STATE OF MICHIGAN

COURT OF APPEALS

PAMELA WEST,

Plaintiff-Appellant,

v

OLYMPIA ENTERTAINMENT, INC., A Michigan Corporation, d/b/a JOE LOUIS ARENA,

Defendant-Appellee.

UNPUBLISHED
March 19, 2002

No. 229044
Wayne Circuit Court
LC No. 99-911904-NZ

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action involving a premises liability claim and an alleged violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*[1] We affirm.

I. Background Facts and Procedural History

Plaintiff was hit by a motor vehicle approximately fifteen years ago and is a disabled person within the meaning of the PWDCRA. Since the accident, plaintiff claims that her left knee gives out periodically and that the condition has grown progressively worse. Plaintiff testified that her doctors have prescribed the use of a cane or other walking device for her condition.

On October 7, 1998, plaintiff purchased tickets from defendant's ticket agent for the Barnum and Bailey Circus appearing at Joe Louis Arena. According to plaintiff, she asked defendant's ticket agent about the availability of handicapped parking and an elevator to get into the arena. Plaintiff testified that she never asked for handicapped accessible seating.[2] According

[1] This PWDCRA was formally known as the Michigan Handicappers' Civil Rights Act.

[2] This admission was contrary to plaintiff's complaint which stated that she requested seating in the handicap seating area but that defendant's agent failed to honor this request.

to plaintiff's complaint, defendant's ticket agent provided her with tickets on the second deck of the arena.

The next day plaintiff went to the circus with her friend, Chauncey Joiner, and four small children. Plaintiff admitted that she did not bring her cane to Joe Louis Arena. Mr. Joiner testified that after parking in a handicap space they had to walk a fair distance to get to their seats. An usher or security guard, who was near plaintiff's ticketed seats, directed them to their seats. Mr. Joiner claimed that this employee noticed plaintiff's difficulty in reaching the seats and stated that if she had known sooner she would have directed them to the handicapped seating area located below. Plaintiff admitted that she never told any of defendant's employees that her seat was unacceptable because of her condition. Prior to the start of the circus, plaintiff moved up one row, to row 14, so that she could extend her left leg. Plaintiff stated that when the circus began the lights in the arena were turned down.

Plaintiff testified that during intermission she went with her son to use the restroom and to visit the concession stand. When they were ready to return to their seats, plaintiff stated that the show had already started and that the house lights were down. While the first set of stairs leading to the landing were still lit from the hallway light, there were no aisle lights or foot lights on the second flight of stairs leading to plaintiff's seat. Defendant testified that its ushers were equipped with flashlights to escort people to their seats after the lights were down. Plaintiff testified that she did not see any of defendant's employees in the area of her seats when she began to ascend the second flight of stairs.

Plaintiff stated that she slowly ascended the stairs and made it to the landing right below where she had been sitting. According to plaintiff, as she began to place her right leg on the next step off the landing, she missed the step and fell backwards over row 13 and into the cement guardrail. Plaintiff was taken to defendant's first aid station and an ambulance subsequently took her to Henry Ford Hospital. After waiting four hours without being treated by a doctor, plaintiff left the hospital.

Plaintiff filed a complaint against defendant on April 20, 1999. In her complaint, plaintiff alleged that defendant's sales agent failed to provide her tickets to the handicapped area of the arena. The complaint stated that this denied plaintiff "full and equal accommodations of a public place" contrary to the PWDCRA. Under the PWDCRA, defendant, as a "place of public accommodation," has a duty to accommodate plaintiff's needs as a handicapped individual. By not making handicapped seating available to plaintiff, the complaint alleged that defendant breached this duty.

Plaintiff's complaint further stated that due to defendant's negligence she was forced to climb several steps in the dark and that she tripped and sustained several injuries. The complaint alleged that defendant was negligent because it failed to adequately illuminate its steps, failed to assist plaintiff in returning to her seat, and failed to reseat plaintiff in appropriate handicap seating. As a result of this negligence, plaintiff's complaint stated that she endured medical expenses, pain and suffering, humiliation, disability, mental anguish, and embarrassment.

On February 18, 2000, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Specifically, defendant argued that plaintiff failed to state a viable claim under the PWDCRA because defendant provided seating to individuals with disabilities.

Further, defendant claimed that plaintiff failed to present any evidence of a defective condition that was caused by the active negligence of defendant. Moreover, even if there was a defect, defendant argued that it was open and obvious to plaintiff. The circuit court granted defendant's motion for summary disposition based on the reasoning set forth in defendant's summary disposition motion and brief.

On July 12, 2000, plaintiff filed a Motion for Reconsideration with the trial court. This motion was denied as untimely and for failure to state any palpable error.

II. Standard of Review

A trial court's grant of summary disposition is reviewed de novo on appeal. *Silver Creek Township v Corso*, 246 Mich App 94, 97; 631 NW2d 346 (2001). In this case, the trial court did not specify the subrule it was using to grant summary disposition. However, in its motion for summary disposition defendant looked beyond the pleadings and considered other documentary evidence.[3] Because the trial court adopted the reasoning and arguments presented in defendant's motion, we will treat the motion as granted under MCR 2.116(C)(10). See *Larry S. Baker, PC v City of Westland*, 245 Mich App 90, 93; 627 NW2d 27 (2001).

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

III. Premises Liability Claim

Plaintiff first maintains that the trial court erred in finding that defendant did not have a duty to protect plaintiff because the unlit stairway was an open and obvious condition. Rather, plaintiff contends that the stairs, coupled with poor lighting conditions, created a foreseeable and unreasonable risk of harm. We disagree.

Generally, an "invitor's legal duty is 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). However, this duty does not normally extend to the removal of open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). A danger is open and obvious if a person of average intelligence would be able to discover the danger and appreciate the risk upon casual

[3] When a motion is based on MCR 2.116(C)(8) only the pleadings are considered. MCR 2.116(G)(5); *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998).

inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). Normally, "a premises possessor is not required to protect an invitee from open and obvious dangers, but, if *special aspects* of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo, supra* at 517 (emphasis added). Only those special aspects that present "a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519.

A. Existence of a Defective or Dangerous Condition

Plaintiff claims that the unlit stairs were a dangerous condition and that defendant was aware of the danger. According to plaintiff, the fact that defendant equipped its employees with flashlights to help patrons back to their seats is evidence of defendant's awareness of the danger. Plaintiff further suggests that "[a] reasonable jury could find that Defendant knew of the dangerous condition created by lighting that was insufficient to allow Plaintiff to see the step in front of her."

Conversely, defendant argues that plaintiff failed to establish the existence of a defective condition. Defendant notes that plaintiff never claimed that the steps themselves were defective; rather, she pointed to the inadequate lighting as a unique condition surrounding the stairs. However, defendant maintains that plaintiff failed to show that the lighting was inadequate. While the house lights were dimmed in the arena, defendant claims that plaintiff's testimony established that she was aware of and could actually see the steps. Specifically, defendant points to plaintiff's testimony that "I took my right leg to step up on the level to get to my seat and missed the step" and "when the fall occurred I went to extend my right leg to the next step." Defendant further opines that plaintiff must have known about the steps because she had already used them and sat right next to them during the first part of the circus.

Based on the record, we find that plaintiff was aware of the stairs and the lighting conditions. However, the testimony cited by defendant does not establish that plaintiff could actually see the stairs. At most, plaintiff's testimony indicates that she was attempting to climb the stairs back to her seat. Further, plaintiff's awareness of the stairs and the lower lighting level does not automatically eliminate all risk. See *Abke v Vandenberg*, 239 Mich App 359, 363; 608 NW2d 73 (2000), citing *Hottmann v Hottmann*, 226 Mich App 171, 176; 572 NW2d 259 (1997). Nevertheless, we find that any danger posed by the stairs and lower lighting levels was open and obvious to the average user with ordinary intelligence. See *Novotney, supra* at 474-475.

B. Application of the Open and Obvious Doctrine

The danger of tripping and falling on steps is generally open and obvious and a failure to warn theory cannot establish liability. *Bertrand, supra* at 614. Our Supreme Court has also stated that "ordinary steps cannot be considered to present an unreasonably dangerous risk of harm." *Lugo, supra* at 525, n 6; see also *Bertrand, supra* at 616-617. Indeed, people are expected to exercise reasonable care for their own safety; therefore, landowners are not required to make their premises "foolproof." *Bertrand, supra* at 616-617. However, the unique character, location, or conditions surrounding stairs have the potential to make them unreasonably dangerous. *Id*. at 617.

In *Lugo*, our Supreme Court thoroughly explained the concept of "special aspects" and when they serve to remove an ordinarily observable condition from the open and obvious danger doctrine. Basically, special aspects are those conditions that create a high risk of harm or severity of harm if not avoided. *Lugo, supra* at 518-519. The *Lugo* Court provided two scenarios to demonstrate when a condition could be considered unavoidable or unreasonably dangerous. *Id*. at 518-519. *Lugo* noted that in the following situation the open and obvious doctrine would not apply because the condition would be essentially unavoidable.

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. [*Id*. at 518.]

Lugo next discussed the special aspects of a thirty foot unguarded and unmarked pit in a parking lot as posing an unreasonable risk of severe harm.

> The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. [*Id*.]

Lugo has clearly established a high standard for determining what constitutes a special aspect. Without the existence of a special aspect, an action premised on a typical open and obvious condition will be barred by the open and obvious danger doctrine. *Id*. at 519-520.

In the instant case, plaintiff suggests that the lack of proper illumination was a condition surrounding the stairs that created an unreasonable risk of harm. According to plaintiff, defendant should have foreseen the potential harm to plaintiff despite the open and obvious nature of the lighting. However, defendant claims that plaintiff was aware of the lighting and that the level of illumination was consistent throughout the performance.[4] Defendant essentially argues that there was nothing unusual about the lights being dimmed to create the type of "unique circumstances" discussed in *Bertrand*. Therefore, defendant maintains that the open and obvious doctrine bars liability.

Applying the principles established in *Bertrand* and *Lugo*, we do not find that the danger in the instant case was unavoidable or that it presented a uniquely high likelihood of severe harm or death. Plaintiff has failed to present any evidence that the unlit stairway to her seat was an unavoidable risk. Unlike the example in *Lugo*, plaintiff was not trapped inside defendant's arena so that she was effectively forced to transverse the unlit stairway. Rather, plaintiff had several

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[4] We note that the portion of Justice Weaver's opinion in *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135; 565 NW2d 383 (1997), cited by defendant to suggest that the consistent inadequate illumination was customary for a circus, is not binding precedent on this Court because fewer than four Justices agreed. See *Cox v City of Dearborn Heights*, 210 Mich App 389, 396; 534 NW2d 135 (1995).

other available options. Indeed, plaintiff could have simply remained on the landing of the stairway, returned to the lighted concessions area, or waited for the lights to come back on. A reasonable jury could not conclude that plaintiff was forced to return to her seat in the dark.

Additionally, plaintiff has failed to offer any evidence that the conditions of the steps were so unreasonably dangerous that they posed a likelihood of severe injury or death. Plaintiff does not argue that the stairs were defective in any way and it is undisputed that she was aware of their existence. Plaintiff was also aware that the house lights were down when she decided to climb the stairs. More importantly, the risk of harm in this case does not rise to the degree of harm discussed in *Lugo*. Indeed, there is a difference in the potential for harm in tripping on a step and falling into a thirty foot hole in a parking lot. Thus, we find that no reasonable juror could conclude that the darkness surrounding the stairs during the circus was such a unique circumstance that it posed an unreasonable risk of harm.

Consequently, we conclude that plaintiff's premises liability claim is barred by the open and obvious danger doctrine.

IV. Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*.

Plaintiff next argues that the trial court erred in holding that defendant did not violate the PWDCRA. Specifically, plaintiff maintains that defendant was aware of her disability but failed to offer her seats in the area designated for disabled individuals. Plaintiff suggests that the failure to offer accommodations is akin to a denial and contrary to her civil rights. We disagree.

The PWDCRA requires defendant, as a place of public accommodation, to provide an "equal opportunity" for disabled individuals to use and enjoy its services and facilities. The applicable portion of the PWDCRA provides:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation or public service because of a disability that is unrelated to the individual's ability to utilize and benefit from the goods, services, facilities, privileges, advantages, or accommodations or because of the use by an individual of adaptive devices or aids. [MCL 37.1302(a).]

To sustain an action under the PWDCRA plaintiff is required to make a prima facie showing that defendant failed to accommodate her disability. *Cebreco v Music Hall Center for the Performing Arts, Inc*, 219 Mich App 353, 360; 555 NW2d 862 (1996). Thereafter, the burden shifts to defendant to show that the accommodation required would impose undue hardship. *Id*.

In *Lindberg v Livonia Public Schools*, 219 Mich App 364; 556 NW2d 509 (1996), this Court was faced with a similar situation. The plaintiff in *Lindberg* was a paraplegic due to an accident and decided that he wanted to attend classes to continue his welding career. Before plaintiff's classes began, the center asked what accommodations needed to be made for him to practice his welding. Plaintiff asked that the table inside the welding booth be moved and the center accommodated this request. *Id*. at 366. When plaintiff suffered third-degree burns he

claimed that the center failed to accommodate his disability. *Id*. at 366-367. However, this Court found that the center responded to every request made by the plaintiff regarding what was necessary to accommodate him. The Court further held that "[i]t [was] not reasonable to expect that an institution or an employer will be better aware of the needs of a handicapped individual than the individual himself." *Id*. at 367.

There is no dispute in this case that defendant provided seating for disabled individuals. In fact, plaintiff testified in her deposition that she saw the available seating area while she was being directed to her ticketed seat. However, plaintiff argues that defendant denied her the opportunity to avail herself of these accommodations because no one affirmatively asked her if she needed to be seated in that area. We find that this argument is without merit. Plaintiff admitted that she never specifically asked if she could be seated in a more accessible area. The fact that defendant's usher noted that plaintiff could have sat in that area, but guided plaintiff to her ticketed seat, does not amount to a denial or refusal to accommodate plaintiff's disability.

Like the situation in *Lindberg, supra*, defendant accommodated all of plaintiff's requests concerning handicapped parking and elevator access. Because plaintiff failed to request accessible seating she can not claim that defendant denied her the opportunity to use or enjoy its facilities. "While the [PWDCRA] expressly places an obligation upon an institution or employer to make certain accommodations to a handicapped individual, it does not impose upon them the additional obligation to determine which accommodations are necessary to respond to each individual's distinct handicap or special needs." *Id*. at 367-368.[5] Plaintiff was in the best position to determine what type of seating she required and it is unreasonable to expect defendant to make these decisions for her.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper

[5] We note that plaintiff has failed to provide any caselaw to support her contention that defendant was required to affirmatively offer her accessible seating to comply with the PWDCRA. This Court is not required to search for law to sustain a party's argument. *Chapdelaine v Sochocki*, 247 Mich App 167, 174; 635 NW2d 339 (2001).