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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Plaintiff Tests Elliptical Machine But Fails On Exercising Caution

By Joseph P. Pittel

In *Miller v Dunham's Discount Sports*, __ Mich App __ (issued Dec 16, 2010) (Docket No. 294445), an unpublished decision, the Court of Appeals relied upon the "open and obvious" doctrine and affirmed a trial court's dismissal of a lawsuit where plaintiff fell from an elliptical machine at a sporting goods store.

Elliptical machines were "open and obvious" hazards.

In *Miller*, Plaintiff broke her foot attempting to get off an elliptical machine at a Dunham's Discount Sports store. The elliptical machine was among a group of machines spaced three to four inches apart. Plaintiff mounted one of the elliptical machines for the purpose of testing the product and fell as she was stepping off. Plaintiff sued claiming that the close spacings of the elliptical machines constituted a dangerous condition on the property and that Dunham's breached its duty to protect her from this hazard.

The trial court dismissed Plaintiff's complaint, holding that the close proximity of the machines was an "open and obvious" danger. The Court of Appeals agreed, reasoning that "[a]n average person of ordinary intelligence would be aware of the risk of tripping or falling when attempting to get on or off exercise machines that have been placed three inches from another machine." The Court was persuaded by the fact that Plaintiff knew the ellipticals were close together, that she did not look to see if she would have a safe place to put her foot before dismounting, and that she decided to test the elliptical without asking for assistance.

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The Court apparently saw an inherent danger in the use of elliptical machines, holding that "[A]n elliptical machine has moving parts that require a person to use care when attempting to get on and off the machine." The fact that the machines were close together only meant that patrons had to "use an even higher degree of care."

The standard the Court relied upon can be broken into two parts: First, whether a reasonable person would have gotten on the elliptical machine in the first place given the obvious danger; and, when seeing the danger, whether a reasonable person would have looked before stepping off the machine.

The "Special Aspects" Exception Does Not Apply

Having found that the elliptical machines were an "open and obvious" hazard, the Court then sought to determine whether there were "special aspects" which made the situation unavoidable and unreasonably dangerous. Citing *Lugo v Ameritech*, 464 Mich 512; 629 NW2d 384 (2001), the Court held that there was "no special aspect that made the elliptical machines unnecessarily dangerous, or made the danger of falling unavoidable."

In arguing for the exception, the Plaintiff suggested that the facts of her case were akin to those in *Robertson v Blue Water Oil Company*, 268 Mich App 588, 593-594; 708 NW2d 749 (2005), where a gas station patron fell in an icy parking lot on her way to purchase windshield washer fluid. In applying the special aspects exception, the *Robertson* court found that the weather conditions made it sufficiently unsafe to drive without windshield washer fluid and, thus, made the trip across the icy parking lot unavoidable. To distinguish *Robertson*, this Court pointed out the difference between a customer entering a store and Plaintiff, who was testing a product the store was selling.

The Court of Appeals also rejected Plaintiff's attempts to rely on the *Lugo* case, where the plaintiff was forced to confront an entrance blocked by standing water. The court noted that, unlike the plaintiff in *Lugo,* Miller had "no pressing reason to confront the 'open and obvious' dangers of the placement of the ellipticals."

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