

STATE OF MICHIGAN
COURT OF APPEALS

HEATHER P. VAN VLEET, Personal
Representative of the Estate of KATLYNN VAN
VLEET, Deceased,

UNPUBLISHED
November 19, 2002

Plaintiff-Appellant,

v

No. 234970
Monroe Circuit Court
LC No. 99-009329-NZ

CONSOLIDATED RAIL CORPORATION,

Defendants-Appellee,

and

CITY OF MONROE and DONALD LINK,

Defendants.

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant Consolidated Rail Corporation (Conrail) in this wrongful death action. We affirm.

This case involves the drowning death of four-year-old Katlynn Van Vleet. The accident occurred on property that abuts the River Raisin, between the Conrail railroad tracks and the City of Monroe Water Treatment Plant. On April 20, 1996, Katlynn was one of eight children who went to the River Raisin to fish. The children proceeded across a parking lot, down a path, and along a cement wall adjacent to the river. They stopped at the dam where there were cement structures on the river bank. When Katlynn jumped down from one cement structure to a lower one, she fell into the river and drowned.

Plaintiff brought this wrongful death action against Conrail based on theories of general negligence and attractive nuisance.¹ Plaintiff alleged that Conrail failed to exercise reasonable care to prevent members of the public from using its property to gain access to the river, failed to warn of the dangers associated with the river, and failed to inspect its property in order to

¹ Plaintiff also claimed against the City of Monroe and Donald A. Link. This appeal concerns only Conrail.

discover the dangerous condition of the river. Conrail moved for summary disposition under MCR 2.116(C)(10) on the ground that Katlynn's accident did not occur on its property and therefore Conrail owed no duty to her. The trial court agreed and granted Conrail's motion.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and is subject to review de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996); MCR 2.116(G)(5). A trial court properly grants summary disposition if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

One of the necessary elements that a plaintiff must establish in order to prevail in a negligence action is the existence of a duty. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 4; 535 NW2d 215 (1995). The existence of a duty is a question of law for the trial court which is subject to review de novo on appeal. *Id.*; *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 132; 517 NW2d 289 (1994). Duty exists where the relationship between the parties gives rise to a legal obligation on the part of one party for the benefit of the other, injured party. *Braun v York Properties, Inc*, 230 Mich App 138, 147; 583 NW2d 503 (1998); *Rodriguez v Detroit Sportsmen's Cong*, 159 Mich App 265, 270; 406 NW2d 207 (1987).

In order to establish duty in a premises liability claim, a plaintiff must prove that the defendant had legal possession and control of the premises at issue. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998); *Merrit v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980); *Stevens v Drekich*, 178 Mich App 273, 276; 443 NW2d 401 (1989). Generally, a defendant's duty ends at the boundary of his premises. *Stevens, supra* at 276. A defendant's duty may be extended to conditions on adjacent property if the defendant has exercised possession or control over those adjacent properties. *Devine v Al's Lounge, Inc*, 181 Mich App 117, 120; 448 NW2d 725 (1989); *Rodriguez, supra* at 271.

In support of its motion for summary disposition, Conrail presented evidence that it did not have possession or control of the property where Katlynn fell. John Kelly, former Real Estate Property Manager for Conrail's Dearborn Division, stated that at the edge of the river, Conrail's property extended no more than ninety feet from the center line of the railroad tracks. The property beyond this ninety-foot extension, which includes the area where the accident occurred, had been transferred to the City of Monroe from the New York Central Railroad Company in 1922. The deed was attached to Kelly's affidavit. James R. Stump, a Division Engineer for Conrail and a licensed professional engineer, attested that the distance from the center line of the railroad track located to the east of the water treatment plant to the eastern fence line of the plant is ninety-feet, eight inches. He referenced an attached exhibit which depicts the end of Conrail's property at the fence surrounding the plant, and at the end of the fence at the river there is a cement retaining wall. The cement structures where the accident occurred are located farther west along this retaining wall.

Plaintiff does not appear to dispute that the accident did not occur on Conrail's property. Plaintiff offered no evidence that Conrail exercised control or possession over the adjacent property where the accident occurred. *Rodriguez, supra* at 271 ("Where an occupant of one parcel of land has been held responsible for the condition of an adjoining parcel to which another has title or possession, such responsibility is predicated on the fact that he exercised control over the land beyond his boundaries."). Plaintiff relies on *Berman v LaRose*, 16 Mich App 55; 167 NW2d 471 (1969), which recognizes liability of a property owner for injuries which occur on abutting property if the plaintiff can establish that the defendant property owner has in some manner either increased the existing hazard or created a new hazard. Plaintiff argues that the path on Conrail's property leading to the river increased the hazard on the abutting property. We find no genuine issue of material fact on this question. The mere existence of the path did not make the river more dangerous, and the record evidence shows that the river was easily accessible from other areas. We conclude that the trial court properly determined that Conrail did not owe a duty to Katlynn on the basis of control of or increased hazards on the property.

Plaintiff also bases her claim against Conrail on the attractive nuisance doctrine. Plaintiff maintains that the path on Conrail's property was an attractive nuisance because it leads to the river.

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. [*Rand v Knapp Shoe Stores*, 178 Mich App 735, 740-741; 444 NW2d 156 (1989).]

See *Pippin v Atallah*, 245 Mich App 136, 146 n 4; 626 NW2d 911 (2001). "All five conditions must be met in order for a possessor of land to be held liable for injury to a trespassing child." *Rand, supra*. "At the onset, liability under this rule is imposed only where the injury is caused by an 'artificial condition.'" *Id.*.

There is no genuine issue of material fact regarding whether Katlynn was injured by an artificial condition on Conrail's property. As an initial matter, there is no evidence that the path

is an “artificial condition” on the land. Moreover, even if the path could be considered artificial, Katlynn was not injured while on the path or by any aspect of the path itself. Katlynn’s injury occurred on the bank of the river near the dam, and Conrail had no duty to protect her from that danger. *Summers v Detroit*, 206 Mich App 46, 51; 520 NW2d 356 (1994) (“[T]he doctrine of attractive nuisance extends only to those who both possess and control the land.”) Accordingly, the trial court properly granted summary disposition in favor of Conrail.

Finally, we reject plaintiff’s argument that summary disposition was prematurely granted. “Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed.” *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). Summary disposition may be proper before the close of discovery if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Id.* at 537-538; *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). In this case, Conrail was entitled to summary disposition based on the absence of a legal duty, and plaintiff fails to show how further discovery would support a finding of a duty on the part of Conrail.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald