

STATE OF MICHIGAN
COURT OF APPEALS

VELMA O. HENDERSON,

Plaintiff-Appellant,

v

PKT, INC., and PALACE SPORT &
ENTERTAINMENT, INC., d/b/a DTE MUSIC
THEATRE,

Third-Party Plaintiffs/Defendants-
Appellees,

and

CENTERPLATE, INC.,

Third-Party Defendant-Appellee.

UNPUBLISHED

October 4, 2005

No. 253439

Oakland Circuit Court

LC No. 02-046127-NO

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition in favor of defendants because a hazard was open and obvious without special aspects making it unreasonably dangerous. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff argues that the circuit court erred by determining (1) the hazard was open and obvious, (2) the alleged hazard lacked special aspects making it unreasonably dangerous, and (3) the open and obvious doctrine applied to the third-party defendant, an independent concessions contractor. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

First, we agree that the trail of water over the walkway, which apparently caused plaintiff to slip and fall, was open and obvious. Plaintiff attended a concert at an outdoor music theatre with three companions. Upon exiting the theatre, plaintiff was injured when she slipped and fell. She claims that her accident was caused by a one-foot-wide trail of water that "trickled" from a beverage stand, down a paved and inclined walkway, to a drain. Plaintiff contends that the condition was not open and obvious because an "average person of ordinary intelligence" would not have discovered the water because the area was dark and crowded, and the water blended in

with the black asphalt. To establish a prima facie negligence case, a plaintiff must prove: (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).

“[T]he ‘no duty to warn of open and obvious danger’ rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case.” *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992). “[I]f 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) (emphasis in original). There is no dispute here that plaintiff, as a concert attendee, was an invitee.

Plaintiff stated that immediately before the accident, she could see her husband exiting the restroom approximately twenty feet away from where she waited for him. Likewise, her companions testified that there was adequate visibility and that upon looking at the ground following plaintiff’s accident, they were able to view the trail of water running from its point of origin down to the drain. The fact that the water was readily observable to plaintiff’s companions answers the inquiry as to whether “an average user of ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.” *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff’s argument relies upon the fact that she found the ground to be generally dry that night and that she did not observe the trail of water until after she fell. Her reasoning is erroneous because the relevant inquiry is not whether *plaintiff* actually saw the trail of water, but whether a *reasonable person* proceeding from her perspective would have seen it and recognized its risk. *Id.* The Court must look to the objective nature of the condition at issue. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 524; 629 NW2d 384 (2001). Based upon plaintiff’s ample opportunity to observe the condition and the fact that her companions observed it upon casual inspection after the incident, we conclude that there is no genuine issue of material fact but that the trail of water was open and obvious.

Plaintiff’s second argument is that even if the trail of water constituted an open and obvious hazard, defendants should still be held liable because it presented an “unreasonable risk of harm.” The *Lugo* Court stated, “[O]nly those special aspects that give rise to 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. Plaintiff claims special aspects were present in this case based on the “totality of the circumstances.” She lists several factors that she believes aggregated to create the unreasonable risk, including (1) the area where the accident occurred was dimly lit and shadowed by trees, (2) the ground was generally dry that evening, and thus the water was unanticipated, and (3) the path on which the accident occurred was the only means of “ingress and egress” from the facility.

But, upon consideration of the sum of these and other factors, we find that plaintiff’s case does not meet the standard for special aspects articulated in *Lugo*. There is no evidence that the trail of water gave rise to a “uniquely high likelihood of harm” or that it was “an unavoidable risk.” Severe harm was not likely, as illustrated by the fact that thousands of patrons passed around or through that same trail of water without injury. In addition, the depositions of

plaintiff's companions indicate that the trail of water was relatively insubstantial and easily avoidable. No reasonable person could view the water as presenting an unreasonable risk of harm. Therefore, the evidence did not create a genuine issue of material fact whether "special aspects" removed the condition here from the open and obvious danger doctrine.

As to plaintiff's final argument, we conclude that third-party defendant, Centerplate, was entitled to invoke the open and obvious doctrine. Centerplate's concessions contract with Palace permitted Palace to decide which items would be sold and prices, but Centerplate staff and volunteers operated the beverage carts. Plaintiff argues that her claim against Centerplate is one of general negligence, not premises liability. But prior to appeal, plaintiff emphasized Centerplate's *occupancy* or *possession* of the land, not its *conduct*. Plaintiff's complaint describes the trail of water as an unavoidable or unreasonably dangerous *condition on the land*.

Premises liability requires both possession and control over the land. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Plaintiff argues that Centerplate, as the concessions contractor, did not have the requisite dominion and control over the property to invoke the open and obvious doctrine. This argument relies heavily upon the rationale that Centerplate's interactions with the property were merely incidental; however, the facts indicate that although Centerplate is an independent contractor, it was the music theatre's exclusive concessions provider, and its employees operated all the relevant beverage stands. The trial court correctly recognized under their contract both Centerplate and Palace possessed the premises where plaintiff's accident occurred. So, the circuit court correctly ruled that Centerplate was entitled to invoke the open and obvious doctrine and, thus, it was entitled to summary disposition as there were no genuine issues of material fact.

In sum, we conclude that the circuit court properly granted summary disposition in favor of defendants. The trail of water was open and obvious, and there was no evidence of "special aspects" rendering this condition unreasonably dangerous. Further, Centerplate could also invoke the open and obvious doctrine because it was a possessor of the property under its contract with Palace.

We affirm.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Jane E. Markey