MEMORANDUM DECISION

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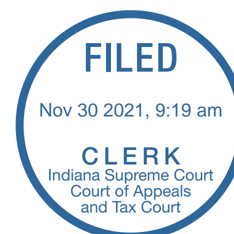


ATTORNEYS FOR APPELLANT

David A. Singleton
Chad Romey
Blackburn & Green
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE

Matthew J. Kowals
Leahy, Eisenberg & Fraenkel, LTD
Chicago, Illinois

IN THE COURT OF APPEALS OF INDIANA

Sharon Kaufman,
Appellant-Defendant,

v.

J & M Enterprise Corporation of Northern Indiana d/b/a The Channel Marker,
Appellee-Plaintiff.

November 30, 2021

Court of Appeals Case No. 21A-CT-1262

Appeal from the Kosciusko Superior Court

The Honorable Christopher D. Kehler, Judge

Trial Court Cause No. 43D04-1910-CT-71

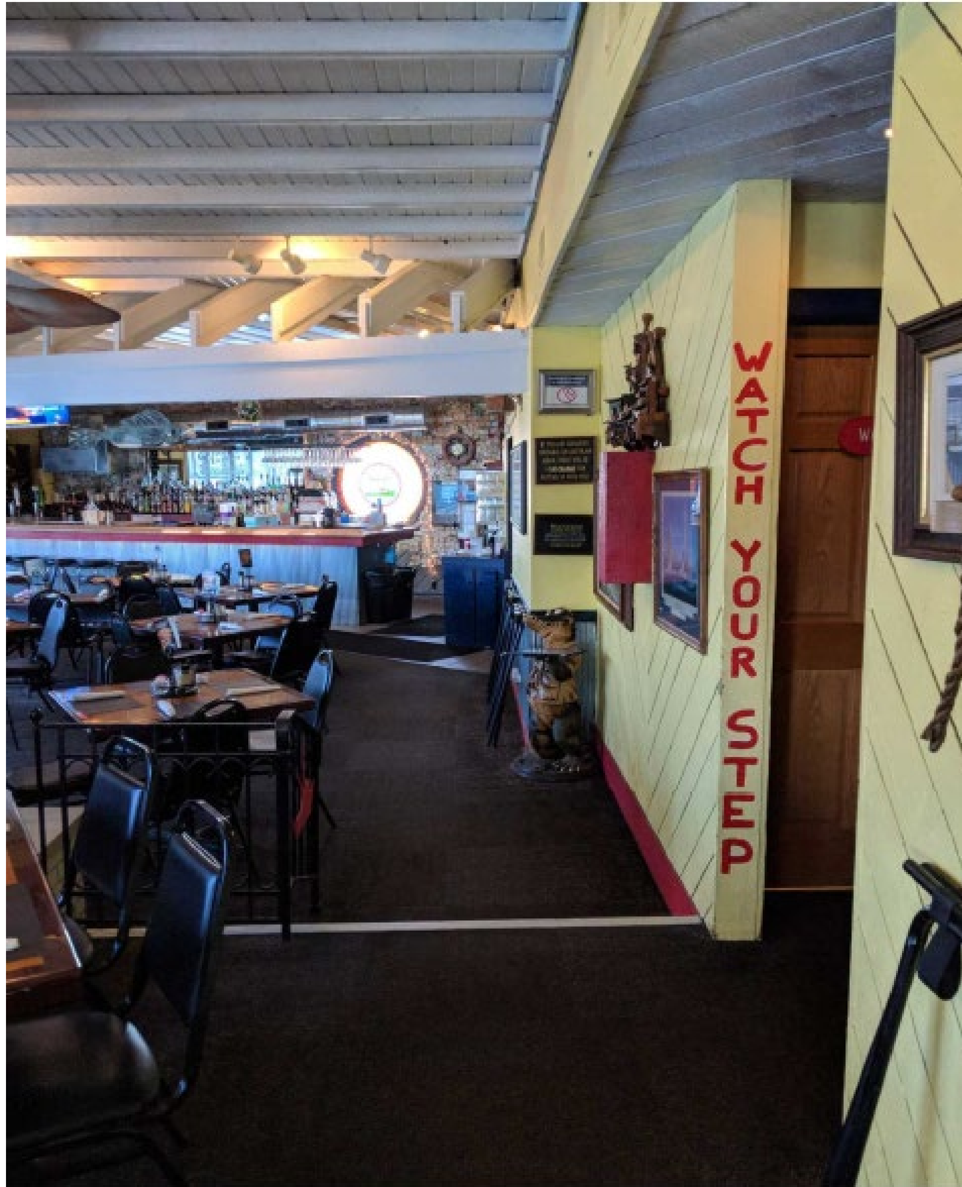
Brown, Judge.

[1] Sharon Kaufman appeals the entry of summary judgment in favor of J & M Enterprise Corporation of Northern Indiana d/b/a The Channel Marker ("The Channel Marker"). We affirm.

Facts and Procedural History

[2] On April 15, 2018, Kaufman fell while at The Channel Marker, a restaurant and bar. On October 31, 2019, she filed a Complaint for Damages alleging that she fell due to a dangerous step and failure to properly warn.

[3] On October 27, 2020, The Channel Marker filed a motion for summary judgment and designated materials including the affidavit of Dana Polman and Kaufman's deposition. The Channel Marker argued that it did not breach any duty owed to Kaufman, it took all reasonable precautions to alert patrons to the existence of the step, and the step was known and obvious to Kaufman. The Channel Marker submitted the following photograph of the step and the area around the step which "shows a metal strip running across the step, a handrail toward the left of the step, and the words 'WATCH YOUR STEP' painted vertically on a narrow wall near the step." Appellant's Brief at 6.



Appellant's Appendix Volume II at 87.

[4] In her affidavit, Polman stated that she was an employee of The Channel Marker, that she seated and waited on Kaufman on April 15, 2018, and that, when she seated Kaufman and the man she was with, she warned Kaufman to watch her step before leading her and the man down the step to the bar seating area. She stated that she observed Kaufman go to the restroom at least once, in

order to reach the restroom Kaufman had to walk up the step that she had used to reach the bar seating area and back down the same step, Kaufman did not trip or fall going up or down the step, and when Kaufman left the restaurant following her meal she used the step to exit the bar seating area. Polman further stated that Kaufman left her purse in the bar seating area and that, when she returned later that night to pick up her purse, she "was walking quickly and appeared to be in a hurry as she approached the bar seating area" and, when she reached the step, she fell. *Id*. at 85.

[5] During her deposition, Kaufman stated that she was born in 1944 and that she had visited The Channel Marker one or two times prior to her visit on April 15, 2018. When asked "the bar area is sunken, so to speak," she replied affirmatively, and when asked "by sunken, I mean it is on a lower elevation than the hallway," she answered "[y]eah. And it's quite a step." *Id*. at 51. She also stated: "I'm going to say this Watch Your Step is in a weird place. To me, it's in a weird place. I did not see Watch Your Step ever when I go in there. It's kind of like behind you." *Id*. at 52. When asked if, on April 15, 2018, "you would have necessarily walked past the Watch your Step warning to patrons," she stated "I never did see that" and "[w]e would have walked by there . . . We had to. Yes. Yes." *Id*. at 58-59. When asked "when you . . . went down that step to reach the lower level prior to . . . being shown to your seat, you were able to traverse that step at that time," she replied affirmatively. *Id*. at 59. When asked "do you know why it is you would not have seen it when you . . . traversed that step," she answered "[n]o. Except I think it's more behind you. .

. . I don’t know . . . [b]ut I do know the step . . . is there . . . because I was there before.” *Id*. at 59.

[6] Kaufman indicated that she would have gone up the step when she left the restaurant and, when she left the restaurant, she was aware of the presence of the step. She stated that she and the person with her drove away, realized she did not have her purse, and returned to the restaurant. She indicated that she left The Channel Marker around 6:00 to 6:15 and returned around 7:15 to retrieve her purse. When asked “[s]o you enter The Channel Marker, and you would have taken a right down that hallway to get to the bar area,” she replied affirmatively, and when asked “you were in a hurry to get your purse,” she said “[w]ell, I was worried about my purse.” *Id*. at 62. When asked “you were going faster than you normally would,” she replied “[p]robably a little faster.” *Id*. When asked “[a]s you traversed the hallway leading to the bar area, what did you see in front of you,” she answered “[t]he bartender waving my purse in the air (demonstrating). So I looked at him, come up on the step before I realized it, fell down, and I just – I went real fast.” *Id*. When asked where the bartender was located as she approached the bar area, she said “I think he was in front of the bar . . . waving my purse.” *Id*. When asked where she was situated when she saw him lifting the purse, she said “probably about halfway down the – . . . before I got to the step.” *Id*. at 63.

[7] When asked “[f]rom the time he waved the purse till the time you fell, how many steps did you take,” Kaufman replied “[m]aybe ten, but I’m not sure.” *Id*. She stated “I forgot about the step.” *Id*. She indicated she fell on the same

step she had traversed forty-five minutes earlier when leaving the restaurant. She stated that she was walking "[a] little faster than normal." *Id*. at 64. She indicated it was a little darker in the hallway and she had no recollection of the lighting in the bar area. When asked "when you saw [the bartender] at the location we've marked . . . you were approximately ten steps away from the area where you fell," she answered affirmatively. *Id*. at 69.

[8] Kaufman filed a response arguing there was an issue of fact regarding the adequacy of the warning and a reasonable jury could conclude that the step was dangerous and posed an unreasonable risk of harm. She further argued that, "[a]s she walked toward the bar area, the bartender (identified by the Defendant as part-owner Keith Wronka) was standing in front of the bar, saw [her], and waved her purse in the air, drawing [her] attention to him and her purse" and that a reasonable jury could conclude that The Channel Marker should have anticipated that she "would be injured due to the Defendant's distraction of her as she approached the step." *Id*. at 103-104. In his deposition, Steve Johnson stated that he had worked at the restaurant for over twenty-five years, the corporation had been formed in 1995, he was one of the owners of The Channel Marker, and Keith Wronka had been an owner before he passed away. Johnson stated that he thought the current version of the sign was painted in 2016, to his knowledge no one had ever fallen on the step, and there is a railing, there is a silver piece of metal approximately three inches wide which spans the entire step.

[9] On February 25, 2021, the court held a hearing, and the court requested that the parties submit proposed orders. The court issued an order granting The Channel Marker's motion for summary judgment. The order provided in part that "[t]here was a metal strip affixed to the lip of the step," "[a] handrail was located next to the step," and "[t]here was signage, reading 'Watch Your Step,' painted in large red letters on the wall next to the step." *Id*. at 8. It stated that Polman noted that Kaufman had utilized the step multiple times during her visit and that Kaufman knew of the existence and location of the step leading to the bar area. It also stated that, in the restaurant's twenty-four years of operation prior to Kaufman's fall, no other patrons had injured themselves as a result of the step.

Discussion

[10] We review an order for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* Special findings are not required in summary judgment proceedings and are not binding on appeal. *Lowrey v. SCI Funeral Servs., Inc.*, 163 N.E.3d 857, 860 (Ind. Ct. App. 2021), *trans. denied*. A trial court's grant of summary judgment is clothed with a

presumption of validity. *Id*. We may affirm a grant of summary judgment on any legal basis supported by the designated evidence. *Id*. at 861.

[11] To prevail on a negligence claim, the plaintiff must demonstrate a: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty. *Id*. (citing *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016) (citing *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 484 (Ind. 2003))). The issue of whether a duty exists is a question of law for the court. *Id*. Where the facts are undisputed and lead to but a single inference or conclusion, the court as a matter of law may determine whether a breach of duty has occurred. *King*, 790 N.E.2d at 484.

[12] Kaufman asserts that she presented evidence from which a factfinder could conclude the step was dangerous and posed an unreasonable risk of harm, the extensive warnings regarding the step are evidence The Channel Marker knew the step posed an unreasonable risk of harm, and The Channel Marker "should have anticipated that Mr. Wronka's distraction of [her] as she approached the step would result in her injury." Appellant's Brief at 19.

[13] A landowner owes a duty to an invitee to exercise reasonable care for the invitee's safety while the invitee is on the landowner's premises. *Lowrey*, 163 N.E.3d at 861 (citing *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991), *reh'g denied*). Negligence cannot be inferred from the mere fact of a fall. *Id*. The Restatement (Second) of Torts § 343 (1965) provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.

See Burrell, 569 N.E.2d at 639-640 (adopting RESTATEMENT (SECOND) OF TORTS § 343); *Lowrey*, 163 N.E.3d at 861. Further, Section 343A(1) of the Restatement provides:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

RESTATEMENT (SECOND) OF TORTS § 343A. "The word 'known' denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves." RESTATEMENT (SECOND) OF TORTS § 343A, cmt. b. "'Obvious' means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Id.* The comparative knowledge of a possessor of land and an invitee regarding known or obvious dangers may properly be taken into consideration in

determining whether the possessor breached the duty of reasonable care under Sections 343 and 343A. *Smith v. Baxter*, 796 N.E.2d 242, 245 (Ind. 2003).

[14] "In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes," "[t]he possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so," "and [r]easonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them." RESTATEMENT (SECOND) OF TORTS § 343A, cmt. e. "There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger," "[i]n such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection," "[t]his duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm," and "[s]uch reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." RESTATEMENT (SECOND) OF TORTS § 343A, cmt. f.

[15] The Channel Marker is not liable to its invitees for harm caused by any condition "whose danger is known or obvious to them." *See* RESTATEMENT (SECOND) OF TORTS § 343A. The designated evidence demonstrates that the allegedly dangerous condition presented by the step was known and obvious to Kaufman. Kaufman testified that she was aware of the existence of the step and that she had walked down the step when she walked from the restaurant's entrance to her seat in the bar area and then up the step when she walked from the bar area to the exit. The designated evidence shows the phrase "WATCH YOUR STEP" was painted vertically in red lettering on the wall near the step, there was a railing for a person to hold while stepping up or down the step, and there was a silver strip of metal about three inches in width along the edge of the step. While she stated the sign was "in a weird place" and "I never did see that," Kaufman testified that she "would have necessarily walked past" the warning sign and that she knew the step was there. Appellant's Appendix Volume II at 52, 58-59. Further, Polman stated that she warned Kaufman to watch her step when leading her down the step to the bar seating area and that she observed Kaufman go to the restroom at least once which required walking up and down the step. The Channel Marker did not have knowledge that Kaufman did not possess, and could not have informed her of, any facts of which she was not already aware. Also, it did not have reason to expect Kaufman would be distracted and fail to protect herself. While Wronka or the bartender may have waved to Kaufman to indicate that he had her purse, the designated evidence shows that Kaufman walked approximately ten steps after she saw the person wave to her and before she reached the bar area and the step

where she fell and that she was walking at a pace which was "a little faster than normal" when she reached the step. *Id*. at 64. Kaufman knew about the step, used the step when she visited the restaurant at least once prior to April 15, 2018, and used the step less than a few hours prior to her fall on April 15, 2018, to enter and exit the bar seating area when she used the restroom and when she left the restaurant. The trial court did not err in granting summary judgment. *See Lowrey*, 163 N.E.3d at 862-863 (affirming the entry of summary judgment in favor of the premises owner, a cemetery, where the allegedly dangerous condition, a two-inch differential between a sidewalk and adjacent ground, was known and obvious, and rejecting the argument that, because many invitees are in a state of emotional distress, the premises owner should have anticipated the harm despite the plaintiffs' knowledge of the obvious condition).

[16] For the foregoing reasons, we affirm the trial court.

[17] Affirmed.

Najam, J., and Riley, J., concur.