STATE OF MICHIGAN

COURT OF APPEALS

DARLENE FRANKS, individually and as Personal Representative of the Estate of Larry Franks, Deceased,

Plaintiff-Appellant,

v

KASLE STEEL CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 30, 1997

No. 194934
Wayne Circuit Court
LC No. 95-510536-NI

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

Plaintiff Darlene Franks appeals as of right an order granting summary disposition in favor of defendant, Kasle Steel Corporation pursuant to MCR 2.116(C)(10). We reverse in part and remand.

On appeal, plaintiff argues that summary disposition was improper because genuine issues of material fact exist as to whether defendant was negligent. A trial court's determination of a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition under MCR 2.116(C)(10) may be granted when, giving the benefit of reasonable doubt to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Before summary disposition may be granted, the trial court must be satisfied that, because of some deficiency that cannot be overcome, it is impossible for the claim to be supported at trial. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

Plaintiff's specific contention on appeal is that the trial court erred when it ruled, as a matter of law, that defendant exercised reasonable care in maintaining its unloading area. We agree. In Michigan, a possessor of land is subject to liability for physical harm caused to invitees by a condition on his land if (1) the possessor knows or by reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, (2) the possessor should expect that the invitees will not discover or realize the danger, or that they will fail to protect themselves against it, and (3) the

possessor fails to exercise reasonable care to protect the invitees against the danger. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995), quoting 2 Restatement Torts, 2d, § 343, pp 215-216. In the instant case, decedent Larry Franks testified in his deposition that, in order to deliver his load of steel coils to defendant, he was required to unchain his load in an outdoor area that was extremely muddy. Although the loading dock was not in a muddy area, the area where drivers prepared their load for unloading was in a muddy section of defendant's property. He explained that whenever it rained or the frost left the ground, the entire area was a "mudhole." Plaintiff also presented an affidavit of another driver who recalled that, at the time of decedent's injury, the entire unloading preparation area consisted of mud that was several inches deep.

This Court in *Van Deusen v Fountainview Terraces, Inc*, 69 Mich App 199, 202; 244 NW2d 411 (1976), reasoned that "there is no substantial difference between a natural accumulation of ice and snow and a natural accumulation of mud as a result of inclement whether." Relying on *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244, 261; 235 NW2d 732 (1975), in which the Michigan Supreme Court established the rule that invitors are required to take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to an invitee, the *Van Deusen* Court held that the issue of whether a defendant landlord was negligent in placing a dumpster on a muddy surface was a question of fact. *Van Deusen, supra* at 202. Likewise, the issue of whether defendant exposed decedent to an unreasonable risk by requiring him to unchain his load in a muddy area is a question of fact.

Defendant unduly relies on *Bertrand, supra* at 618-621, for the proposition that the trial court could determine, as a matter of law, that the risk was reasonable. Although plaintiff did not assert that there was anything unusual or unique about the mud, she *did* assert that there was something unusual or unique about the unloading area: the presence of excessive mud. Thus, plaintiff presented sufficient facts to create an issue of fact as to whether the preparation and unloading areas posed an unreasonable risk of harm. Cf. *Bertrand, supra* at 621. Because those proofs create a question of fact as to whether the risk of harm posed by the excessive mud was unreasonable, the existence of a duty to exercise reasonable precautions is dependent upon a finding of fact and therefore is not amenable to summary disposition. See *Bertrand, supra* at 617, citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

Although the muddy condition was obvious, a person in decedent's position might reasonably conclude that the advantages of encountering the risk (completing the delivery as requested) would outweigh the apparent risk (slipping on the mud). See *Bertrand, supra* at 612, quoting 2 Restatement Torts, 2d, § 343A, comment f, p 220. Thus, a genuine issue of material fact exists as to whether defendant should have realized that decedent would have failed to protect himself from the risk posed by the muddy unloading area, despite its open and obvious nature. Finally, the issue of whether defendant exercised reasonable care to protect decedent from the danger posed by the alleged unreasonable risk of harm is also a question of fact. See *Bertrand, supra* at 613; *Riddle v McClouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

In sum, we hold that summary disposition was improper because genuine issues of material fact exist as to whether defendant (1) knew or should have known it was exposing decedent to an unreasonably dangerous condition, (2) should have expected decedent to encounter the condition despite its obvious nature, and (3) exercised reasonable care to protect decedent from the condition.

Plaintiff also argues on appeal that the trial court erred in failing to recognize that defendant owed a duty to plaintiff under the nuisance provisions of the Dearborn Code. We disagree. The nuisance provision of the Dearborn Code does not expressly provide for a private cause of action. On the contrary, it states that its provisions are to be enforced by city police officers and the department of building and safety. Because the Dearborn Code does not expressly create a private cause of action, we hold that it imposes a public duty for which there is no private right of action. Cf. *Levendoski v Geisenhaver*, 375 Mich 225, 227-228; 134 NW2d 228 (1965); *Szkodzinski v Griffin*, 171 Mich App 711, 713; 431 NW2d 51 (1988); *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984). Although the city ordinance does not support a separate cause of action, we offer no opinion on whether an alleged violation of the ordinance may be used for other purposes.

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

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell