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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002067-MR

ELIZABETH RUCINSKI APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 08-CI-004639

CINEMARK U.S.A., INC. d/b/a TINSELTOWN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND KELLER, JUDGES.

COMBS, JUDGE: Elizabeth Rucinski appeals from the order of the Jefferson Circuit Court that granted summary judgment to Cinemark U.S.A., Inc., d/b/a/ Tinseltown. Following careful review, we affirm.

On November 7, 2007, Rucinski and her husband went to a movie at Cinemark's Tinseltown theater in Louisville. They remained in their seats for a

portion of the credits, but they decided to leave while the credits were still rolling. The house lights had not yet been turned on. In order to exit, Rucinski and her husband had to walk down some steps, which were illuminated by edging lights on the front and sides. However, not all edges were completely lit. As she walked down the stairs, Rucinski missed a step and fell, breaking her ankle.

Rucinski filed a complaint against Cinemark in Jefferson Circuit Court alleging that Cinemark's negligence caused her fall and the resulting injury. On October 16, 2009, the court granted Cinemark's motion for summary judgment. This appeal follows.

Summary judgment is utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). In Kentucky, the movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

A trial court must view the evidence in favor of the nonmoving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to avoid summary judgment, the nonmoving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. On appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was

entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Further, because summary judgments do not involve fact finding, our review is *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

Three elements constitute actionable negligence: 1) that the defendant owed a duty to the plaintiff; 2) that the defendant breached that duty; and 3) that the breach caused an injury to the plaintiff. *Illinois Cent. R.R. v. Vincent*, 412 S.W.2d 874, 875-76 (Ky. 1967). Whether a duty exists is a question of law. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003).

The parties agree that Rucinski was an invitee of Cinemark. An invitee is one who "enters upon the premises at the express or implied invitation of the owner or occupant . . . in connection with business of the owner or occupant." *Cozine v. Shuff*, 378 S.W.2d 635, 637 (Ky. 1964). It is firmly established in Kentucky's law that owners of premises do not have a "duty to warn an invitee concerning open and obvious conditions." *Reece v. Dixie Warehouse & Cartage Co*., 188 S.W.3d 440, 450 (Ky. App. 2006). Very recently, our Supreme Court refined the doctrine by adopting the position of the Restatement (Second) of Torts § 343A(1) (1965), which holds that if "the possessor should anticipate the harm despite such knowledge or obviousness," then the possessor does have a duty to warn. *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 389 (Ky. 2010).

In the case before us, the trial court found that the dark stairs were an obvious and open condition that Rucinski recognized and voluntarily accepted when she attempted to walk down them before the house lights came on. Therefore, finding that Cinemark did not have a duty to warn Rucinski about the dark stairs, it granted the summary judgment.

In a well-reasoned opinion, the trial court summarized its findings:

> The Court finds that the facts of this case simply do not support a finding that Tinseltown breached a duty it owed to Ms. Rucinski by failing to turn up the lights during the movie's closing credits. It is clear that Ms. Rucinski appears to be an avid movie fan; her testimony indicated she had been to Tinseltown dozens of times before the accident and was still visiting it regularly after her rehabilitation was complete. Not only was she aware of the general condition of Tinseltown's premises, she was familiar with the very theater in which she fell. She was so familiar with the theater (and others in the facility), in fact, that she complained "many times" about what she considered its inadequate lighting. . . . As noted in Section 343A of the Restatement, the possessor of land is not liable to harm to its invitees caused by a condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. The Court is entirely satisfied that Ms. Rucinski not only "knew" the danger of this darkened theater, but that the same was also an "obvious" danger, as those terms are contemplated by comment b to Section 343A. To argue somehow that Ms. Rucinski could not appreciate the risk a darkened theater presented to her contradicts her own sworn testimony – she felt it so unsafe that she actually complained to people about it.
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> The Court finds the facts of this case do not give rise to a finding that Tinseltown should have anticipated that its patrons will be so distracted by

> previews or credits in its theater that they will not discover the danger of climbing a set of stairs in the dark, or forget that the darkened stairs could be dangerous, or simply fail to protect themselves against the risk of falling up or down darkened stairs. In this case, Ms. Rucinski had almost the entire theater at her disposal; there were only two other patrons in this theater. She knew the theater and was aware of how difficult it was for her to see when the lights were down. Instead of simply sitting in a seat on the entry level, she and her husband climbed six or seven steps to reach seats that would allow them to prop their feet up. After the movie, she and her husband watched the credits for a time. There is no question in the Court's mind that Ms. Rucinski knew as she left, just as she knew when she entered, that she had had trouble seeing in the darkened theater in the past. Her husband used the handrail to descend the staircase. She admitted there was nothing preventing her from using the handrail herself by following after him. She simply chose not to use it, despite her repeated complaints over many visits to more than one employee that she considered the theater too dark during the previews and credits. . . .
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> Finally, Ms. Rucinski contends she had no choice but to make her exit in the darkened conditions, and that she did not willingly step into the darkness, but that the darkness "was thrust upon her." This argument is unpersuasive. Ms. Rucinski may have had to leave by way of the staircase, but she had every opportunity to use the handrail, as her husband did, and as she freely admitted. Further, knowing she could not see as well when the credits were rolling, she could have left after the lights were turned on. The darkness was no more thrust upon her than was the bag of popcorn she chose to eat during the movie.

Rucinski has not presented any arguments that compel or permit us to conclude otherwise.

We affirm the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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