[Cite as *Johnson v. Regal Cinemas, Inc.*, 2010-Ohio-1761.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93775

ELLEN JOHNSON

PLAINTIFF-APPELLANT

vs.

REGAL CINEMAS, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-666187

BEFORE: Celebrezze, J., Dyke, P.J., and Sweeney, J.

RELEASED: April 22, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run

upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant, Ellen Johnson ("appellant"), appeals from the lower court judgment finding a condition to be open and obvious and granting summary judgment in favor of defendants-appellees, Regal Cinemas, Inc. and Regal Entertainment Group ("appellees"). Based on our review of the record and the relevant case law, we affirm.

{¶ 2} On December 29, 2006, appellant and her friend, Barbara Durma ("Durma"), went to Regal Cinemas in Westlake, Ohio to see a movie. The cinema contains several individual theaters, each with stadium-style seating. Patrons must enter in the back of the theater by way of a descending ramp that leads to a flat section in the middle of the seating area. Once an individual reaches the center platform, he can choose to turn and ascend up a set of stairs to sit in the upper level or can proceed down a set of stairs to sit in the lower level.

{¶ 3} Appellant and Durma arrived in the theater while the previews and other advertisements were playing. Since the upper level looked crowded, the women chose to proceed to the lower level in search of seating. According to appellant's deposition testimony, she assumed that the ramp into the theater continued downward to the lower level rather than becoming

stairs.[1] Appellant fell as she was descending to the lower seating area. As a result of this fall, appellant suffered a fractured foot, torn ligaments, and injuries to her neck, back, and legs.

{¶ 4} On July 28, 2008, appellant filed a complaint against appellees in the common pleas court asserting that appellees were negligent in failing to notify patrons that the ramp transformed into a stairway and in failing to adequately light the stairway. On April 30, 2009, appellees filed a motion for summary judgment wherein they argued that the stairs were an open and obvious condition for which they could not be held liable. In response, appellant argued that whether or not the stairs were an open and obvious condition was a question of fact and summary judgment was inappropriate. Appellant also argued that a trier of fact should be required to determine whether appellees breached the duty they owed appellant, and such a decision must be made only after all attendant circumstances are considered.

{¶ 5} The trial court granted appellees' motion for summary judgment on July 20, 2009. This appeal followed wherein appellant presents two assignments of error for our review.

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[1]Appellees asserted both below and in this appeal that the ramp that descends into the theater does not instantly become a set of stairs. Appellees contend that once an individual reaches the end of the entrance ramp, they must turn to the right and enter the main theater area. It is after entering this main platform that an individual must choose whether to sit in the upper or lower level.

{¶ 6} "The Trial Court erred in granting Summary Judgment because there exists genuine issues of material fact regarding the duty element of Appellant's Negligence Claim."

{¶ 7} "The Trial Court erred in granting Summary Judgment because it did not take into account the presence of attendant circumstances as factors in deciding whether a hazardous conditions [sic] was open and obvious."

Law and Analysis

{¶ 8} "Civ.R. 56(C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. This court reviews the lower court's grant of summary judgment de novo. *Brown v. Scioto Cty. Commrs.* (1993), 87 Ohio App.3d 704, 622 N.E.2d 1153. A de novo standard of review affords no deference to the trial court's decision, and we independently review the record. *Gilchrist v. Gonsor*, Cuyahoga App. No. 88609, 2007-Ohio-3903.

Open and Obvious Doctrine

{¶ 9} To overcome a summary judgment motion in a negligence action, a plaintiff must prove that the defendant breached a duty owed to the plaintiff and that this breach was the proximate cause of the plaintiff's injuries. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 1998-Ohio-602, 693 N.E.2d 271.

{¶ 10} It is undisputed that appellant was a business invitee at the time she entered appellees' cinema. An owner of a premises owes a business invitee a duty of ordinary care; he must maintain the premises in a reasonably safe condition so that patrons are not "unnecessarily and unreasonably exposed to danger." *Paschal v. Rite Aid Pharmacy, Inc.* (1985) 18 Ohio St.3d 203, 480 N.E.2d 474, citing *Campbell v. Hughes Provision Co.* (1950), 153 Ohio St. 9, 90 N.E.2d 694. This duty is predicated on the premise that a business owner has superior knowledge of dangerous conditions that may cause injury to those on the premises. *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 497, 693 N.E.2d 807, citing *Debie v. Cochran Pharmacy-Berwick, Inc.* (1967), 11 Ohio St.2d 38, 227 N.E.2d 603. An owner is not, however, an insurer of the patron's safety, and thus is not required to warn the patron of open and obvious dangers. *Paschal*, supra, at 203, citing *Sidle v. Humphrey* (1968), 13 Ohio St.2d 45, 233 N.E.2d 589, paragraph one of the syllabus.

{¶ 11} This maxim, commonly referred to as the open and obvious doctrine, essentially mandates that owners and occupiers of land have no duty to warn invitees of open and obvious dangers on the property. *Simmers v. Bentley Constr. Co.*, 64 Ohio St.3d 642, 644, 1992-Ohio-42, 597 N.E.2d 504. The theory behind this doctrine is that "the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves." Id. A plaintiff does not have to actually observe a condition for it to be considered open and obvious. *Leonard v. Modene & Assoc., Inc.*, Wood App. No. WD-05-085, 2006-Ohio-5471, ¶53. "The determining factor is whether the condition is or *could have been* seen, if the injured party had looked." (Emphasis sic.) Id.

{¶ 12} Appellant argues in her first assignment of error that genuine issues of material fact exist with regard to whether the transition from the entrance ramp to a set of stairs constituted an open and obvious condition, and thus summary judgment was improperly granted. Although the existence of a duty is a question of law to be decided by a court, the presence of an open and obvious condition may present a genuine issue of material fact for a jury to determine. *Klauss v. Marc Glassman, Inc.*, Cuyahoga App. No. 84799, 2005-Ohio-1306, ¶17. "Where only one conclusion can be drawn from the

established facts, the issue of whether a risk was open and obvious may be decided by the court as a matter of law. However, where reasonable minds could differ with respect to whether a danger is open and obvious, the obviousness of the risk is an issue for the jury to determine." (Internal citations omitted.) Id. at ¶18.

{¶ 13} In support of her argument that the stairs were not an open and obvious condition, appellant relies on the fact that the stairs had the same carpeting as the ramp and that the theater was dark. This argument lacks merit. Although there is conflicting testimony with regard to whether the theater was lit at the time of the event, appellant undertook an open and obvious danger and summary judgment was properly granted.

{¶ 14} The cinema's lighting system includes five canned overhead lights, five sconce lights on either side of the theater's walls, and stringed lights along the aisles and steps. In addition, the theater has three levels of lighting. The highest level occurs when the Regal First Watch and advertisements are playing. The intermediate level occurs while the previews are playing, and the lowest level of illumination occurs once the movie actually begins. Appellant, by her own admission, entered the movie theater either while the advertisements or the previews were playing. Because appellees had a policy of maintaining some sort of lighting during these times, appellant arguably could have seen the stairs had she been looking. This theory is supported by

Durma's deposition testimony where she said, "you know, there was still those little lights, you know, and there was light from the screen * * *."

{¶ 15} The photographs submitted in evidence, and relied upon by the trial court, support the theory that the stairs on which appellant fell were illuminated by string lights. Had appellant been cognizant of her surroundings and glanced at the floor, she arguably would have noticed the stairs and could have avoided her injuries altogether. It is undisputed, however, that appellant did not look down while proceeding through the theater in an attempt to find seating. In fact, appellant testified that her "attention was focused straight ahead and to look to get into a seat also." If the stairs were lit, as the evidence shows, appellant could have appreciated the risk and taken the appropriate precautions. As such, the condition was open and obvious, and summary judgment was properly granted.

{¶ 16} We recognize that an issue of fact exists with regard to whether there was any lighting in the theater when appellant fell. We find, however, that this is not a genuine issue of *material* fact. Assuming arguendo that the theater was completely dark, as appellant testified in her deposition, she would still be barred from recovery due to the "step-in-the-dark" rule. This rule mandates that an individual who intentionally steps from a lighted area to total darkness, without investigating the possible dangers concealed by the darkness, is liable for his or her own injuries. *Leonard*, supra.

{¶ 17} This case is analogous to *Draper v. Centrum Landmark Theater* (June 12, 1997), Cuyahoga App. No. 72000. In *Draper*, the plaintiff, a patron of a movie cinema, fell on a set of dimly lit stairs as she was exiting the theater. The plaintiff argued that the theater's darkness impaired her ability to see the stairs and thus constituted a hazardous condition. The court in *Draper* recognized that "it is well settled that darkness is always a warning, and for one's own protection it may not be disregarded." Id., citing *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, 239 N.E.2d 37. The court in *Draper* went on to hold that there can be no genuine issue of material fact when the defendant owed no duty to the plaintiff. Id.

{¶ 18} In this case, appellant ascribes her fall to the theater's alleged lack of lighting. Because darkness is always considered an open and obvious hazard, appellant's injuries are attributable to her own actions. As in *Draper*, "it is clear that appellant failed to proceed with due deference to the dangers attendant to moving through the dark in an unfamiliar building." Id.

{¶ 19} This case is also comparable to *McDonald v. Marbella Restaurant*, Cuyahoga App. No. 89810, 2008-Ohio-3667. In *McDonald*, the plaintiff fell on a set of unilluminated stairs as she was leaving a restaurant. Id. at ¶2. As in this case, the plaintiff in *McDonald* relied on the darkened stairway and the consistency in color of carpeting to argue that genuine issues of material fact existed as to whether the hazard was open and obvious. Id. at ¶31. The

plaintiff in *McDonald* admitted that her injury did not occur until she stepped into darkness. Id. at ¶32 ("She admitted that she placed her foot down despite not being able to see where it would land"). The court held the primary hazard that caused the plaintiff's injury was the darkness rather than the stairs. Id.

{¶ 20} As in *McDonald*, appellant's deposition testimony unequivocally shows that she proceeded through appellees' theater despite her inability to see the path in front of her. In fact, appellant made the following statements: "Because it was dark there. When I was sitting down or when I was down on the floor, of course I could see closer to the floor than when you're standing up and you're in a theater, a dark theater. I couldn't see the step at all." When asked what caused her to fall, appellant stated: "The transition to the step from the ramp without any kind of notice, warning, and in a dark theater where you can't see it."

{¶ 21} We find that the stairway itself, if illuminated, was an open and obvious condition that appellant would have recognized if she had merely looked at the floor as she was proceeding through the theater. However, even if the theater was entirely dark, as appellant alleges, this darkness was also an open and obvious hazard, and appellees cannot be held liable as a matter of law. For these reasons, we overrule appellant's first assignment of error.

Attendant Circumstances

{¶ 22} Appellant argues in her second assignment of error that the trial court committed reversible error in failing to consider attendant circumstances as factors when deciding whether the stairs constituted an open and obvious condition. This argument lacks merit.

{¶ 23} Attendant circumstances act as an exception to the open and obvious doctrine and can create issues of fact and render summary judgment inappropriate. *Klauss*, supra, at ¶20; *Cooper v. Meijer Stores Ltd. Partnership*, Franklin App. No. 07AP-201, 2007-Ohio-6086. Although no precise definition of "attendant circumstances" exists, they include "'any distraction that would come to the attention of [an individual] in the same circumstances and reduce[d] the degree of care an ordinary person would exercise at the time.'" *McGuire*, supra, at 499, quoting *McLain v. Equitable Life Assur. Co. of U.S.* (Mar. 13, 1996), Hamilton App. No. C-950048. "Attendant circumstances" also refer to "all facts relating to the event, such as time, place, surroundings or background and the conditions normally existing that would unreasonably increase the normal risk of a harmful result of the event." *Klauss*, supra, at ¶20, citing *Menke v. Beerman* (Mar. 9, 1998), Butler App. No. CA97-09-182, and *Cash v. Cincinnati* (1981), 66 Ohio St.2d 319, 421 N.E.2d 1275.

{¶ 24} Appellant argues that the lack of lighting, the consistency in the carpet pattern, and the fact that the theater was crowded were all attendant circumstances. Appellant essentially argues that the presence of these circumstances would distract a reasonable person and cause them to exercise a lower standard of care in maneuvering through the theater. We find this argument unpersuasive.

{¶ 25} The plaintiffs in *Cooper*, supra, and *Bounds v. Marc Glassman, Inc.*, Cuyahoga App. No. 90610, 2008-Ohio-5989, made a similar argument. In both *Cooper* and *Bounds*, the plaintiffs were injured in crowded parking lots and argued that the crowded nature was an attendant circumstance that obviated the application of the open and obvious doctrine. Both courts relied on the fact that parking lots are often crowded to find that the attendant circumstances argument was unavailable. *Cooper*, at ¶17; *Bounds*, at ¶25. In essence, "[t]he breadth of the attendant circumstances exception does not encompass the common or the ordinary." *Cooper*, supra, at ¶17.

{¶ 26} We cannot find that the consistency in the carpet pattern on both the ramp and the stairs constitutes an attendant circumstance. It is illogical to assume that appellant was distracted by this factor when she testified in her deposition that she was looking straight ahead as she proceeded through the theater. In addition, as it is common for movie theaters to be dark and crowded, we cannot find that these factors are attendant circumstances.

Although the evidence shows that appellant and Durma were attending a new release, there is nothing to suggest that the attendance in the theater was any different than a patron would ordinarily encounter. Without more, this does not create a distraction that would reduce the degree of care exercised by an ordinary person. *Bounds*, supra, at ¶25, citing *Seifert v. Great Northern Shopping Ctr.* (Nov. 5, 1998), Cuyahoga App. No. 74439. As such, no attendant circumstances existed that would prevent application of the open and obvious doctrine, and appellant's second assignment of error is overruled.

Conclusion

{¶ 27} Regardless of the theory presented, appellant undertook an open and obvious hazard when maneuvering through appellees' movie theater. If the stairway was lit, appellant would have been able to recognize its presence, and thus appellees were under no duty to warn appellant. If, however, the stairway was dark, as alleged by appellant, she undertook an open and obvious risk by proceeding in the dark, and appellees cannot, as a matter of law, be held liable for her injuries. In addition, no attendant circumstances existed to obviate the application of the open and obvious doctrine. As such, no genuine issue of material fact existed and summary judgment was properly granted.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

ANN DYKE, P.J., CONCURS;
JAMES J. SWEENEY, J., DISSENTS (WITH SEPARATE OPINION)

JAMES J. SWEENEY, J., DISSENTING:

{¶ 28} I respectfully dissent and would find that genuine issues of material fact remain and accordingly the trial court erred by granting summary judgment in Regal Cinemas' favor. See *Sanders v. Anthony Allega Contractors*, Cuyahoga App. No. 74953 (finding genuine issues of material fact existed that precluded summary judgment where appellant fell into a hole after crossing a highway ramp and walking in the dark through a construction site); see, also, *Demrock v. D.C. Entertainment & Catering, Inc.*, Wood App. No. WD-03-087, 2004-Ohio-2778, ¶8-9 (finding it "impossible on summary judgment to determine if the condition of the stairs and lighting [were] apparent enough to create an adequate warning of any danger"), citing *Lovejoy v. Sears, Roebuck & Co.* (June 19, 1998), Lucas App. No. L-98-1025; *Brown v.*

Marcus Theaters Corp., 154 Ohio App.3d 273, 2003-Ohio-4852, at ¶22-28 (darkness or low light are not open and obvious risks when the invitee cannot discern the dangerous condition); *McGowan v. St. Antonius Church* (Apr. 6, 2001), Hamilton App. No. C-000488 (degree of lighting changed, therefore, question of fact existed as to "whether any change in the lighting would have created an unreasonably dangerous condition on the premises").