LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS

Tribal Court

Court Address: 7500 Odawa Circle, Harbor Springs, MI 49740 Phone: 231-242-1462

TRIBAL COURT

Case No: C-136-1011

Ethel Blanz

Plaintiff,

vs.

Odawa Casino Resort

Defendant.

ORDER GRANTING MOTION FOR FAILURE TO STATE A CLAIM AND DENYING MOTION FOR SUMMARY DISPOSITION

Defendant, Little Traverse Bay Bands of Odawa Indians, d/b/a Odawa Casino Resort, filed a motion for summary disposition regarding the negligence and nuisance claims filed against it by Plaintiff, Ethel Blanz. Defendant argues that Plaintiff's claim of nuisance fails to state a claim on which relief may be granted; further, Defendant argues that Plaintiff's Negligence Claim is barred by application of the "Open and Obvious" doctrine, and is therefore subject to summary disposition.

This Court finds that Plaintiff's claim of nuisance fails to state a claim upon which relief may be granted, and as such is hereby dismissed. Defendant's motion arguing the application of the "open and obvious" doctrine, which would result in summary disposition, is denied, as this Court does not recognize this Michigan state court doctrine.

I.

The facts are stated in conformity with the briefs submitted by the respective parties. Inconsistencies are noted.

On December 5, 2010, Plaintiff, Ethel Blanz, fell and injured herself while purchasing lunch at the property of Defendant, Little Traverse Bay Band of Odawa

Indians, d/b/a Odawa Casino Resort. According to the deposition of Plaintiff, she was in the deli area of the casino when the fall occurred. As she approached the counter to speak with the attendant, she walked past two stanchions connected by a cordon. In her deposition, Plaintiff states that she did not see the stanchions as she approached, despite surveillance footage showing her walking within a few feet of the objects. She claims to have been distracted by her engagement with the attendant at the counter, with whom which she has a passing acquaintance. Plaintiff states in her deposition that she had never noticed the stanchions in one of her numerous prior visits to the deli area of the casino.

There is a factual dispute regarding whether the stanchions had been in place for a period of six months, as submitted by Defendant by means of an affidavit of the Associate Hospitality Director, Hank Rowland, or if they were placed there for an event the prior evening, as proffered by Plaintiff by way of a conversation between Plaintiff and Keith Ellison, casino security guard. In any event, Plaintiff was the only person in the customer area. After finishing her transaction with the attendant at the counter, Plaintiff turned, and as she did so, either stepped on top of or caught her foot on one of the stanchions, after which she fell to the ground. Plaintiff claims injuries to both her hip and wrist as a result of the fall.

II.

A.

A motion under LTBBITCR XVI(b)(6) provides for summary disposition if the claim is so clearly unenforceable that no proofs could justify a right to recovery. If the claim fails to state a claim upon which relief can be granted, dismissal is appropriate.

In the instant case, Plaintiff sets forth a claim for "nuisance." There are two species of nuisance claims, private and public. Although Plaintiff does not specify whether her claim is for public or private nuisance, it is clear that the only cognizable claim under the circumstances is an action for public nuisance, as a private nuisance claim only lies where there is an interference with someone's right to the private use and enjoyment of real property. Generally speaking, a "public nuisance is an unreasonable interference with a right common to the general public." It does not arise "because a large number of people are affected; rather, it arises only when a public right has been affected." *Kramer v Angel's Path*, 174 Ohio App. 3d 359 (2007).

Public nuisance law has been defined in Michigan as an "unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co. v Phillips Petroleum Co.*, 213 Mich.App. 186, 190 (1995). The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. *Id.*

Plaintiff alleges that the improper placement of the stanchion interfered with her right of way and travel, causing her injuries, and therefore constitutes a nuisance. This count fails to state a claim upon which relief may be granted. Primarily, the placement of the stanchions has not "significantly interfere[ed] with the public's health, safety, peace, comfort, or convenience." *Id.*

A short cordon of several feet suspended between two stanchions in the middle of an open floor space cannot be said to have "significantly interfered" with a public interest. A nuisance claim must be predicated on the continuance of a condition on the land that significantly affects the public in a general way. *See Fuga v Comerica Bank-Detroit*, 202 Mich App 380, 383 (1993). The devices in question constitute a nominal obstruction, one that under no circumstances rises to the level of a *significant* interference with a *right* common to the public. This obstruction is neither significant, nor can the public be said to have a right to walk a perfectly straight line without having to make minor adjustments in order to continue upon its right of way.

Plaintiff has produced no evidence demonstrating that the public has been adversely affected. Only the private claim of Plaintiff has been presented. Further, Plaintiff provides no evidence that she suffered a type of harm different from that of the general public. A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public. *See Cloverleaf* at 190. An obstruction in the middle of a customer area presents the danger of tripping and falling. This is what happened to Plaintiff, and there is no suggestion that the general public would face a different type of danger. As such, there is no cognizable claim for public nuisance, and the claim is dismissed.

B.

In evaluating Defendant's motion for summary disposition regarding the premises liability claim, the Court must address the application of the Michigan common law open and obvious doctrine upon which the motion relies. Since this Court determines that the doctrine, as applied in Michigan, is not a part of LTBB Tribal Law, the motion for summary disposition must be denied. Plaintiff has set forth facts that, when viewed in a light most favorable to the Defendant, establish *slightly* more than a "mere scintilla" of evidence, necessitating the continuance of this proceeding.

Typically, land possessors owe a duty to invitees to discover unreasonably dangerous conditions on the land and to either correct them or warn of them. *Lugo v Ameritech Corp., Inc.*, 464 Mich 512, 516. But, as applied in Michigan and other jurisdictions, the open and obvious doctrine obviates a land possessor's duty where an invitee is injured by an open and obvious danger. Restatement (First) of Torts § 340 (1934). The Michigan standard for determining whether a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Slaughter v Blarney Castle Oil Co.*, 281 Mich App 474, 478, quoting *Novotney v Burger King Corp.*, (on remand), 198 Mich App 470, 475 (1993).

Recent developments in the law have moved towards abandonment of the doctrine. The transformation has been predicated on the understanding that underlying issue is one of fact, and as such should be determined by the jury on a comparative negligence basis, as opposed to being a matter of law to be disposed with by summary judgment. Where the constraints of the doctrine have been loosened, open and obvious dangers only demonstrate that an invitee is to some extent at fault for failing to avoid injury. The degree of fault to be placed on the invitee and how much, if any, should be placed on the land possessor is a factual issue to be determined by the fact finder.

In deciding how to address open and obvious dangers in this Court, the Tribe's heritage and cultural values are of paramount importance. "[T]he laws set forth within the [LTBB] Constitution are set forth 'in the ways of our ancestors' and 'in accordance with our Anishinaabe Heritage.'" *Harrington v Little Traverse Bay Bands of Odawa Indians Election Board*, LTBB Appellate Case A-019-1011, p. 10 (February 16, 2012) (quoting *LTBB Constitution*, Preamble). Under the Tribal Constitution, this Court is mandated to "follow the Anishinaabe Traditions, Heritage, and Cultural Values." *LTBB Constitution*, Preamble. In doing so, the Court "shall preserve our Heritage while adapting to the present world around us." *Id.* Therefore, this Court must look the Tribe's traditional sense of justice and apply it in a manner that is adapted to our modern judicial system.

Traditionally, when an individual was harmed through the fault of another, the extended kin groups of the parties involved would come together and determine who was at fault and what the appropriate compensation would be. In such cases, the forum would be a public council where all the parties would come to a final determination. There was not an individual vested with the ability to make unilateral decisions; all decisions rested with the people, who sought to determine fair compensation and just outcome for all aggrieved parties. See, e.g., Manassas Hickey, *Collections: report of the Pioneer Society of the State of Michigan*, Volume 4, 550-56 (1882). This Court places heavy weight on the historical notions of fairness espoused by the ancestry of the Tribe.

These traditional notions of fairness are demonstrated in the modern governmental functions and business practices of the Tribe. This is evidenced by the Tribe's waiver of sovereign immunity to suit for personal injury arising on insured properties. LTBB Tribal Council Resolution 112303-02, November 23, 2003. The resolution states that the resolution is enacted to "promote fairness and justice to all persons on insured properties." *Id.*

In determining whether the application of the open and obvious doctrine conflicts with Tribal notions of fairness and justice, the Court also takes into account the evolution of loss allocation in tort law. As a historical matter, the open and obvious doctrine arose in the era of contributory negligence. Under the doctrine of contributory negligence, regardless of the level of negligence of a defendant, any negligence on the part of the plaintiff completely barred recovery. Courts would sometimes explain the open and obvious doctrine in terms of contributory negligence. *See generally* Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions*, 100 U. Pa. L.Rev. 629 (1952). A defendant's encounter with an open and obvious danger was an immediate indication that the injured party had been in some way negligent. *Id.* However, almost all

states now have adopted comparative fault in favor of contributory negligence. *See e.g., Lamp v Reynolds*, 249 Mich App 591, 605 (2002); *Laier v Kitchen*, 266 Mich App 482, 496 (2005); *Harrison v Taylor*, 768 P.2d 1321, 1325 (Idaho 1989). Under comparative negligence, a court reduces the award of damages by the percentage of comparative fault of the plaintiff instead of completely barring recovery. *See e.g.,* MCL 600.2959.

Jurisdictions that maintain both the open and obvious doctrine and comparative negligence tend to define the doctrine in terms of duty rather than deferring to the contributory negligence foundation. In Michigan, the Supreme Court held that a possessor of land has no duty to protect an invitee from an open and obvious danger. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 94 (1992). By framing the doctrine in terms of duty, a court can summarily dispose of a claim since one of the necessary elements of a tort action does not exist.

This Court believes that such an interpretation is inappropriate. Many jurisdictions agree with this conclusion. "The manifest trend of the courts in this country is away from the traditional rule absolving, ipso facto, owners and occupiers of land from liability for injuries resulting from known or obvious conditions." *Ward v K-Mart*, 554 N.E.2d 223, 231 (Ill.1990). Instead, these courts allow the trier of fact to evaluate the comparative fault of the parties.

This trend is supported by the Restatement (Second) of Torts, which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*. [Restatement (Second) of Torts § 343A(1) (1965)(emphasis added).]

The comments to this section elaborate further:

> There are . . . cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger.
>
> Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact

> that the danger is known, or is obvious . . . is not . . . conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances. [*Id.* cmt. f.]

The Restatement places an emphasis on foreseeability in its analysis of whether a defendant has a duty. That fact that harm from an open and obvious danger can sometimes be foreseeable suggests that there should be some remaining duty on the land possessor.

Many states other than Michigan have adopted this analysis, looking to a number of factors beyond the open and obvious nature of the danger:

> Whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence, and judgment, and whether there was some other reason for the defendant to foresee the harm, are all relevant considerations that provide more balance and insight to the analysis than merely labeling a particular risk "open and obvious." In sum, the analysis recognizes that a risk of harm may be foreseeable and unreasonable, thereby imposing a duty on the defendant, despite its potentially open and obvious nature. [*Coln v City of Savannah*, 966 S.W.2d 34, 42 (Term.1998).]

It is important to note, however, that despite the removal of an absolute bar to recovery, there are many situations where the open and obvious doctrine would have traditionally applied that under the modern conception the land possessor would nevertheless be free from liability. If a danger is clearly observable and a land possessor has no reason to anticipate a reasonable person injuring themselves due to its existence, he would not be liable. However, under particular circumstances a land possessor has "reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." Restatement (Second) of Torts § 343A(1) cmt. f. In these situations, the injury is still foreseeable. *Id.*

The modern approach harmonizes better with the rule of comparative fault, which this Tribe adopts. Where a danger is open and obvious, an invitee would ordinarily be negligent for falling victim to it; but, this does not necessarily mean that the land possessor should not be responsible for failing to fix an unreasonable danger in the first place. Under comparative fault, a defendant should be held responsible for his own negligence. Allowing open and obvious conditions to uniformly absolve land possessors from liability "would be to resurrect contributory negligence." *Harrison*, 768 P.2d at 1325.

Moreover, Tribal "Traditions, Heritage, and Cultural Values" are not honored under the strict application of the open and obvious doctrine. *LTBB Constitution*, Preamble. Where an injured party is denied compensation for a harm based on the application of an indiscriminate doctrine that fails to look to particulars of a circumstance, there is more than the mere specter of injustice. Prior to the creation of a formal judicial forum, the Odawa looked to the substance of a dispute, bringing together the parties and determining whether a wrong had been committed. There was no preference for procedural "safeguards" to prevent the members of the Tribe from hearing each side's story and coming to a decision.

Fairness has also been the basis of many state court decisions to modify their conception of the open and obvious doctrine:

> It is anomalous to find that a defendant has a duty to provide reasonably safe premises and at the same time deny a plaintiff recovery from a breach of that same duty. The party in the best position to eliminate a dangerous condition should be burdened with that responsibility. If a dangerous condition is obvious to the plaintiff, then surely it is obvious to the defendant as well. The defendant, accordingly, should alleviate the danger. [*Tharp v. Bunge Corp.*, 641 So.2d 20, 25 (Miss.1994).]

This Court has determined that the open and obvious doctrine does not act as a complete bar to recovery in actions for damages based on a theory of premises liability. Strict application of the doctrine is contrary to both the traditions and cultural values of the Tribe, as well as the modern development of tort law in state court jurisdictions.

With this in mind, the Court turns to the instant motion. A motion under LTBBITCR XVII provides for summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Defendant's motion was based on the application of the open and obvious doctrine, which this Court has declined to adopt as a complete bar to recovery. Consequently, this motion must be denied.

Despite the Court decision to not apply the open and obvious doctrine, the fact that the stanchions were clearly visible will be given significant weight in the absence of contrary evidence at trial. These factors will have great bearing on the final outcome of the case, and as such, should be given similar weight in further settlement discussions.

WHEREFORE, IT IS SO ORDERED:

1. that Defendant's motion for dismissal for failure to state a claim of nuisance is granted;

2. that Defendant's motion for summary disposition of the negligence action based on the open and obvious doctrine is denied;

3. the Parties are ordered to engage in settlement negotiations within 30 days;

4. the Parties must make a report on the status of settlement negotiations to the Court within 60 days; and

5. if settlement negotiations fail after 60 days, proceedings may move forward to trial.

8/2/12
Date

[redacted]
Allie Greenleaf Maldonado, LTBB Chief Judge

CERTIFICATE OF MAILING

I certify that on this date copies of this *Order* were served to the parties by First-Class Mail.

8-2-12
Date

[redacted]
Tribal Court Officer