STATE OF MICHIGAN

COURT OF APPEALS

PATRICIA TRAPANI and ANTHONY GARY TRAPANI,

Plaintiffs-Appellants,

v

M.J.R. GROUP, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
January 17, 2006

No. 255696
Wayne Circuit Court
LC No. 03-315973-NO

Before: O'Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant, pursuant to MCR 2.116(C)(10), and dismissing their claims of negligence and loss of consortium. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Patricia Trapani sustained injuries when she fell while descending a stairway at defendant's movie theater. Plaintiffs alleged negligent maintenance of a defective condition on the stairway, namely frayed and ripped carpeting on the riser.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) entitles the movant to summary disposition if there is no genuine issue of material fact, and the facts fail to establish the legal elements of the non-movant's claims. When reviewing a motion under this rule, we consider "the pleadings, depositions, admissions, and documentary evidence" submitted by the parties in the light most favorable to the non-moving party. MCR 2.116(G)(5).

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A possessor of land owes an invitee a duty to reasonably prepare and make safe the premises, encompassing both the duties of disclosure of known dangerous conditions and of reasonable inspection and repair. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). However, "if the particular activity or condition creates a risk of harm only because the invitee

does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). To determine whether a condition is open and obvious as a matter of law, a court must evaluate whether the plaintiff has "come forth with sufficient evidence to create a genuine issue of material fact that an ordinary user upon casual inspection could not have discovered the" condition. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Because Patricia was undisputedly an invitee, the only issue on appeal was whether the condition causing her fall was open and obvious. Viewed in a light most favorable to plaintiffs, the record suggested that the theater was dimly illuminated with mid-level lighting and stairwell floor lights. Patricia allegedly stepped on a fold in the stairway carpet, which was ripped and detached from the stair. As opposed to parking lot potholes, see *Lugo v Ameritech Corp*, 464 Mich 512; 629 NW2d 384 (2001), and ordinary cement steps, see *Bertrand*, *supra*, folded and torn carpeting on a dimly-lit theater stairway is not normally anticipated or easily detected and avoided with the exercise of ordinary observation and reasonable care. Accordingly, viewing the evidence most favorably to plaintiffs, they presented sufficient evidence to raise a material question of fact whether an ordinary patron would have detected and avoided the condition exercising ordinary observation and reasonable care.[1] *Novotney*, *supra*. Because plaintiffs' documentation sustains a prima facie case for negligence, the trial court erred in granting defendant's motion for summary disposition.

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[1] We note that the trial court's grant of summary disposition was based in part upon a misinterpretation of *Lugo*. Citing *Lugo*, the trial court noted that its decision was based on the fact that plaintiffs could not establish that Patricia "exercised due care for her safety." In *Lugo*, however, the Supreme Court expressly rejected this type of analysis as it applies to open and obvious determinations. The Court noted that "in resolving an issue regarding the open and obvious doctrine, the question is whether the *condition of the premises* at issue was open and obvious . . . . [T]he fact that the plaintiff was also negligent [does] not bar a cause of action. This is because Michigan follows the rule of comparative negligence." *Lugo*, *supra* at 523. In relying on its misreading of *Lugo*, the trial court granted summary disposition because it believed that Patricia, through her admissions, could not plausibly dispute that her negligence may have contributed to her injury. But even if accurate, this finding would not automatically mean that the condition at issue was open and obvious. On the contrary, plaintiffs' evidence suggested that the condition was not open or obvious in the dim theater, so Patricia's alleged carelessness, while perhaps a contributing factor to the injury, does nothing to diminish defendant's own obligation to its patrons. To hold otherwise would distort the legal analysis and require an ad hoc, wholesale determination of each defendant's general duty based on a given plaintiff's actions and final injuries rather than the plaintiff's legal status. This would ultimately hurt defendants, who could never rest assured that they had fulfilled their established legal duties.

Reversed and remanded for further proceedings on plaintiffs' claims. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot