STATE OF MICHIGAN

COURT OF APPEALS

SHERYL L. BALSER,

Plaintiff-Appellant,

v

SPECTACOR MANAGEMENT GROUP, d/b/a SMG,

Defendant-Appellee,

and

DP FOX FOOTBALL HOLDINGS, LLC, d/b/a GRAND RAPIDS RAMPAGE,

Defendant.

UNPUBLISHED
July 20, 2006

No. 259810
Kent Circuit Court
LC No. 03-002168-NO

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right an order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff won tickets through a radio promotion to attend a Grand Rapids Rampage arena football game. At the game, plaintiff sat in the "Bud Zone," a separate spectator area behind the end zone with tables and barstools on an elevated platform. The platform was open-sided and had no guardrails, but black curtains and promotional banners were hung between the back of the platform and retracted bleachers attached to the walls behind the end zone. Large gaps in the curtains clearly revealed that the retracted bleachers abutted the rear of the platform. Behind plaintiff, however, there was an open, triangle-shaped space between the bleachers and the platform. The drop-off could not be seen because of the curtains and banners. Plaintiff testified that she saw neither the retracted bleachers through the gaps in the curtains nor the open space behind the curtains to her rear. During the final seconds of the football game, plaintiff's barstool moved, and she fell through the black curtains, off the platform, and into the space between the bleachers and the curtain. She fractured her right lower leg and ankle. She filed suit alleging she suffered permanent injury. Defendant moved for summary disposition arguing that the risk of harm to plaintiff was open and obvious because the platform was open-sided and had no

guardrails. The trial court granted the motion, finding that whatever was behind the curtain was discoverable on casual inspection, and the risk was therefore open and obvious.

A grant of summary disposition is reviewed de novo to determine whether the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Whether a duty was owed in a negligence case is a matter of law, *Riddle v McLouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992), and this Court reviews questions of law de novo, *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996). Premises possessors, in general, owe a duty to invitees to exercise reasonable care to protect them from unreasonable risks of harm caused by dangerous conditions on the land. *Ghaffari v Turner Constr Co*, 473 Mich 16, 21; 699 NW2d 687 (2005). However, premises possessors are not absolute insurers of the safety of their invitees. *O'Donnell v Garasic*, 259 Mich App 569, 573-574; 676 NW2d 213 (2003). Their duty extends only to *unreasonable* risks of harm. *Id.* A premises possessor is therefore not liable to invitees for physical harm caused by a condition when the danger is known or obvious, unless the possessor should anticipate the harm despite the knowledge or obviousness. *Riddle, supra* at 96. Whether a hazard or condition is open and obvious depends on whether "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Corey v Davenport College (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002), quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

Plaintiff first argues that she had no duty to lift the curtains and inspect the area behind the platform as part of a casual inspection. We agree. The word "casual" means "happening by chance," "without definite or serious intention," "off hand." *Random House Webster's College Dictionary* (2001). Thus, a *casual* inspection of the premises is one that occurs in an offhand manner, without definite and serious intention. This type of inspection would not include looking behind curtains. Indeed, curtains, by their very nature can imply that privacy is sought by the hanger.[1] Further, there is simply no authority to support placing an affirmative duty on an invitee to inspect a premises by looking behind obstructions for hazards. In fact, such a duty was rejected by our Supreme Court in *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523; 629 NW2d 384 (2001).

In *Lugo*, the trial court granted the defendant's motion for summary disposition because "the plaintiff 'was walking along without paying proper attention to the circumstances where she was walking."' *Id.* In other words, the trial court imposed upon plaintiff an affirmative duty to look around and pay attention to where she was walking. Our Supreme Court specifically "disapproved" of the trial court's rationale and noted that the plaintiff's failure to pay attention to where she was walking was properly addressed as comparative negligence, not whether the hazard was open and obvious. *Id.* Hence, to the extent the trial court here placed a duty on plaintiff to look *behind* the curtains as part of a casual inspection, the ruling was in error.

[1] "Curtain" is defined as "a hanging piece of fabric used to shut out the light from a window, adorn a room, increase privacy, etc." *Random House Webster's College Dictionary* (2001).

Nevertheless, it still must be determined whether the risk of harm was open and obvious absent the misplaced duty.

Whether a risk of harm is open and obvious is examined under an objective standard, looking at what an ordinary user would observe upon a casual inspection. *Lugo, supra* at 523-524. Therefore, the question is not what a particular plaintiff saw or did not see, but what an ordinary user of average intelligence would have seen. Here, the risk of harm was concealed behind curtains and promotional banners. Gaps in these curtains elsewhere along the rear edge of the platform revealed retracted bleachers that abutted against the rest of the platform, which suggested that one could not fall from the back of the platform. An average user of ordinary intelligence would not have noticed the specific risk of harm posed by the drop-off between the platform and bleachers that was concealed by the curtain near the area where plaintiff sat. Therefore, we conclude that the risk of harm in this case was not noticeable upon a casual inspection. It was not open and obvious, and the trial court's ruling to the contrary is reversed.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray