

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN L. LOWRY,

Plaintiff-Appellant,

v

CELLAR DOOR PRODUCTIONS OF
MICHIGAN, INC. and ARENA ASSOCIATES,
INC. d/b/a PINE KNOB MUSIC THEATRE,

Defendants-Appellees.

UNPUBLISHED

June 8, 1999

No. 206875

Oakland Circuit Court

LC No. 96-519569 NO

Before: Murphy, P.J., and Gage and Zahra, JJ.

MURPHY, P.J. (concurring in part and dissenting in part).

I respectfully dissent in part and concur in part.

I see no meaningful distinction between this case and the recently decided case of *MacDonald v PKT, Inc*, 233 Mich App 395; ___ NW2d ___ (Docket No. 204703, issued 1/15/99). In *MacDonald* at 400, this Court held that because the plaintiff presented evidence that there had been incidents of sod throwing at previous concerts, a genuine issue of material fact existed whether the sod throwing incident at issue in *MacDonald* was foreseeable. In this case, plaintiff also presented evidence that there had been incidents of sod throwing at previous concerts. Specifically, Pine Knob Event Coordinator Connie Marshall testified in deposition that she believed that there had been incidents of sod throwing at previous events. Although plaintiff did not present evidence regarding the number of previous sod throwing incidents or the dates and circumstances surrounding those previous occurrences, plaintiff nonetheless established the existence of a genuine issue of material fact with respect to whether the sod throwing incident at issue in this case was foreseeable. Accordingly, pursuant to *MacDonald*, I would reverse the trial court's decision to grant summary disposition in favor of defendants.

I also disagree with the majority's conclusion that even assuming that the sod throwing incident in this case was foreseeable, plaintiff failed to establish a genuine issue of material fact with respect to defendants' negligence. The reasonableness of a defendant's conduct is generally a question for the jury. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 767 (1992). In this case, although the evidence reveals that patrons with disabilities, such as plaintiff, were afforded seating

locations at the venue that would allow them to view concerts without obstruction, the evidence also reveals that defendants made no additional effort to protect the safety of these patrons, who often suffer from limited mobility. In light of my conclusion regarding the foreseeability of the sod throwing incident, I likewise find that the reasonableness of defendants' conduct with respect to protecting patrons with disabilities from injuries resulting from sod throwing should also have been submitted to a jury.

Finally, I concur with the majority's decision that the trial court properly granted summary disposition in favor of defendants regarding plaintiff's handicapper's discrimination claim.

I would reverse in part, affirm in part, and remand to the trial court.

/s/ William B. Murphy