

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTY MOORE,

Plaintiff-Appellant,

v

STIMAC COMMERCIAL PROPERTIES, LLC,

Defendant,

and

S&J INVESTMENT, LLC,

Defendant-Appellee.

UNPUBLISHED

October 27, 2022

No. 357778

Van Buren Circuit Court

LC No. 20-070420-NO

Before: SHAPIRO, P.J., and GADOLA and YATES, JJ.

SHAPIRO, P.J. (*dissenting*).

I respectfully dissent. We are to decide whether the premises hazard is open and obvious as a matter of law. If there is a question of fact presented by the evidence then the question must be left to the fact-finder. See *Estate of Livings v Sage’s Investment Group, LLC*, 507 Mich 328, 337; 968 NW2d 397 (2021). And the evidence in this case does establish a question of fact.

The majority concludes that we should make our determination based solely upon (a) still photographs taken from the opposite direction of plaintiff’s travel, and (b) still photographs specifically directed at the hazard. Neither should be dispositive as neither remotely represents what an ordinary person leaving the store would see on casual inspection.

In addition, plaintiff is not alone in her testimony that she could not discern the hazard as she left the store. Another customer described the hazard as “below the line of sight as you exited the store” and “not visible upon casual inspection.” A former insurance company loss prevention engineer stated the same in an affidavit after conducting his inspection.

Given that the hazard is not visible on casual inspection as one leaves the store, the majority opines that summary disposition is proper because it was (presumably) readily visible as plaintiff entered the store and the invitee has a duty to remember all hazards visible on the way in when she

departs. I respectfully disagree as this demands that invitees not only observe all hazards but that they consciously retain that information while shopping or conducting other activities inside the store. While that may be relevant to comparative negligence, failing to recall a previously seen hazard should not constitute a lack of “casual inspection.” It is one thing to expect invitees to see and avoid clearly visible hazards as they approach them, it is another to expect invitees to make a mental map of the sidewalk or other approaches so that they can avoid the hazard as they approach from a direction in which the hazard cannot be readily observed.¹

Because there are questions of fact regarding the application of the open and obvious defense I would reverse.

/s/ Douglas B. Shapiro

¹ I also believe the majority reads far too much into plaintiff’s use of the word “heel” in her appellant brief. Plaintiff testified that the boots she was wearing at the time of the fall did not have “heels.” Given this testimony, the majority concludes that plaintiff’s position on appeal that the “heel” of her boot was caught in the crack is “utterly implausible.” I suggest that plaintiff is merely using the word “heel” in the more general sense, i.e., “the part of a stocking, shoe, etc., covering the back part of the wearer’s foot,” as opposed to “a solid raised based attached to the sole of a shoe or boot under the back part of the foot.” *Random House Webster’s College Dictionary* (1997). In any event, this matter has no bearing on the question before us regarding the open and obvious doctrine.