

STATE OF MICHIGAN
COURT OF APPEALS

PAUL KACHUDAS,

Plaintiff-Appellant,

v

INVADERS SELF AUTO WASH, INC.,

Defendant-Appellee.

UNPUBLISHED
September 1, 2009

No. 281411
Genesee Circuit Court
LC No. 06-084859-NO

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition on the basis that plaintiff's claim was precluded by application of the open and obvious danger doctrine. We reverse and remand.

Plaintiff slipped and fell in defendant's car wash in March 2005. The car wash was designed with a heating system consisting of pipes that run under the floors of the bays and the front area of the car wash, a boiler that heats antifreeze in a tank, and a pump that circulates the antifreeze through the pipes. The principal purpose of the heating system was to keep ice from forming on the bay floors. A temperature control inside the office was set to about 36 degrees. Outside of one of the bays, a thermostat was mounted to sense the air temperature. When the thermostat sensed that the air temperature had fallen to 36 degrees, the heating system would turn on automatically and remain on unless someone turned it off, or the thermostat registered 37 degrees. On the day of the accident, the temperature was between 11 and 24 degrees, according to climatological data reports, and while the heating system should have been running continuously, the evidence established that it wasn't.

Sometime just prior to plaintiff's fall, Richard Weishuhn, the owner of the car wash, had inspected the business. Weishuhn conducted these inspections himself because he did not have constant on-site attendants at the car wash. During his inspection, Weishuhn noticed that bays one and two had ice formation, but bays three and four did not. Weishuhn went into the office and checked the breaker connected to the heating system pump. The breaker was off, so he reset it, after which the pump restarted. Meanwhile, plaintiff arrived at the car wash, and began washing his car in bay three.

Weishuhn was grabbing orange cones to place them in front of the bays, when a friend of his arrived and began talking with him, which caused an interruption in Weishuhn's placement of the orange cones. During the less than five minutes of conversation, plaintiff fell in bay three

as he was in front of his vehicle, rinsing it off. Plaintiff broke his wrist in the fall. He testified that he believed there was ice in the bay, because he fell, and while he did not know whether the car wash had an in-floor heating system, he had expected it to have one, since his friend, who opened the first car wash in Genessee county, told him that his car wash had such a system because of Michigan's wintry weather.

After he fell, plaintiff went to the office and told Weishuhn that he should put some salt down on the floor because he had just fallen. According to plaintiff, Weishuhn apologized and acknowledged that "the heating system on that bay is not working." Weishuhn then went over to bay three to move plaintiff's car. As he entered the bay, he noticed that ice had formed on plaintiff's vehicle, but the floor looked wet to him, not icy. Despite being unable to see ice, nevertheless, Weishuhn concluded that there was ice on the floor, because he could feel that the floor was slippery when he walked on it.

Plaintiff's suit alleges that the heating system designed to heat the floor of the wash bay, in order to prevent ice from forming, was malfunctioning, that defendant knew at the time plaintiff fell that the heating system was malfunctioning, and that, despite this knowledge, defendant failed to warn the public of the malfunctioning system or close the car wash to prevent the public from using the car wash when it might not be safe. While the complaint asserts a failure by defendant to inspect and maintain the premises, it principally alleges that defendant's conduct, in failing to act on the knowledge that the heating system was malfunctioning, was negligent or grossly negligent, and that defendant's negligence or gross negligence proximately caused the accident.

Defendant moved for summary disposition, based on the open and obvious danger doctrine. The trial court granted the motion, based on that doctrine, and denied plaintiff's motion for reconsideration.

Summary dispositions are reviewed de novo. *Ligon v City of Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). A motion made under MCR 2.116(C)(10) tests the factual support for a claim, and should be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* But such evidence is only considered to the extent that it is admissible. MCR 2.116(G)(5). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *The Healing Place at North Oakland Med Ctr, supra* at 56.

Michigan law distinguishes between a claim sounding in ordinary negligence, and a premises liability claim. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). The applicability of the open and obvious danger doctrine is dependent on the theory of liability presented by the pleader, and on the nature of the duty at issue. *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). The doctrine is applicable only to premises liability actions, and product liability cases involving a failure to warn, and is not applicable to actions asserting claims of ordinary negligence. *Id.* at 615-616. When an injury develops from a condition of the

land, rather than from an activity or conduct that created the condition thereon, the action sounds in premises liability. *James, supra* at 18-19.

In *Hiner*, the plaintiff fell and injured his leg while trying to avoid the defendant's dog during a house call to fix the defendant's cable equipment. *Hiner, supra* at 606-608. The defendant argued that the open and obvious danger doctrine applied, arguing that the plaintiff should have known of the soft, muddy ground on which he tripped or slipped. *Id.* at 615. This Court rejected the defendant's argument, giving the following analysis:

[P]laintiff's claim is based on defendant's failure to reasonably control the dog – not [on] the alleged hazard presented by the muddy conditions on the ground. Moreover, the applicability of the open and obvious danger doctrine depends on the theory underlying the negligence action. *Laier v Kitchen*, 266 Mich App 462, 489-490; 702 NW2d 199 (2005) (opinions of Neff, J., and Hoekstra, P.J.). The doctrine applies to an action based on premises liability, but not [to an action based on] ordinary negligence. . . . Plaintiff does not rely on premises-liability principles in this appeal. Instead, she relies on the duty recognized in *Trager [v Thor]*, 445 Mich 95, 99; 516 NW2d 69 (1994), . . . which derives from ordinary-negligence principles rather than premises-liability theory. [*Hiner, supra* at 615-616 (citations omitted).]

We hold that, here, similarly, the gravamen of plaintiff's complaint and the predominating theory of liability in the case relates to defendant's alleged conduct or failure to act, i.e., negligence or gross negligence, and that the theory of liability is not based on the alleged existence of a dangerous condition on the premises. Therefore, plaintiff's claim is not barred by the open and obvious doctrine. The parties agree that the ice on which plaintiff slipped was caused or created when plaintiff sprayed his own vehicle with water. Plaintiff's allegations, that defendant knew of a malfunctioning heating system, but did not do anything, or did not take sufficient action, to protect the public from the likely effects of the malfunctioning system, and that defendant's failure to act violated a duty to him and the public, are allegations concerning *conduct* that sound in negligence. While we recognize that plaintiff's complaint also pleads allegations typically found in premises liability claims, it is plain that the complaint challenges defendant's conduct in the face of knowledge about the malfunctioning heating system. As we noted earlier, the applicability of the open and obvious danger doctrine depends on the theory underlying the negligence action. *Hiner, supra* at 615-616. Because the trial court misconstrued the underlying theory of the case as one for premises liability rather than negligence, the trial court erred as a matter of law in applying the open and obvious doctrine. *Id.*

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh