STATE OF MICHIGAN

COURT OF APPEALS

CONSTANCE JACKSON-RUFFIN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2008
v	No. 276144 Wayne Circuit Court
METRO CARS, INC., Defendant-Appellant.	LC No. 05-504665-NI

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Following a jury trial, judgment was entered in favor of plaintiff Constance Jackson-Ruffin in this third-party auto negligence action. Defendant Metro Cars, Inc. appeals as of right the trial court order denying its subsequent motions for judgment notwithstanding the verdict (JNOV) and a new trial. We affirm.

In March of 2004, plaintiff rode a passenger shuttle owned and operated by defendant. When plaintiff exited the shuttle through its only door, she slipped on the shuttle's snow-covered steps and suffered serious injuries to her left ankle and foot, which included a severely comminuted fracture of the heel bone and permanent nerve damage. As a result of her injuries, plaintiff's left foot is permanently misaligned, she experiences pain with walking, she retired early from her position as a court clerk and began working as a greeter for Meijer, Inc, and she has difficulty completing daily tasks. Plaintiff subsequently filed a negligence claim against defendant. Following trial, the jury found that defendant was negligent and that such negligence was a proximate cause of plaintiff's injuries, awarded $600,000 in non-economic damages, and concluded that plaintiff was 25 percent comparatively negligent. The trial court denied defendant's subsequent motions for JNOV and a new trial. The following appeal ensued.

I

Defendant first argues that the trial court erred in denying its motion for a new trial. According to defendant, a new trial is warranted because the trial court failed to instruct the jury

on the open and obvious danger doctrine.[1] We disagree. A trial court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A trial court's determination whether an instruction is applicable to the facts of the case is also reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

This Court has previously explained that applicability of the open and obvious danger doctrine depends on the theory of liability, and thus, the nature of the duty at issue. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006); *Laier v Kitchen*, 266 Mich App 482, 489, 493; 702 NW2d 199 (2005). This Court has held that the open and obvious danger doctrine applies only to premises liability actions and certain product liability cases involving failure to warn, but it has specifically been held not to apply to claims of ordinary negligence. *Hiner, supra* at 615-616; *Laier, supra* at 484, 487, 491. Where the injury arises out of a condition of the land, rather than out of the activity or conduct that created the condition of the land, the action lies in premises liability.[2] *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

This case is neither a premises liability nor a products liability action. Rather, it is a third-party ordinary negligence claim to which the open and obvious danger doctrine does not apply. Defendant was obligated to exercise due care in the maintenance of its vehicle and transportation of its shuttle passengers, including ensuring a safe access to and egress from the shuttle.

Defendant argues that the open and obvious danger doctrine should apply to the dangerous condition in question because it involved slippery steps on a passenger shuttle. In doing so, defendant cites a 19th century case, *Caniff v The Blanchard Navigation Co*, 66 Mich 638; 33 NW 744 (1887). In *Caniff*, the plaintiff was an experienced sailor. *Id*. at 646. While walking on the defendant's ship in the dark while the vessel was stowed away off-season, the plaintiff fell through an open hatchway. *Id*. at 639-640. Our Supreme Court held that the plaintiff, who had enough experience to realize the danger of his conduct, was precluded from recovery because his own negligence contributed to his injury. *Id*. at 646. The Court did not specifically use the term "open and obvious" in its reasoning. However, in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 91; 485 NW2d 676 (1992), the Court cited *Caniff* as being an important case in the development of the open and obvious danger doctrine.

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[1] In its appellate brief, defendant contends that the trial court erred in not granting its motion for JNOV on this issue. Review of the trial court record, however, reveals that defendant did not raise the open and obvious danger doctrine in its motion for JNOV.

[2] In premises liability actions, "liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct." *Laier, supra* at 493.

Caniff, decided in 1887, does not explicitly cite the open and obvious danger doctrine, which had not yet been fully developed. The mere fact that *Caniff* may have helped form the theoretical basis for what would become the open and obvious danger doctrine is not in itself evidence that the doctrine applies to dangerous conditions that exist on passenger vehicles. This Court has explicitly stated that the open and obvious danger doctrine applies in premises liability cases, which arise out of injuries occurring on land. See *Laier, supra*. *Caniff* has no additional bearing on the outcome of this case.

The out-of-state authority cited by defendant is also unpersuasive. Defendant cites two Missouri Court of Appeals cases, each involving automobile accidents. Decisions of the courts of another state are not binding on this Court but may be treated as persuasive authority. *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 559 n 38; 705 NW2d 365 (2005). With regard to this issue, however, Michigan law clearly establishes that the open and obvious danger doctrine does not apply to dangerous conditions existing on passenger vehicles, and we are not persuaded that this firmly established policy should change. See *Hiner*, *supra*; *Laier*, *supra*. As with all claims involving negligence, to the extent plaintiff's own conduct should be factored into the equation, the comparative negligence doctrine applies, and in this matter the jury found plaintiff 25 percent comparatively negligent.

Even if one were to apply the open and obvious danger doctrine to dangerous conditions on passenger vehicles, the dangerous condition in this case was effectively unavoidable and would, therefore, form a basis for liability. It is undisputed that in order to exit the shuttle, plaintiff had to traverse the steps on which she slipped, which were located at the shuttle's only exit door. See *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001) (stating that standing water in a commercial building is effectively unavoidable when it blocks the building's only exit).

Because the open and obvious danger doctrine is inapplicable to this case, the trial court properly denied defendant's motion for a new trial.

II

Next, defendant argues that the trial court erred in denying its motion for JNOV because plaintiff failed to establish that she suffered a serious impairment of body function. We disagree. We review a trial court's denial of a motion for JNOV de novo, viewing the evidence in the light most favorable to the nonmoving party. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). JNOV should be granted only if the evidence fails to establish a claim as a matter of law or, in other words, if no factual question exists on which reasonable jurors could honestly have reached different conclusions. *Id.*; *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

In order to maintain a cause of action for non-economic damages arising out of an individual's ownership, use, or maintenance of a motor vehicle, a plaintiff must demonstrate that she "suffered death, serious impairment of body function, or permanent serious disfigurement." *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); MCL 500.3135(1). At issue here is whether plaintiff suffered a serious impairment of body function, which is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). On appeal, the parties do not

dispute that plaintiff suffered an objectively manifested impairment of an important body function, but rather, whether her injury has affected her general ability to lead her normal life.

As indicated in *Kreiner*, in determining whether an injury has affected a plaintiff's general ability to lead her normal life, "a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life." *Kreiner*, *supra* at 132-133. In conducting the analysis, the court should consider, among other factors: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id*. at 133. The above list is not exhaustive, nor should any of the individual factors be considered to be dispositive of the issue. *Id*. at 133-134. The *Kreiner* Court further explained that, "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead [her] normal life has not been affected." *Id*. at 131.

When viewing the evidence in the light most favorable to plaintiff and considering the factors provided in *Kreiner*, the evidence presented at trial established that the serious impairment to plaintiff's left ankle and foot affected her general ability to live her normal life. Plaintiff testified that, before the accident, she did not intend to retire from her job as a court clerk until she was 70 years old. As a result of the injury, she retired at the age of 61. Plaintiff testified that she is in pain every time she takes a step and her testimony was supported by the findings of Dr. Paul Dougherty and Dr. Mark Rottenberg. According to plaintiff, she is no longer able to dance or run, both things she previously enjoyed doing, and she still struggles with daily life tasks. While it is true that Dr. Milton Green testified that nothing prevented plaintiff from working as a court clerk, review of his deposition reveals that his familiarity with the requirements of that job are superficial at best. In contrast, plaintiff testified regarding the requirements of her job and the amount of activity required to perform her tasks to satisfaction.

According to the expert testimony presented at trial, plaintiff suffered a serious injury from which she is not expected to fully recover. Her condition will continue to deteriorate due to her traumatic arthritis and the thinning of her heel bone. Additionally, plaintiff's right leg will deteriorate at an accelerated pace as she will be forced to favor it because of the weakened state of her left foot. Further, as previously described, there was evidence indicating that the impairment prevents her from ever returning to her career of choice. When viewing this evidence in the light most favorable to plaintiff, defendant cannot establish that her claim fails as a matter of law. Therefore, we find that the trial court properly denied defendant's motion for JNOV.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane M. Beckering