MISSOURI COURT OF APPEALS
WESTERN DISTRICT

TINA HURSMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	**WD87919**
	)	
THE CITY OF SEDALIA, MISSOURI,	)	**Filed: November 25, 2025**
	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Pettis County
The Honorable Jeff A. Mittelhauser, Judge

Before Division Three: Mark D. Pfeiffer, P.J., and Alok Ahuja and Thomas N. Chapman, JJ.

Tina Hursman sued the City of Sedalia in the Circuit Court of Pettis County, alleging damages for injuries she sustained when she fell on a City sidewalk. The City moved for summary judgment, contending that Hursman's injuries were not caused by a dangerous condition of the sidewalk, and in the alternative that any dangerous condition was open and obvious. The circuit court granted the City's motion and entered judgment in its favor. Hursman appeals. We reverse and remand for further proceedings.

Factual Background

On June 19, 2019, Hursman visited a lawyer's office located at 501 South Ohio Avenue in Sedalia, at the corner of Fifth Street and Ohio Avenue. After

parking her car to the east of the office, Hursman walked west along the sidewalk on the south side of Fifth Street to enter the building. She had followed this same route when she visited the office on at least five prior occasions. On each of her five previous visits, Hursman returned to her car after leaving the building, retracing her steps by heading east on the sidewalk. Hursman had no trouble navigating the sidewalk on any prior visit to the lawyer's office.

The sidewalk in front of the lawyer's office has a step-down in the middle of the sidewalk, running parallel to the curb along both Fifth Street and Ohio Avenue, and diagonally at the corner. The step-down runs for approximately ten feet, and is approximately five inches in height at its highest point. The step was placed in the sidewalk to accommodate a wheelchair ramp, which declines to street level below the step. The step was marked with yellow or white paint. A picture of the step appears as an addendum to this opinion.

Hursman did not follow her customary route back to her vehicle when she left the lawyer's office with another person on June 19, 2019. Instead, she walked out of the office in a generally northward direction, toward the intersection of Fifth Street and Ohio Avenue (which is controlled by a traffic light). Hursman testified that she always walked with her head up, looking forward, so that she could watch for pedestrians and traffic. Hursman did not notice the step, and her foot slipped. She lost her balance, causing her to fall to the ground and sustain physical injuries.

The City of Sedalia owns and maintains the sidewalk where Hursman fell. The City's Corporate Representative[1] agreed that the City painted the step

[1] Pursuant to § 509.520.1, RSMo and Supreme Court Operating Rule 2.02(c), we do not provide the names of any non-party witnesses in this opinion.

because "there is an alteration in the height of the surface [which] . . . could cause somebody to lose their balance"; the paint was applied to warn people of the drop-off, and protect against "[s]lips, trips, [and] falls."

Two other corners at the Fifth Street and Ohio Avenue intersection have wheelchair ramps which are configured with a step-down similar to the one on the southeast corner where Hursman fell. The City installed guardrails at the other two corners to prevent pedestrians from walking over the step. The drop-off on the southeast corner does not have a similar guardrail.

Hursman filed suit against the City in the circuit court on December 15, 2022. Hursman's petition alleged that she lost her balance, fell, and injured her ankle due to the change in elevation in the sidewalk. The petition alleged that Hursman's ankle injury required surgical repair. The petition alleged that the change in elevation on the sidewalk was a dangerous condition which created a reasonably foreseeable risk of harm to pedestrians, and that Hursman's injury directly resulted from the dangerous condition. The petition contended that the City failed to use ordinary care to remedy or warn of the sidewalk's dangerous condition.

The City moved for summary judgment on November 27, 2024. The City's motion argued that it was entitled to summary judgment because (1) Hursman could not establish that her injury directly resulted from the step-down on the sidewalk; (2) Hursman could not establish that the City had notice of the dangerous condition on its sidewalk; and (3) any dangerous condition of the sidewalk was open and obvious.

In opposing the City's summary judgment motion, Hursman presented an affidavit from a Safety Expert. In his affidavit, Safety Expert opined that the change in elevation where Hursman fell was dangerous and not reasonably safe, because pedestrians do not expect to encounter a change in elevation on a sidewalk, and when they encounter one they can lose their balance and fall. The Safety Expert testified that "[t]here is a hierarchy of safety controls" to address hazards like the one in the sidewalk. Under this hierarchy, a hazardous condition should be eliminated if possible. "If the hazardous condition cannot be eliminated, then it is to be guarded or controlled." The Safety Expert opined that a warning should be used only if the hazard cannot be eliminated or guarded; "[t]o use a warning when a barricade or a guard could be used is not an appropriate remedy." The Safety Expert stated that "[a] warning is the least effective method of dealing with a hazardous condition" in a walking surface because "people generally do not walk looking downward but looking straight ahead," and "[a] person looking straight ahead may or may not see a painted line in their peripheral vision." A barricade, by contrast, would extend vertically into a pedestrian's field of vision, and would physically prevent the pedestrian from encountering the hazard. Safety Expert specifically opined that the City had not used ordinary care to address the hazardous condition of its sidewalk, because a reasonable property owner "would use a handrail instead of a warning to make the condition reasonably safe."

On February 27, 2025, the circuit court granted the City's motion for summary judgment. Although the City had moved to strike the affidavits of Hursman and Safety Expert which were submitted in opposition to the motion,

the circuit court's judgment refers to both affidavits. The City does not argue on appeal that the affidavits of Hursman and Safety Expert should be disregarded in determining whether the grant of summary judgment was appropriate.

The circuit court's judgment rejected the City's claim that the undisputed facts established that the step had not caused Hursman's fall. Citing Hursman's deposition testimony that the step "caught [her] off guard" and "surprised" her, causing her to fall, the court ruled that "[t]here is a genuine issue of fact to be determined by a jury as to whether Plaintiff's injuries were caused by her fall and whether the fall was caused by the 'little lip' on Defendant's sidewalk." The judgment also rejected the City's contention that the undisputed facts established that the City had no notice of the purportedly dangerous condition of the sidewalk. The judgment notes that the City's Corporate Representative "testified at his deposition that [the City] routinely inspects its sidewalks"; as a result, the court concluded that "there is evidence that [the City] was fully aware of the condition of this sidewalk."

The City did not move for summary judgment on the basis that the undisputed facts established that the step was not a dangerous condition. Nevertheless, the circuit court's judgment found that summary judgment was warranted on this basis. The judgment noted that the sidewalk was not in disrepair; that no foreign substance or object had been placed on the sidewalk; that the drop-off "was only five inches"; and that the edge of the step had been marked with yellow paint. The judgment dismissed Safety Expert's opinion that painting the step was not a reasonable safeguard. The court reasoned that the

step was safe, even if Safety Expert believed it could be made *safer*. The judgment explained:

> In his affidavit, Plaintiff's expert offers his opinion that yellow markings are the least effective way to warn of a change in elevation. . . . Barricading pedestrians from stepping across that portion of the sidewalk would make the area safer, according to this witness. That is, it would be possible to install a handrail along the level portion of the lip. This witness points out that such a handrail is used at another corner of this same intersection. However, the fact that a condition may be made safer yet does not mean it is hazardous without the handrail. The yellow warning paint was sufficient to make the sidewalk safe for normal pedestrian use.

The circuit court also found that summary judgment was warranted because the condition of the sidewalk was open and obvious.

> Anyone leaving the office would see this section of sidewalk immediately in front of them at a distance not more than 10 feet.
>
> . . . Any pedestrian passing this area for the first time and exercising ordinary care and judgment would be aware of the yellow paint warning of the small change in elevation. Defendant owed no duty of care to warn of this open and obvious condition of its property.

Hursman appeals.

Standard of Review

> [T]his Court . . . reviews the grant of summary judgment *de novo*. In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. . . . A material fact in the context of summary judgment is one from which the right to judgment flows.
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> The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party

> is entitled to the benefit of all reasonable inferences from the record. However, facts contained in affidavits or otherwise in support of the party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion.

Green v. Fotoohighiam, 606 S.W.3d 113, 115–116 (Mo. 2020) (cleaned up).

Discussion

We begin by addressing whether there was a genuine issue of material fact concerning whether the sidewalk was in a dangerous condition. We then address whether the circuit court's grant of summary judgment can be sustained on the basis that any dangerous condition was open and obvious as a matter of law. Finally, we address whether the summary judgment ruling can be affirmed on the grounds the circuit court rejected: whether the undisputed facts establish that the step did not cause Hursman's fall; and whether the undisputed facts establish that the City had no notice of the sidewalk's dangerous condition.

I.

The City of Sedalia is a public entity that enjoys sovereign immunity from tort liability, except where that immunity has been waived. *Phelps v. City of Kansas City*, 371 S.W.3d 909, 912 (Mo. App. W.D. 2012). "[S]overeign immunity is not an affirmative defense; instead, when suing a [political subdivision], the burden is on the plaintiff to plead facts with specificity that give rise to [the waiver of] sovereign immunity." *Estes ex rel. Doe v. Bd. of Trustees of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d 678, 709 n.26 (Mo. App. W.D. 2021) (quoting *State ex rel. City of Kansas City v. Harrell*, 575 S.W.3d 489, 492 (Mo. App. W.D. 2019)).

Section 537.600.1[2] provides in relevant part:

> Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:
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> . . . .
>
> (2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

"Dangerous public property within section 537.600.1(2)'s narrow exception must exhibit a defect that is physical in nature." *State ex rel. Springfield R-XII Sch. Dist. v. Christensen*, 712 S.W.3d 1, 4 (Mo. App. S.D. 2025) (cleaned up). "For a dangerous condition waiver of sovereign immunity to apply, the dangerous condition must 'describe, define, explain, denote or reference only and exclusively the physical defects in, upon and/or attending to property of the public entity.'" *State ex rel. Div. of Motor Carrier and R.R. Safety v. Russell*, 91 S.W.3d 612, 616 (Mo. 2002) (footnote omitted).

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[2] Statutory citations refer to the 2016 edition of the Revised Statutes of Missouri, updated by the 2025 Cumulative Supplement.

The circuit court erred in granting summary judgment on the basis that the undisputed facts established that the sidewalk was not in a dangerous condition. Hursman provided evidence that a physical defect in the City's sidewalk caused her injury – namely, an unguarded five-inch drop-off in the middle of the sidewalk. Safety Expert opined that the elevation change in the sidewalk was dangerous, because pedestrians do not expect to encounter such an elevation change, and can lose their balance and fall when they unexpectedly encounter it. The City's Corporate Representative himself acknowledged that the drop-off in the sidewalk could cause a pedestrian to lose their balance and fall.

The circuit court concluded that the drop-off in the sidewalk was not dangerous, because "[t]he yellow warning paint was sufficient to make the sidewalk safe for normal pedestrian use." Hursman testified, however, that the paint failed to alert her to the drop-off, because she did not see it as she was looking forward while approaching the intersection of Fifth Street and Ohio Avenue. Safety Expert also opined that the paint on the sidewalk was insufficient to protect pedestrians from the danger presented by the unguarded step, because "people generally do not walk looking downward but looking straight ahead," and "[a] person looking straight ahead may or may not see a painted line in their peripheral vision."

The affidavits of Hursman, and of her Safety Expert, created a genuine factual issue as to whether the unguarded step on the sidewalk constituted a dangerous condition. Although it does not involve a claim against a governmental entity, we find *Rhodes v. Kandlbinder, Inc.*, 557 S.W.3d 502 (Mo. App. E.D. 2018), to be instructive. In *Rhodes*, the plaintiff fell and injured herself

when she tripped on a step at the entrance to a convenience store. *Id.* at 504. The stair was painted yellow to alert visitors to its presence. *Id.* Plaintiff won a jury verdict against the property owner on the theory that – despite the yellow paint – the step was not reasonably safe, and that the property owner had failed to exercise ordinary care by removing it. *Id.*

The property owner appealed, contending that it did not have an obligation to *remove* the step, but had discharged its duty to visitors by *warning* of the step's presence with yellow paint. The Eastern District rejected the property owner's arguments. The Court held that the plaintiff was entitled to submit its case to the jury on the theory that the property owner had a duty to *remove* the step, and that the property owner was not absolved of that duty simply because it had painted the step. The Court explained:

> The duty owed by a premises owner to an invitee under Missouri law is clear that in a premises liability case a plaintiff must show that the defendant failed to use ordinary care to remove it, barricade it, or warn of it. In other words, in Missouri, the ultimate duty required of a landowner is to ensure that the premises are reasonably safe, whether through warning, barricades, or removal. . . .
>
> Kandlbinder insists that once it painted the step yellow, it had no additional duty to make the premises reasonably safe. However, . . . Missouri law is clear that not all attempts to provide a warning absolve the property owner from liability. Under certain circumstances, like the present one, a premises owner must do more than simply warn about a dangerous condition; it must take action to "remedy" the unsafe condition.
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> Here, it was the Rhodeses' theory of recovery that the step, despite being painted yellow, was a dangerous condition that required removal. This is consistent with Missouri law that a plaintiff is entitled to choose the theory of recovery on which to

> submit his case to the jury as long as there is sufficient evidence to support him.

Id. at 508-09 (cleaned up). *Rhodes* emphasized that the plaintiff in that case had presented sufficient evidence to submit her theory that the step was dangerous despite being painted yellow, based in part on the testimony of a safety expert who opined that "the yellow paint, from a human factors perspective, would be ineffective in bringing customers[']attention to the step." *Id.* at 508.

As in *Rhodes*, we cannot say, as a matter of law, that any danger presented by the step in the middle of the City's sidewalk was eliminated by the yellow paint on the step's edge. The City would certainly be entitled to argue to a jury that the step was not dangerous because the paint provided sufficient warning. Hursman presented evidence, however, which creates a genuine factual issue whether the yellow paint was sufficient to discharge the City's duty to exercise ordinary care to render its sidewalk reasonably safe. The circuit court erred by granting summary judgment on the basis that there was no genuine factual dispute whether the step constituted a dangerous condition.

II.

The circuit court also found that summary judgment was warranted because the danger presented by the step was open and obvious. The circuit court stated that "[a]ny pedestrian passing this area for the first time and exercising ordinary care and judgment would be aware of the yellow paint warning of the small change in elevation."

The Missouri Supreme Court has held that,

> when the dangerous condition [of property] is so open and obvious that the invitee should reasonably be expected to discover it and realize the danger, a possessor of land does not breach the standard

> of care owed to invitees unless the possessor should anticipate the harm despite such knowledge or obviousness. This element acknowledges that a possessor of land is not an absolute insurer of the well-being of its invitees. As a general matter, therefore, a possessor's actions do not fall below the applicable standard of care if the possessor fails to protect invitees against conditions that are open and obvious as a matter of law.

Harris v. Niehaus, 857 S.W.2d 222, 226 (Mo. 1993) (citations omitted). "[A] 'landowner is entitled to expect that invitees will exercise ordinary perception, intelligence, and judgment to discover open and obvious conditions, appreciate the risk they present, and take the minimal steps necessary to protect themselves.'" *Allen v. 32nd Judicial Circuit*, 638 S.W.3d 880, 888 (Mo. 2022) (citation omitted).

The circuit court concluded that any danger presented by the step was open and obvious as a matter of law, because any pedestrian exercising ordinary care would see it. As we explained in § I above, however, Hursman presented testimony from Safety Expert, who opined that the application of yellow paint was not sufficient to alert pedestrians to the danger presented by the step, because pedestrians would not necessarily *see* the yellow paint as they walked.

Missouri courts have recognized that defects in a walking surface are not necessarily open and obvious, even though those defects would be visible to anyone who was looking down. Thus, in *Cunningham v. Bellerive Hotel, Inc.*, 490 S.W.2d 104 (Mo. 1973), the Missouri Supreme Court held that a pedestrian was not contributorily negligent as a matter of law, when he fell in a depression in a parking lot which was two-to-five inches deep, and approximately two feet across. *Id.* at 106. Although the indentation would have been visible if the plaintiff had been looking down, the Court held that this did not defeat his

negligence claim against the property owner as a matter of law. The Court explained that the plaintiff

> testified that he was looking where he was going, and walking in the way in which one would normally walk. He knew of nothing constituting a danger, anticipated none, and had no reason to suspect any. Under these circumstances, he was not required to look down at his feet or the pavement at every step, or to survey the pavement with a 'critical eye,' or walk with his eyes 'glued upon' the pavement.

Id. at 108.

Similarly, in *Little v. Kansas City*, 197 S.W.2d 1005 (Mo. App. 1946), this Court held that a pedestrian was not contributorily negligent as a matter of law when she failed to notice a visible crack in a City sidewalk, on which she tripped. The Court explained that, although pedestrians "cannot 'star-gaze' or be indifferent to dangers in their pathway, . . . they are not required to keep their eyes fixed upon the sidewalk immediately in front of them," or "keep [their] eyes riveted upon the sidewalk at each step of [their] progress." *Id.* at 1007-08 (cleaned up).

More recently, the Eastern District held that a tripping hazard which would have been visible to anyone looking down was not open and obvious as a matter of law in *Anslinger v. Christian Hospital*, 687 S.W.3d 180 (Mo. App. E.D. 2024). In *Anslinger*, the plaintiff tripped and fell on a fold in a rubber mat on the floor of a hospital's vestibule. *Id.* at 182. After a jury returned a verdict for the plaintiff, the defendant appealed, arguing that it was entitled to a judgment notwithstanding the verdict because the fold in the rubber mat was open and obvious. Although the fold would have been visible to plaintiff if he had been

looking down at the floor, the Court held that this did not defeat his claim as a matter of law. The Court explained:

> *[S]ome* prior Missouri cases holding a condition was not open and obvious as a matter of law involved evidence of conditions which were arguably concealed or obscured and likely could not have been seen by the plaintiff, even if he or she had been looking down. However, in many other instances, Courts have also held a condition not to be open and obvious as a matter of law in the face of evidence indicating the condition was plainly visible and could have been seen by the plaintiff had he or she been looking down.
>
> In sum, prior Missouri holdings demonstrate that simply because a defendant presents evidence indicating a plaintiff could have seen an unobscured dangerous condition does not mean the condition is necessarily open and obvious as a matter of law. Moreover, whether an invitee fails to keep a careful lookout and notice potentially dangerous conditions, either obscured or openly visible, is a question for the finder of fact to answer at trial when allocating fault under Missouri's comparative fault principles. Likewise, the obviousness of the dangerous condition is also a factor for the jury to consider when evaluating comparative fault.

Id. at 186 (citations omitted). Citing multiple cases, *Anslinger* observed that "Missouri cases involving a trip hazard on a walking surface . . . have consistently held these types of dangerous conditions are not open and obvious as a matter of law." *Id*. at 187 (citations omitted).

Under this caselaw, and in light of the evidence which Hursman presented indicating that a reasonable pedestrian might not see the step or the yellow paint lining it, the circuit court erred in holding that the danger presented by the step was open and obvious as a matter of law.

III.

In its brief as Respondent, the City argues that the judgment can be affirmed on two grounds which the City raised in its summary judgment motion, but which the circuit court rejected.

First, the City contends that the undisputed facts establish that Hursman's fall did not directly result from the drop-off in the sidewalk. Yet the City's own Statement of Uncontroverted Material Facts quotes a passage from Hursman's deposition in which she stated that "this little lip caught me off guard. Surprised me. And I twisted my ankle and fell on my rear end." Moreover, in the affidavit she submitted as part of her opposition to the City's summary judgment motion, Hursman specifically testified that "[m]y foot stepped off of a decline or drop-off and I lost my footing and sustained an injury." In light of this evidence in the summary judgment record, the circuit court correctly held that "[t]here is a genuine issue of fact to be determined by a jury as to whether . . . the fall was caused by the 'little lip' on Defendant's sidewalk."

The City also contends that it had no notice of the condition of the sidewalk. The defect at issue, however, was not a transitory condition caused by a foreign substance or recent damage; the defect on which Hursman relies was an inherent part of the sidewalk designed and built by the City. The City's own Statement of Uncontroverted Material Facts once again defeats the City's lack-of-notice argument, since the City's Statement specifically alleges that "[t]he City has regular inspections of the sidewalk and paints the striping on an as needed basis." The City's appellate brief is, if anything, even more explicit: "Here, the City has a schedule under which it routinely performs inspections of its sidewalk. The sidewalk [at] issue here was inspected by the City and yellow striping painted

as needed." Moreover, the City's Corporate Representative testified that the City painted the step in the sidewalk to safeguard against "[s]lips, trips, [and] falls"; remedial action was required because otherwise, the drop-off "could cause somebody to lose their balance." Given the City's regular inspections and painting of the step; its recognition that the step created a risk of falls; and Safety Expert's testimony that a reasonable landowner would recognize that the City's safety measures were insufficient, a genuine factual issue was presented as to whether the City had notice of the dangerous condition in sufficient time to remedy it.

The summary judgment ruling cannot be sustained on the basis that there was no genuine factual issue concerning proximate causation or notice.

Conclusion

The circuit court's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.



Alok Ahuja, Judge

All concur.


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