COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP1308 **Cir. Ct. No. 2002CV3892**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CARRIE L. ZILLMER,

PLAINTIFF-APPELLANT,

V.

ORPHEUM THEATRE PROJECT, LLC, WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY, MICHAEL HAIGHT D/B/A TRIBAL BROTHERS PROMOTIONS AND PLANTATION/NOMATIK PROMOTIONS AND WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Carrie L. Zillmer appeals a summary judgment and order entered in favor of Orpheum Theatre Project, LLC, Wisconsin American Mutual Insurance Company, Michael Haight d/b/a Tribal Brothers Promotions and Plantation/Nomatik Promotions, and West Bend Mutual Insurance Company (where appropriate, collectively the defendants). Zillmer brought a safe-place statute and common law negligence action against the defendants after suffering injuries sustained by falling over a railing in a fly loft area in the Orpheum Theatre while attending a New Year's Eve party. The circuit court concluded that while it was unable, factually, to determine whether Zillmer was a frequenter or trespasser within the meaning of the safe-place statute or whether the open and obvious danger doctrine applied, the defendants were nevertheless entitled to summary judgment because Zillmer's negligence exceeded that of the defendants.

¶2 Zillmer argues the circuit court erred in granting summary judgment because the record does not support its conclusion that her negligence exceeded that of the defendants as a matter of law. Zillmer further argues the circuit court erred in granting summary judgment because a reasonable jury could conclude she was less negligent than defendants. We conclude that Zillmer is not entitled to relief under either the safe-place statute or common law negligence regarding Orpheum Theatre Project as the owner of the theatre because she was a trespasser within the meaning of the safe-place statute and because she has neither pled nor shown that the defendants engaged in willful, wanton, or reckless conduct. However, we conclude that there are disputed material issues of fact concerning whether Zillmer's negligence outweighed Haight's negligence regarding the negligence claim against Haight. We do not address the safe-place statute claim against Haight. Accordingly, we conclude the circuit court properly granted

summary judgment to Orpheum Theatre Project but erred in granting summary judgment to Haight. We therefore affirm in part and reverse in part.

BACKGROUND

¶3 The material facts are undisputed. Zillmer attended the Orpheum Theatre's 2001 New Year's Eve party. Zillmer was one of about 1000 people at the event, dubbed by its promoter, Michael Haight, as "Madison's Premiere Nightlife Gala Celebration." Advertisements for the event promoted a variety of live bands playing at the theatre and stated, "This party starts at 9:00 p.m. and goes to 6:00 a.m.—there is NO BAR TIME in Madison on New Years Eve!!! Many bars will be set up to offer a wide variety of drinks and drink specials without long lines!"

¶4 Zillmer attended the party as a paying patron of the Orpheum Theatre. Upon arriving at the theatre Zillmer sought out a friend, Aaron Villand, who was a member of one of the bands performing that night. Zillmer and Villand met up after the band's set ended, sometime after 1:00 a.m. Villand invited Zillmer backstage. It was common for guests of band members to be invited to the backstage area and at least 100 backstage passes were issued to band members and guests for the evening. However, while Villand had a backstage pass, Zillmer did not.

¶5 Zillmer and Villand went backstage to the band's dressing room located on the second floor. The dressing room was crowded and too noisy to talk. Villand and Zillmer left the dressing room and went to an area on the third floor called the fly loft area. The fly loft area was closed to the general public and to band members and their guests; only theatre employees were allowed in this

area. Earlier in the evening, the stairway leading to the third floor was used by the bands as a place to store equipment.

¶6 Villand knew the fly loft area was not open to the public; he also knew it did not have a bar and the bands were not visible from the room. Both Villand and Zillmer knew there were places in the Orpheum Theatre they were not allowed to go and neither one asked permission to go up to the fly loft area. However, both Villand and Zillmer testified that no one told them this area was off-limits to band members and their guests. They further testified they saw no warning signs, ropes, or chains indicating the fly loft area was dangerous or off-limits when they walked up the stairway to the area.

¶7 Henry Doane, owner of Orpheum Theatre Project, testified in his deposition that the fly loft area, and the stairs leading up to it, was not a public area or space. In his deposition, Doane testified that the fly loft area had been used in the past for the stage crew to fly curtains and sets and rigging for the main theatre. In response to Zillmer's interrogatories, Doane stated the fly loft area was off-limits to the public and to others not employed by Orpheum Theatre Project, including band members and their guests. Doane also stated in an interrogatory answer that the Orpheum Theatre had a policy of placing a rope barricade across the bottom of the stairs leading to the fly loft area, with a sign hanging from the barricade stating "RESTRICTED AREA—DO NOT ENTER."

¶8 Robert Wasserman, building manager for the Orpheum Theatre, testified in his deposition that he told security staff during a tour of the fly loft area conducted on New Year's Eve that the area was off-limits. He also testified the rope barricade was in place at the time of the tour. According to Wasserman, generally the upper dressing rooms were not used except when a major act is

playing at the theatre. Wasserman testified that the Orpheum Theatre usually barred the stairway leading to the upper dressing rooms and fly loft area with a locked iron gate and that Doane was uncomfortable with allowing the promoter, Haight, to use the upper dressing rooms on the night of the event. Wasserman stated he checked the upper dressing room area several times during the day and night of the event as part of his normal security duties. The first time was during the day as part of his general preparation duties. The second time occurred at 11:30 p.m.; he observed the rope was secure. The third time he checked the stairs leading to the fly loft area was approximately 1:00 a.m.; he noticed the rope was not secure and retied it.

¶9 To get to the fly loft area, Villand and Zillmer walked up two flights of stairs. As Villand led Zillmer up the stairs, they observed that the fly loft was pitch black. Villand led Zillmer by the hand about ten feet into the dark room and they found a place to sit. After about five minutes, Zillmer got up to return to the stairway. As she tried to leave the loft, she tumbled over the railing, landing on top of the plaster ceiling fifteen feet below. Zillmer suffered serious injuries. Zillmer testified that at no time while she was in the fly loft did she or Villand attempt to find a light switch. A blood alcohol concentration (BAC) test later performed on Zillmer showed she had a BAC of 0.23.

¶10 Zillmer sued the defendants, alleging violations of Wisconsin's safe-place statute as well as common law negligence. The defendants denied the allegations. The defendants moved for summary judgment contending (1) Zillmer was a trespasser in the fly loft area when she was injured, therefore she was not protected by the safe-place statute, and Haight alternatively argued that the safe-place statute did not apply to him; (2) the defendants owed no duty of care to Zillmer because she voluntarily confronted an open and obvious danger when she

entered the fly loft area; and (3) Zillmer's negligence exceeded that of the defendants as a matter of law. The circuit court orally granted the defendants' motions, concluding Zillmer's negligence exceeded the defendants' negligence as a matter of law. The circuit court entered a written order and judgment. Zillmer appeals.

DISCUSSION

¶11 We review summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first determine whether the complaint states a claim. ***Id.*** If the complaint states a claim, we then determine whether there are any material facts in dispute and whether the moving party is entitled to judgment as a matter of law. ***Id.***; *see also* WIS. STAT. § 802.08(2) (2003-04).[1] We view the facts contained in the moving party's supporting papers in the light most favorable to the party opposing the motion. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

¶12 The duties of an owner of a public building to a "frequenter" are those prescribed by the safe-place statute, WIS. STAT. § 101.11,[2] and the principles

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] WISCONSIN STAT. § 101.11 reads in pertinent part:

(continued)

of common law negligence. ***Monsivais v. Winzenried***, 179 Wis. 2d 758, 764, 508 N.W.2d 620 (Ct. App. 1993). "However, the only duty owed by an owner to a trespasser is to refrain from willful, wanton or reckless conduct." ***Id.***; s*ee also* WIS JI—CIVIL 8025. Zillmer does not allege that the defendants acted in a willful, wanton, or reckless manner. Thus, to recover on her safe-place statute claims Zillmer must first establish that she was a frequenter when she entered into the fly loft area.

> **(1)** Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.
>
> **(2)** (a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.
>
> (b) No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished and provided for use in any employment or place of employment, nor interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, nor fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees or frequenters.

¶13 WISCONSIN STAT. § 101.01(6) defines a frequenter as "every person, other than an employee, who may go in or be in a place of employment or public building under circumstances which render such person other than a trespasser." *See also* ***Monsivais***, 179 Wis. 2d at 765. A trespasser is a person "'who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.'" ***Monsivais***, 179 Wis. 2d at 765 (quoting ***Antoniewicz v. Reszczynski***, 70 Wis. 2d 836, 840, 236 N.W.2d 1 (1975)). Consent may be express or implied; express consent is given when the owner invites or authorizes another person to be on his or her premises. WIS JI—CIVIL 8015. Consent is implied when the owner, "by his or her conduct or … words, or both, by implication consents to such other person's [sic] being on the premises." ***Id.*** Implied consent is determined by examining "all the existing circumstances," including the owner's acquiescence "in the previous use of the premises by others"; the customary use of the premises by others; "the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises" and then concluding whether "a reasonable person would conclude that the possessor of the premises impliedly consented that the plaintiff be on the premises." ***Id.*** Thus, a person on the premises without an invitation by an owner, either expressly or impliedly, and solely for his or her own pleasure, convenience, or purpose, is a trespasser. ***Grossenbach v. Devonshire Realty Co.***, 218 Wis. 633, 638, 261 N.W. 742 (1935). However, a frequenter may become a trespasser by entering into an area to which he or she is not expressly or impliedly invited. ***Monsivais***, 179 Wis. 2d at 763.

¶14 Under principles of common law negligence, every person owes a duty of care to the world at large to protect others from foreseeable harm. ***Jankee v. Clark County***, 2000 WI 64, ¶53, 235 Wis. 2d 700, 612 N.W.2d 297. Put

another way, every person has a duty to use ordinary care in all of his or her activities, and a person is negligent when that person fails to exercise ordinary care. ***Gritzner v. Michael R.***, 2000 WI 68, ¶¶20, 22, 235 Wis. 2d 781, 611 N.W.2d 906. In Wisconsin a duty to use ordinary care is established whenever it is foreseeable that a person's act or failure to act might cause harm to some other person. ***Id.***, ¶20. Under the general framework governing the duty of care, a "'person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.'" ***Id.***, ¶22 (quoting WIS JI—CIVIL 1005). However, as with the safe-place statute claim, if Zillmer was a trespasser, then the only common law duty of care owed by an owner of a public building is to refrain from willful, wanton, or reckless conduct. ***Monsivais***, 179 Wis. 2d at 766.

Orpheum Theatre Project

¶15 Zillmer contends the circuit court erred in granting summary judgment because, in her view, the summary judgment record does not support the court's conclusion that her negligence exceeded that of the defendants as a matter of law. She further claims that the determination of whether she was comparatively negligent is usually a jury question and one that cannot be reached by a "trial by affidavits." Zillmer also contends that it was inconsistent for the circuit court to determine, on one hand, that it could not apply the open and obvious doctrine to this case because of the state of the record, and, on the other hand, find as a matter of law that Zillmer's negligence exceeded that of the

defendants. We need not address these arguments[3] with regard to Orpheum Theatre Project because we conclude, based on the undisputed facts viewed in the light most favorable to Zillmer and the reasonable inferences arising therefrom, that, as a matter of law, Zillmer was a trespasser when she entered into the fly loft area, and thus was outside the protections of the safe-place statute and common law negligence as they pertain to Orpheum Theatre Project as owner of the theatre.

¶16 Zillmer concedes Orpheum Theatre Project did not *expressly* invite her into the fly loft area. Thus, to prevail under the safe-place statute Zillmer must establish the Orpheum Theatre *impliedly* invited her into this area.

¶17 Zillmer argues her status as a frequenter or trespasser is in dispute because she could have reasonably assumed that Orpheum Theatre Project gave Villand permission to be in the fly loft area. She bases this argument on the fact that neither she nor Villand observed any rope barrier or sign indicating the stairs and the fly loft area were off-limits to the public and that Villand had been to the fly loft area twice before the night of the accident. We find her arguments unpersuasive and conclude that the undisputed facts and reasonable inferences drawn in Zillmer's favor establish that, under all the circumstances surrounding Zillmer's injuries, no reasonable person could have believed Orpheum Theatre Project had impliedly invited frequenters to the fly loft area.

[3] We may affirm the circuit court's grant of summary judgment on different grounds than the circuit court relied upon. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). The circuit court concluded it could not determine, based on the current record, whether Zillmer was a frequenter or a trespasser. We conclude otherwise. Our de novo review of the record indicates there are sufficient undisputed facts from which we can determine whether Zillmer was a frequenter or a trespasser when she entered the fly loft area.

¶18 There is no dispute that Zillmer was a frequenter when she entered the Orpheum Theatre to attend the New Year's Eve party. She paid $25 to attend the event. There is also no dispute that the safe-place statute applies here. But the undisputed evidence shows that Zillmer's status as a frequenter ceased when she entered the fly loft area. Even though we are required under summary judgment methodology to accept Zillmer's and Villand's testimony that the barricade was not up at the time they entered the fly loft, the nature of the fly loft area itself clearly shows it was off-limits to frequenters.

¶19 Both Zillmer and Villand testified the room was pitch black. Zillmer testified she could not watch any of the bands from this area, dance, or obtain a drink; and neither Zillmer nor Villand observed any other theatre patrons in the fly loft area during a time when approximately 1000 partygoers were in the building enjoying themselves. We also note that this loft was part of the backstage area of the theatre, where a reasonable person would know the "inner workings" of the theatre are located, areas that frequenters would not ordinarily be allowed to enter.[4] This situation is analogous to other cases in which courts have determined frequenters to establishments were trespassers because they entered areas off-limits to them. *See*, *e.g.*, ***Grossenbach***, 218 Wis. at 634 (tenant became a trespasser when she entered the boiler room of her apartment building);

[4] As we pointed out, approximately 100 backstage passes were issued for the New Year's Eve party. Under these limited circumstances, a patron holding a backstage pass would be permitted to enter the backstage area. However, there is no evidence that the backstage pass gave theatre patrons access to areas beyond the dressing room areas. In other words, Zillmer has not argued or pointed to any facts that raise a reasonable inference that a backstage pass holder was explicitly or impliedly invited to enter the "inner workings" areas of the backstage beyond the dressing room areas.

Monsivais, 179 Wis. 2d at 769 (frequenter of a tavern became a trespasser when he entered the basement).

¶20 Regarding the argument that Villand had been given permission to enter the fly loft, even if we assume without deciding that Villand was permitted to enter the fly loft, Zillmer points to no evidence indicating Orpheum Theatre Project delegated authority to Villand to take members of the public into the fly loft area. Villand was not an employee of Orpheum Theatre Project or of Michael Haight. In other words, there is nothing in the record indicating Villand was an agent of Orpheum Theatre Project or of Haight so as to reasonably lead Zillmer to conclude that Villand had explicit or implied authority to grant her consent to enter into the fly loft area.

¶21 In addition, there was no evidence Zillmer was aware that Villand had been to the fly loft prior to the night of her accident, thus there is no basis for inferring that she relied on Villand's prior visits to the fly loft as an indicator Orpheum Theatre Project gave him permission to be there. In other words, to the extent she relies in her argument on Villand's previous visits to the fly loft area as an indicator Orpheum Theatre Project consented to her presence there, that reliance is irrelevant in the absence of evidence indicating she was aware on the night of her accident that Villand had been in the fly loft on two previous occasions. After reviewing the summary judgment materials, we conclude, based upon the undisputed facts and drawing all reasonable inferences in Zillmer's favor, that Zillmer was a trespasser when she entered the fly loft area.

Haight

¶22 Turning to Zillmer's claims against Haight under the safe-place statute and common law negligence, we observe that neither Zillmer nor Haight

addressed in their briefs the circuit court's conclusion that it was unable to determine, based on the current state of the record, whether Zillmer was a trespasser or frequenter and thus whether the safe-place statute applied to Haight.[5] We need not address issues that parties fail to brief before this court. *See* ***Phelps v. Physicians Ins. Co. of Wis.***, 2005 WI 85, ¶21 n.6, 282 Wis. 2d 69, 698 N.W.2d 643. Therefore we will not address Zillmer's safe-place statue claim against Haight.

¶23 Regarding the negligence claim, Zillmer argues the trial court erred in granting summary judgment because the present case is not similar to those cases in which courts have appropriately determined that one party's negligence exceeds the negligence of another party as a matter of law.[6] She contends there is nothing exceptional or outrageous about her conduct in entering a dark room led by a person who had been in the room before, while wearing platform shoes, and after consuming some alcohol that would support the conclusion that her negligence exceeded Haight's as a matter of law.

¶24 Haight argues this case is indeed an "exceptional case" in which it is clear that Zillmer's negligence exceeded his negligence, likening Zillmer's

[5] While we address the safe-place statute claim against Orpheum Theatre Project and conclude above that Zillmer was a trespasser, Zillmer's status as a trespasser does not resolve the safe-place statute issue regarding Haight; in order for Haight to be subject to the safe-place statute he must be an "employer" or "owner" within the meaning of WIS. STAT. § 101.01(4) or (10), an issue not briefed to this court by the parties.

[6] Zillmer also argues that the trial court's decision was the result of a "trial by affidavits" and that the court was logically inconsistent in concluding it could not make a "factual determination as to whether or not the open and obvious danger jurisprudence" applied, yet concluding that as a matter of law Zillmer was more negligent than the defendants. We need not address these arguments because we conclude above that the trial court erred in granting summary judgment on the negligence claim against Haight.

negligence in entering the darkened fly loft here with cases where courts have granted summary judgment against plaintiffs who were injured after diving headfirst into opaque water or water of unknown depth, *see, e.g.,* ***Griebler v. Doughboy Recreational, Inc.***, 160 Wis. 2d 547, 466 N.W.2d 897 (1991); ***Wisnicky v. Fox Hills Inn & Country Club, Inc.***, 163 Wis. 2d 1023, 473 N.W.2d 523 (Ct. App. 1991), and adding that Zillmer's negligence is compounded by her probable state of intoxication, her failure to attempt to find a light switch, and by wearing platform shoes.

¶25 Seldom is summary judgment appropriate in negligence actions:

> [T]he court must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that the defendants failed to exercise ordinary care. The concept of negligence is peculiarly elusive, and requires the trier of fact to pass upon the reasonableness of the conduct in light of all the circumstances, even where historical facts are concededly undisputed. Ordinarily, this is not a decision for the court.

Alvarado v. Sersch, 2003 WI 55, ¶29, 262 Wis. 2d 74, 662 N.W.2d 350 (citations omitted). This is particularly true when considering to what degree a plaintiff's contributory negligence exceeds the defendant's causal negligence. Wisconsin is a comparative negligence state; the contributory negligence of a plaintiff does not bar his or her recovery unless his or her negligence is greater than the negligence of the defendant. *See* WIS. STAT. § 895.045(1).[7] Summary judgment does not

[7] WISCONSIN STAT. § 895.045(1) reads as follows:

(continued)

lend itself well to determine the allocation of comparative negligence between parties:

> Summary judgment is a poor device for deciding questions of comparative negligence. What is contemplated by our comparative negligence-statute, sec. 895.045, is that the totality of the causal negligence present in the case will be examined to determine the contribution each party has made to that whole. It is the "respective contributions to the result" which determine who is most negligent, and by how much. A comparison, of course, assumes the things to be compared are known, and can be placed on the scales.

Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 716-17, 150 N.W.2d 560 (1967) (citation omitted). We have also recognized that it is the rare and exceptional case where a court may rule, as a matter of law, that a plaintiff's negligence exceeds that of a defendant. *See* ***Wagner v. Wisconsin Mun. Mut. Ins. Co.***, 230 Wis. 2d 633, 637, 601 N.W.2d 856 (Ct. App. 1999). "'[S]ummary judgment should only be used in the exceptional case where it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary.'" ***Id.*** (quoting ***Hansen v. New Holland N. Am.***, 215 Wis. 2d 655, 669, 574 N.W.2d 250 (Ct. App. 1997).

> COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed.

¶26 We agree with Zillmer that this is not that rare and exceptional case where the undisputed facts and the reasonable inferences derived therefrom show in clear and uncontroverted terms that Zillmer's negligence exceeded that of Haight's such "that no reasonable jury could reach a conclusion to the contrary." ***Id***. Unlike a person diving into opaque and potentially shallow waters without first discerning whether it was safe to do so, *see* ***Griebler***, 160 Wis. 2d at 559, we are not persuaded that there is anything inherently dangerous in entering a dark room, especially when that person is led there by someone who is familiar with the room. Haight has also failed to explain what public policy would be served by a determination that a plaintiff's negligence exceeds the defendant under the factual circumstances presented by this case.

¶27 We also cannot conclude as a matter of law that Zillmer's negligence exceeded Haight's because there are certain disputed issues of material fact. Haight argued before the trial court, as he does in this appeal, that Zillmer's negligence exceeded his as demonstrated by four undisputed material facts: (1) she was severely intoxicated; (2) she voluntarily entered a dark and unfamiliar area; (3) she failed to attempt to illuminate the area before entering it; and (4) she wore platform shoes that increased the risk of falling over any barrier that could have been in the fly loft.

¶28 Zillmer, on the other hand, contends there is a factual dispute as to the role alcohol played in her fall; there is a factual dispute as to the reasonableness of Zillmer's decision to follow Villand to the fly loft, when he was familiar with the space and she was not; that a reasonable jury could conclude based on this record that Villand was negligent by taking her to the fly loft when he was familiar with the space and was aware of the possible danger of walking in a dark room with a low balcony; and that there is a factual dispute as to whether

the combination of wearing platform shoes, being under the influence of alcohol, and walking into a dark room caused her to fall and injure herself.

¶29 Based on the record before us, we cannot say that Zillmer's negligence exceeded Haight's causal negligence as a matter of law. It is not clear from the record what role alcohol played in Zillmer's fall. There is also a question as to what caused Zillmer to fall: did Zillmer fall because of the combination of alcohol, wearing platform shoes, and walking in a dark room as Haight would have us believe? Or was Villand negligent in taking Zillmer to the fly loft when he was aware the general public was not permitted there, and that it was potentially dangerous to walk into the fly loft without light because of the low railing? In addition, the question remains regarding Haight's negligence since under the contract with Orpheum he was responsible for providing security during the New Year's Eve party.[8] This question is for the jury to decide.

CONCLUSION

¶30 We conclude that Zillmer is not entitled to relief under either the safe-place statute or common law negligence regarding Orpheum Theatre Project as the owners of the theatre because she was a trespasser within the meaning of the safe-place statute and because she has neither pled nor shown that Orpheum Theatre Project engaged in willful, wanton, or reckless conduct. However, we conclude there are disputed issues of material fact concerning whether Zillmer's negligence outweighed Haight's negligence regarding the negligence claim against Haight. We also conclude that Haight has failed to persuade us that this is that

[8] Although Zillmer does not raise this issue on appeal, our review of the summary judgment record indicates this is likely to be an issue at trial should the case proceed that far.

rare and exceptional case warranting a conclusion that Zillmer's negligence exceeded his. We do not address the safe-place statute claim against Haight. Accordingly, we conclude the circuit court properly granted summary judgment to Orpheum Theatre Project but erred in granting summary judgment to Haight. We therefore affirm in part, reverse in part, and remand for further proceedings as to Haight.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.