STATE OF MICHIGAN

COURT OF APPEALS

JANICE A. PRAGER and TERRANCE PRAGER,

Plaintiffs-Appellants/
Cross-Appellees,

and

BLUE CROSS/BLUE SHIELD,

Intervening Plaintiff

v

STONEY CREEK ORCHARD AND CIDER MILL,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED
July 30, 1996

No. 178047
LC No. 93-004059-NO

Before: Smolenski, P.J., and Markey and P.J. Sullivan,* JJ.

PER CURIAM.

Plaintiffs Janice and Terrance Prager appeal as of right an order granting summary disposition in favor of defendant. Defendant cross-appeals the same order. We affirm.

On October 3, 1992, plaintiff Janice Prager[1] was injured when the ladder on which she was standing for the purpose of picking apples at defendant's "u-pick" operation fell over or collapsed. The ladder was a uniquely designed three-legged orchard ladder with a tripod-type front leg. Plaintiff filed a common-law premises liability claim against defendant for her injuries. Defendant thereafter moved for summary disposition pursuant to MCR 2.116(C)(8) and (10) on the ground that it was not liable for plaintiff's injuries because (1) plaintiff's documentary evidence created no questions of fact concerning defendant's liability under MCL 300.201; MSA 13.1485; (2) the three-legged ladder was a simple tool, and; (3) any danger posed by either the three-legged ladder or the ground on which it was placed was open and obvious. The court granted defendant's motion on the ground that the ladder did not

* Circuit judge, sitting on the Court of Appeals by assignment.

constitute an unreasonable risk under the statute and that the ladder was a simple tool. This appeal followed.

Because the court considered matters outside the pleadings we treat the motion as granted pursuant to MCR 2.116(C)(10). See MCR 2.116(G). This Court reviews a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo, using the same standard required of the trial court. *Jackhill Oil Co v Powell Productions, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). We consider the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party. *Id*. We determine whether a record might be developed that might leave open an issue upon which reasonable minds could differ. *Id.* We are mindful that a trial court may not make findings of fact in deciding a motion for summary disposition. *Id.*

At common law, defendant owed plaintiff, whose visit to defendant's land was related to defendant's pecuniary interest, the duty of care owed a business invitee. See *Preston v Sleziak*, 383 Mich 442, 449-450; 175 NW2d 759 (1970); 2 Restatement Torts, 2d, § 343, p 215. However, at the time plaintiff was injured, defendant's liability was controlled by MCL 300.201(4); MSA 13.1485(4)[2] (§201[4]), which provided as follows:

> No cause of action shall arise against the owner, tenant, or lessee of land or premises for injuries to any person, other than an employee or contractor of the owner, tenant, or lessee, who is on the land or premises for the purpose of picking and purchasing agricultural or farm products at a farm or "u-pick" operation, unless the person's injuries were cause by a condition which involved an unreasonable risk of harm and all of the following apply:
>
> (a) The owner, tenant, or lessee knew or had reason to know of the condition or risk.
>
> (b) The owner, tenant, or lessee failed to exercise reasonable care to make the condition safe, or to warn the person of the condition or risk.
>
> (c) The person injured did not know or did not have reason to know of the condition or risk.

Legislative analysis makes clear that the legislature's purpose in enacting § 201(4) was to limit the liability of owners of u-pick operations so that such owners could obtain liability insurance at a reasonable cost and citizens could continue to enjoy outdoor recreational and educational experiences. See House Legislative Analysis, HB 4202, August 5, 1987.

The statutory duty of care owed by the owner of a u-pick operation to one of its visitors under § 201(4) is now analogous to the common law duty owed by a possessor of land to a licensee:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensee of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved. [Restatement, § 342, p 210.]

In light of the Legislature's intent to limit the liability of an owner of a u-pick operation and the absence of caselaw construing § 201(4), we believe that resort to caselaw and other relevant legal sources concerning a possessor's common-law duty of care to a licensee is appropriate to resolve the issues raised on appeal in this case.[3]

On appeal, the parties dispute whether the ladder was a simple tool, and whether the danger posed by the ladder was either unreasonable or open and obvious. Although not addressed by the trial court, we first address the issue concerning whether the danger posed by the ladder was open and obvious because we find it dispositive. This Court will not reverse where the right result is reached for the wrong reason. *Welch v Dist Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

The common-law duty owed by a possessor of land to a licensee has been explained by our Supreme Court as follows::

A landowner only owes a licensee a duty to *warn* the licensee of any hidden dangers he knows or has reason to know of, if the licensee does not know or has no reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Wymer v Holmes*, 429 Mich 66, 71, n 1; 412 NW2d 213 (1987) (citing, in part, Restatement, § 342, p 210).]

Concerning the duty to warn, the Restatement explains:

A licensee . . . is not entitled to expect that . . . that the possessor will warn him of conditions which are perceptible by his senses, or the existence of which can be inferred from facts within the licensee's knowledge. The possessor is entitled to expect that the licensee, realizing all this, will be on the alert to discover conditions which involve risk to him. [Restatement, § 342, comment f, p 212.]

In other words, at common law, a possessor of land has no duty to warn a licensee of open and obvious dangers. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611, 617; 537 NW2d 185 (1995); *DeBoard v Fairwood Villas Condominium Ass'n*, 193 Mich App 240; 483 NW2d 422 (1992). Whether a danger is open and obvious depends upon whether it is reasonable to expect an average user with ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

In the negligent entrustment case of *Muscat v Khalil*, 150 Mich App 114, 122; 388 NW2d 267 (1986), this Court held as follows:

> An extension ladder is an essentially uncomplicated instrument which gains a propensity for danger only because it will allow the user to reach great heights. This danger is most obvious to all but children of tender years whose intellectual capacity does not permit them to reason to such conclusions.

However, in *Eason*, this Court distinguised *Muscat* in part as follows:

> First, *Muscat* addressed the dangers generally posed by an extension ladder. Here, plaintiff alleges a specific defect in the ladder, a missing or malfunctioning safety latch. The real inquiry is whether this defect must be deemed an open and obvious danger. We think not. The danger that an extension ladder might slip and telescope down because of inadequate bracing at its base, as happened in *Muscat*, is a danger readily apparent to persons of ordinary intelligence and experience. However, the fact that a safety latch is missing or malfunctioning creates a different, or at least an additional, danger that is not so obvious absent specific knowledge of the defect. [*Eason, supra* at 265.]

In this case, plaintiff claims that the subject ladder is especially prone to instability unless it's tripod leg is properly positioned. Plaintiff also contends that the ladder is unstable because it has enough "play" to permit a wide range of side-to-side motion. Plaintiff claims that the ladder's instability is not readily apparent. In support of her contentions, plaintiff offered expert testimony below in the form of an affidavit indicating that the ladder's tripod leg lacked a suitable means of supporting the weight of its user on soft soil and permitted excessive lateral movement that could affect the ladder's stability.

However, leaning and tipping, particularly on soft soil, are known hazards relating to all ladders. The characteristic that makes the ladder involved in this case unusual, i.e., its tripod-type front leg, obviously provides less lateral stability than a four-legged step ladder, thus making the danger of instability all the more apparent to even the most casual observer. Accordingly, we conclude that no reasonable juror would find that the ladder's risk of instability was not open and obvious. *Bertrand, supra* at 617; *Eason, supra*.. The trial court, although reaching its decision on a different ground, properly granted defendant's motion for summary disposition where defendant had no duty under § 201(4) to warn plaintiff of the ladder's open and obvious risk of instability.

Alternatively, even assuming that the risk of instability posed by the ladder was not open and obvious, we nevertheless conclude that the trial court properly granted summary disposition, albeit on a ground not raised by either party. Again, this Court will not reverse where the right result is reached for the wrong reason. *Welch, supra.*

The Restatement explains in relevant part as follows:

> *j. Effect of notices posted by possessor.* A possessor of land fulfills his duty of warning by *any* notice which contains an adequate disclosure of the condition and which, if the risk is not disclosed by a mere notice of the condition, discloses also the risk involved. A notice to the effect that licensees enter at their own risk may be enough if the physical condition of the land indicates that there may be hidden dangers. Unless the physical conditions observable upon the land indicate to a man of ordinary judgment that there are hidden dangers, a notice to the effect that licensees enter at their own risk is not sufficient. Such a notice, while not satisfying the duty of the possessor, may be of importance in determining whether the licensee is guilty of contributory negligence, in not exercising the amount of care which such a notice would lead a reasonable man to believe to be necessary to ascertain the actual condition which he is likely to encounter.
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> *k. Where warning inadequate.* There will, however, be special situations in which the possessor has knowledge of facts from which he should realize that an ordinary warning will not be sufficient to notify the licensee of the danger, or to enable him to protect himself against it. Thus where the possessor knows that the licensee is blind, illiterate, or a foreigner, or a child too young to be able to read, it is not enough to rely upon a posted notice to give warning of the danger, and the possessor may still be required to exercise reasonable care to give adequate warning in some other way. In extreme cases, as in the case of the blind man, he may even be required to give physical assistance to enable the licensee to avoid the danger. [Restatement, § 342, comments j and k, pp 214-215 (emphasis supplied).]

In this case, plaintiff testified at her deposition that neither she nor anyone else in her party received instructions from defendant concerning the use of its orchard ladders. However, the record indicates that while plaintiff and her family were awaiting wagon transport to defendant's orchard, a chalkboard positioned by defendant contained various messages, including a notice to the effect that its ladders should be used at a person's "own risk." Plaintiff, while not contesting this fact, testified that she did not read this portion of defendant's chalkboard.

Defendant's three-legged orchard ladders had been purchased from two different manufacturers. Although defendant claims that plaintiff fell from a "Columbia" ladder, plaintiff claims that she is unable to confirm whether she fell from a Columbia ladder or a "Stokes" ladder because after her fall defendant returned the ladder to general use. However, although testifying that she did not inspect the ladder before using it, plaintiff does not dispute that each manufacturer affixed to its ladders

extensive warning labels. These labels begin with a bold, capitalized heading reading either "**ORCHARD LADDERS - FOR YOUR SAFETY READ CAREFULLY**" or "**IMPORTANT SAFETY INFORMATION**." A photograph of a Columbia ladder reveals that its warning label is affixed to the ladder's inside rail so that the label's heading is readily observable to a casual user. In smaller type, the warning label on a Columbia ladder instructs a user, in relevant part, that "[t]he step section should be set so steps are level when in use" and "[p]lace ladder close enough to work to avoid over reaching." The warning label on a Stokes ladder instructs a user, in relevant part, to "not extend leg over 60 degrees," that "when reaching, do not allow belt buckle beyond side rail," and to "keep steps level."

There is no indication in the record that plaintiff had any problems with her eyesight or that she was illiterate. Accordingly, even giving plaintiff the benefit of doubt, we conclude that no reasonable juror would find that the manufacturer's notices did not adequately disclose both the proper setup of defendant's ladder and its risk of instability. Therefore, we conclude that any duty defendant had under § 201(4) to warn plaintiff of the risk of instability of its three-legged orchard ladders was fulfilled. In granting summary disposition, the trial court reached the proper result.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Paul J. Sullivan

[1] "Plaintiff" hereinafter refers to plaintiff Janice Prager.

[2] Redesignated without substantive change as MCL 300.201(5); MSA 13.1485(5) by 1993 PA 26. 1995 PA 58 both repealed this subsection and recodified its substantive provisions at MCL 324.73301; MSA 13A.73301.

[3] Likewise, we decline to consider plaintiff's cited cases discussing the greater duty owed by a possessor to a business invitee at common law.