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Id.* Further, MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim, and permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact." *Johnson v Wayne County*, 213 Mich App 143, 149; 540 NW2d 66 (1995). All pleadings, affidavits, depositions, admissions, and any other documentary evidence are considered in favor of the opposing party. *Id.*

Plaintiff contends that defendant is liable pursuant to the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102), because her injury occurred on a "sidewalk." The highway exception to governmental immunity provides in relevant part:

> Each governmental agency having jurisdiction over any highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. Any person sustaining bodily injury or damage to his or her property by reason of failure of any governmental agency to keep any highway under its jurisdiction in reasonable repair, and in condition reasonably safe and fit for travel, may recover the damages suffered by him or her from the governmental agency.

"Highway" is defined as "every public highway, road, and street which is open for public travel and shall include bridges, sidewalks, crosswalks, and culverts on any highway. The term highway does not include alleys, trees, and utility poles." MCL 691.1401(e); MSA 3.996(101)(e). The public highway exception is narrowly drawn. *Scheurman v Dep't of Transportation*, 434 Mich 619, 630; 456 NW2d 66 (1990); *Richardson v Warren Consol School Dist*, 197 Mich App 697, 699; 496 NW2d 380 (1992). MCL 691.1402; MSA 3.996(102) is to be narrowly construed. *Id.* "No action may be maintained under the highway exception unless it is clearly within the scope and meaning of the statute." *Scheurman, supra,* p 630.

In *Richardson, supra*, the plaintiff was injured on the school's driveway. This Court held that a public school's driveway and parking lots are not "public highways" within the meaning of the highway exception to governmental immunity. This Court noted that the fact that "members of the public cross the driveway area to move from one residential street to another is not dispositive." The Court relied on the fact that the school driveway was not a "street which is open for public travel," even though it has some streetlike qualities and was sometimes used "for public travel." *Id.*

It is undisputed that plaintiff in this case fell on a step that was on the sidewalk that crossed a driveway. The highway exception extends to "streets open for public travel." *Id.*, p 705. Because a driveway is not a "highway" within the meaning of the highway exception, the sidewalk leading to the

driveway cannot be said to be on a public highway. Therefore, the court properly granted summary disposition on this claim.

Plaintiff also contends that because the sidewalk is located just outside of the courthouse and leads to the jail, the public building exception applies. We disagree. The public building exception to governmental immunity, MCL 691.1406; MSA 3.996(106), provides, in relevant part:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition.

In order to apply the public building exception, a plaintiff must prove: (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time. *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 421; 487 NW2d 106 (1992); *Carmack v Macomb County Community College*, 199 Mich App 544, 546-547; 502 NW2d 746 (1993). Moreover, the injury must have arisen out of the dangerous or defective physical condition of the building itself. *Id.* Therefore, the duty to maintain safe public places relates to, but does not extend beyond, the condition of a public building itself or the immediately adjacent premises. *Hickey*, *supra*, p 422. Plaintiff in this case suffered her injury on a sidewalk which was not immediately adjacent to or a part of any building. Under these circumstances, the public building exception is inapplicable.

Plaintiff further claims that because the step on which she was injured was not open and obvious, defendant breached its duty of reasonable care. We disagree. The existence of a duty of care owed by a defendant to the plaintiff must be decided by the trial court as a matter of law. *Colangelo v Tau Kappa Epsilon Fraternity*, 205 Mich App 129, 132; 517 NW2d 289 (1994). A question of law is subject to de novo review. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Generally, a landowner has a duty to protect invitees from unreasonable dangers which they may be unaware. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, where 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. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992); *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993). Whether a danger is open and obvious depends upon whether it is reasonable to expect that an average user would have discovered the danger upon casual inspection.

*Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

In *Bertrand*, *supra*, the Supreme Court examined premises liability cases involving steps or differing floor levels. The *Bertrand* Court, in summary, held that:

> because 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 land to exercise reasonable care remains. [*Id.*, pp 616-617.]

This Court must determine whether a genuine issue existed regarding whether the risk of falling off defendant's step was unreasonable, despite the fact that the danger should have been obvious to plaintiff. *Id.* Here, viewing the facts in the light most favorable to plaintiff, we are not convinced that a reasonable juror would find that the step posed an unreasonable risk or was not open and obvious.[1] Plaintiff's only asserted basis for finding that the step (or sidewalk) was dangerous was that she did not see the step. Plaintiff admitted that there was nothing covering or hiding the step. Plaintiff has failed to establish any plausible unusual characteristics about the step that would take it out of the general rule stated in *Bertrand*. Because plaintiff has not presented any facts that the step posed an unreasonable risk of harm, the trial court properly granted summary disposition in favor of defendant.[2]

Affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley

[1] The fact that defendant subsequently painted the step and erected a sign warning pedestrians of its presence is not dispositive, as plaintiff contends. Furthermore, there is a question of the admissibility of such evidence. MRE 407.

[2] We concluded that the highway exception to governmental immunity is inapplicable in this case. We, however, note that in cases where the highway exception applies, the openness and obviousness of the danger does not absolve a municipality of its statutory obligation to repair its sidewalks and highways. See *Haas v City of Livonia*, 214 Mich app 361, 364; 543 NW2d 21 (1995).