

STATE OF MICHIGAN
COURT OF APPEALS

MICHELE COMPAU and TODD COMPAU,

Plaintiffs-Appellants,

UNPUBLISHED
April 16, 2015

v

PIONEER RESOURCE COMPANY, L.L.C.,
WALTER A. KILBOURN, d/b/a WHITTEMORE
INN, and WHITTEMORE INN RACE CLUB,

No. 320615
Iosco Circuit Court
LC No. 12-007121-NO

Defendants-Appellees.

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Plaintiffs, Michele and Todd Compau (the Compaus), appeal as of right the trial court's order granting summary disposition to defendants, Pioneer Resource Company, LLC, Walter A. Kilbourn, and Whittemore Inn Race Club (collectively, Whittemore), under MCR 2.116(C)(10). Because the Compaus asserted claims that sounded in ordinary negligence, the open and obvious doctrine did not bar all the Compaus' claims, and the trial court improperly granted summary disposition. We reverse and remand for further proceedings.

I. FACTS

Whittemore holds barstool and lawn mower races on some weekends. According to Michele Compau, the Compaus and some of their friends were riding mopeds on Saturday, May 29, 2010, and stopped to investigate the races because she had not previously heard of a barstool or lawn mower race. The Compaus and Chuck Miller parked their mopeds on a gravel area, walked around a railroad tie, and stood in front of it to watch the races.

Kilbourn testified that the railroad ties look like logs or telephone poles and that he did not think they were a tripping hazard because everyone was aware of them. According to Kilbourn, people stand or place lawn chairs on the grass around the track or sit in the bleachers to watch the races. Kilbourn received information from the Lawn Mower Racing Association about standard rules for lawn mower racing, but he adjusted his track size to fit into his available space. He also put a fence around the area racetrack. The fence was designed to fold over if struck, but it stopped the lawn mowers. Lawn mower racers occasionally lost control of their lawn mowers, but only rarely spun out or hit the fence.

According to Michele Compau, there was a “flimsy” fence around the track, similar to “the orange fencing that people put in front of their yard so people on snowmobiles can’t go through their yard and stuff.” She did not stand right at the fence, and other people were standing between her and the fence. As she was watching the race, two lawn mowers collided and hit the fence. One of the lawn mowers started to come through the fence, was hit again, and then came through the fence. Everyone in her area started backing up.

As Compau backed up, she fell over the railroad tie. Compau landed on her buttocks and hands. She realized that her middle finger was out of place and decided to go to the hospital. Compau’s wrist was also broken, and it required a total of five surgeries, including for tendon and nerve damage.

The Compaus filed their complaint in August 2012. The brief complaint alleged that Whittemore had “a duty to use ordinary care in the operation of the races to protect its invitees from risks of harm from a condition upon their premises and place of business,” and that the “[t]he manner and operation of the Lawn Mower and Bar Stool races was a special feature that made the condition of the premises unreasonably dangerous.” The complaint also alleged that the racetrack’s design and configuration “created an unreasonable risk of harm to spectators, including [Michele Compau], who stood behind the fence to watch the race” and was alarmed when a lawn mower “lurched out of control toward her, causing [her] and the crowd to hurriedly step back for their safety[.]”

On November 13, 2013, Whittemore moved for summary disposition under MCR 2.116(C)(10), contending that the open and obvious doctrine precluded the Compaus’ claims. On June 6, 2014, the Compaus responded by contending that the open and obvious doctrine did not bar their premises liability claim because the distraction posed by the races were a special aspect that rendered the railroad ties unreasonably dangerous. The Compaus also contended that summary disposition on their entire complaint was inappropriate because the open and obvious doctrine did not bar their ordinary negligence claims. At arguments on the motion, Whittemore contended that the Compaus had not alleged a separate negligence claim, and the Compaus contended that their entire claim did not sound in premises liability.

The trial court determined that the Compaus’ claims sounded in premises liability, reasoning that the lawn mower did not actually hit Michele Compau. It determined that the railroad ties were an open and obvious hazard and that they did not have special aspects that rendered them unreasonably dangerous. The trial court granted Whittemore’s motion for summary disposition under MCR 2.116(C)(10).

II. STANDARD OF REVIEW

This Court reviews de novo the trial court’s decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party is entitled to summary disposition under MCR 2.116(C)(10) if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.” The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120. A genuine issue of material fact exists if, when viewing the record in the light most favorable to the nonmoving party, reasonable minds could differ on

the issue. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 116; 839 NW2d 223 (2013).

To survive a motion for summary disposition, once the nonmoving party has identified issues in which there are no disputed issues of material fact, the burden is on the plaintiff to show that disputed issues exist. MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party “must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Id.* If the nonmoving party does not make such a showing, the trial court properly grants summary disposition. *Id.* at 363.

III. THE COMPAUS’ NEGLIGENCE CLAIM

The Compaus contend that the trial court erroneously granted summary disposition because their complaint included claims that sounded in both premises liability and ordinary negligence. They contend that the open and obvious danger doctrine applied only to their premises liability claims, not their ordinary negligence claims. We agree.

A party may maintain a negligence action, including a premises liability action, only if the defendant had a duty to conform to a particular standard of conduct. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A claim in premises liability does not preclude a separate general negligence claim on the basis of the defendant’s conduct. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). The difference between premises liability and general negligence is the nature of the duty that the plaintiff alleges the defendant owed. See *Id.* at 492.

A premises owner has a duty to protect invitees—persons who enter the owner’s premises at his or her express or implied invitation—from hidden or latent defects on his or her property. *Riddle*, 440 Mich at 90-91; *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2010). But “there is no absolute duty to warn of known or obvious dangers.” *Riddle*, 440 Mich at 97. The open and obvious doctrine provides that the premises owner does not have the duty to warn invitees of conditions “where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them[.]” *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

“[T]he open and obvious danger doctrine does not apply to ordinary negligence claims[.]” *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 304; 807 NW2d 909 (2011). A claim sounds in ordinary negligence if the defendant owed the plaintiff the common-law duty to use due care to not unreasonably endanger others. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); *Johnson v A & M Custom Built Homes of West Bloomfield*, 261 Mich App 719, 722; 683 NW2d 229 (2004). If a plaintiff claims that his or her cause of action sounds in one theory rather than another, the plaintiff may not reverse his or her position on appeal. *Wheeler*, 292 Mich App at 305.

In this case, the Compaus have consistently asserted two theories of liability. A review of the Compaus’ complaint shows that the Compaus did in fact assert two different theories of liability. In defending against Whittemore’s motion for summary disposition, the Compaus raised and argued that they had alleged two different theories of liability. They explained that

their negligence theory was based on ordinary negligence—that Whittemore breached duties to safely design the track and safely operate the races. The Compaus also raised and argued that they had claims sounding in ordinary negligence at oral arguments on the motion.

Paragraph 9 of the complaint asserts that Michele Compau was an invitee. Paragraph 10 alleges that Whittemore had the duty to “use ordinary care in the operation of the races to protect its invitees from risks of harm from a condition upon their premises” Paragraph 12 contends that the races, when combined with the railroad ties, were “a special feature that made the condition of the premises unreasonably dangerous.” These paragraphs sound in premises liability because they concern a hazard on the land.

In contrast, paragraphs 13 and 14 allege that Whittemore configured the racetrack with flimsy fencing and that the lawn mower racers regularly lost control of their vehicles and collided with the fencing. And paragraph 15 alleges that “the race track, as configured on the day of Plaintiff’s injury, created an unreasonable risk of harm to spectators” These claims sound in ordinary negligence because they do not concern hazards on the land. Rather, the claims concern Whittemore’s conduct of designing the racetrack and operating the races.

We conclude that the Compaus’ complaint raised claims of ordinary negligence, as well as claims sounding in premises liability, and did not subsequently abandon those claims. Accordingly, the trial court erred when it granted summary disposition on the entirety of the Compaus’ complaint under the open and obvious doctrine.

IV. THE COMPAUS’ PREMISES LIABILITY CLAIM

The Compaus contend that the trial court erred in granting summary disposition on their premises liability claims because even if the railroad tie was open and obvious, the distraction posed by the races was a special aspect that made it unreasonably dangerous. We disagree.

Special aspects exist when there are aspects “that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]” *Lugo*, 464 Mich at 517. Special aspects include hazards that are “effectively unavoidable” or that present “a substantial risk of death or serious injury[.]” *Id.* at 518. Everyday hazards such as steps and potholes do not generally pose highly unreasonable risks, even in the presence of distractions. See *id.* at 522. But the open and obvious doctrine does not bar recovery “where the possessor has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 718; 737 NW2d 179 (2007) (quotation marks and citations omitted).

In this case, there is no genuine issue of material fact regarding whether the distraction created by the lawn mower races should bar the Compaus’ claims. Kilbourn testified that the railroad ties were the size of logs or telephone poles and did not pose a tripping hazard because everyone knew they were there. The Compaus did not present any facts to support their position that the races were so distracting that invitees would not discover telephone pole- or log-sized railroad ties. To the contrary, Michele Compau testified that she actually saw the railroad tie:

Q. . . . When you parked the mopeds did you see the railroad tie or ties?

A. I seen the one.

Q. Okay. When you parked the moped?

A. Yes. And then we, like, walked around the railroad ties. We walked around, [Miller] and I did. We were standing in front of it..

Accordingly, we conclude that the trial court properly granted summary disposition because the Compaus failed to present evidence sufficient to create a question of fact regarding whether the races were so distracting that invitees could not discover the railroad ties.

We reverse and remand for further proceedings on the Compaus' ordinary negligence claim. We do not retain jurisdiction. Neither party having prevailed in full, no costs. MCR 7.219.

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood