Order

Michigan Supreme Court
Lansing, Michigan

April 6, 2018

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

155380

KERRI HUNTER OTTO, Next Friend of
BAILEY ANN MARIE NOBLE, Minor,
Plaintiff-Appellee,

v

SC: 155380
COA: 330214
Benzie CC: 14-009969-NO

INN AT WATERVALE, INC.,
Defendant-Appellant.

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On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we REVERSE the January 17, 2017 judgment of the Court of Appeals and we REINSTATE the September 21, 2015 summary disposition order of the Benzie Circuit Court. The circuit court correctly ruled that the recreational land use act (RUA), MCL 324.73301, applies to this case. That statute provides in relevant part that gross negligence or willful and wanton misconduct by an owner, tenant, or lessee must be shown in order to bring a cause of action "for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use . . . ." MCL 324.73301(1). Plaintiff's next friend and daughter injured herself on defendant's beachfront property on Lake Michigan after stepping on hot coals that were the remnants of a beach fire. A witness testified that the girl had been at the beach with a friend, "building sand castles, throwing stones in the water, and splashing around." The issue in this case is whether these activities fall within the RUA's general category of "any other outdoor recreational use[.]"

The Court of Appeals interpreted the RUA using the *ejusdem generis* canon, which provides that when specific words precede general words in a statute, " 'the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.' " *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 242 (2000), quoting *People v Brown*, 406 Mich 215, 221 (1979). The Court of Appeals then interpreted the RUA's enumerated list to involve activities that require a higher degree of risk and intensity than beach play, which it thus found to be outside the scope of the RUA's general category. Consequently, the Court held that the RUA did not apply and that plaintiff's negligence action could go forward.

We disagree. The activities at issue here fall within the plain meaning of the general phrase "any other outdoor recreational use." They occurred outdoors and were

done for refreshment or diversion, and consequently were recreational. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "recreation" as, among other things, "a means of refreshment or diversion"). We reject the Court of Appeals' limitations on the scope of the general category fashioned by using the *ejusdem generis* canon. We do not agree that all of the listed activities involve any particular heightened degree of physical intensity or inherent risk. And even if they did, beach play would be encompassed, as it is at least as intense and risky as "sightseeing" or "fishing," two of the listed activities. Nor do we find any need to define what limitations any other common characteristic of the RUA's enumerated items might impose on the general phrase, because the parties have identified no such characteristic that would limit the scope of the general category in a manner that would exclude beach play. Therefore, because the activities here fit the plain meaning of "any other outdoor recreational use" and are not excluded by any interpretation of the RUA's general provision under the *ejusdem generis* canon, we conclude that the RUA applies.[1] Accordingly, we reverse the Court of Appeals' decision and reinstate the Benzie Circuit Court's order.

WILDER, J., did not participate because he was on the Court of Appeals panel.

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[1] As noted above and by the Court of Appeals, the doctrine of *ejusdem generis* provides that " 'the meaning of the general words will ordinarily be presumed to be and construed as restricted by the particular designation and as including only things of the same kind, class, character or nature as those specifically enumerated.' " *Sands Appliance Servs*, 463 Mich at 242, quoting *Brown*, 406 Mich at 221. This doctrine is often applied to avoid rendering the list of specific words superfluous. See 2A Singer & Singer, Sutherland Statutory Construction (7th ed), § 47:17 ("If the general words are given their full and natural abstract meaning, they would include the objects designated by the specific words, making the latter superfluous."). While the doctrine may have applicability to a statute, it is nonetheless unnecessary to define the outer parameters of the common class in a given case. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 208 (explaining that there are times when it is unnecessary "to identify the genus [i.e., the common class] with specificity in order to decide the case at hand"). Because this case involves beach play, which clearly falls within whatever the proper common class may be among the specifically enumerated land uses, it is unnecessary in this case to define the outer limits of the common class.

STATE OF MICHIGAN

COURT OF APPEALS

KERRI HUNTER OTTO, Next Friend of BAILEY ANN MARIE NOBLE, Minor, Plaintiff-Appellant,	UNPUBLISHED January 17, 2017
v	No. 330214 Benzie Circuit Court
INN AT WATERVALE, INC, Defendant-Appellee.	LC No. 14-009969-NO

Before: WILDER, P.J., and BORRELLO and GLEICHER, JJ.

PER CURIAM.

Plaintiff Kerri Hunter Otto, as next friend of Bailey Ann Marie Noble, appeals by right an October 29, 2015, circuit court order granting defendant Inn at Watervale, Inc's (the Inn's) motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). The court granted defendant's motion after holding that plaintiff's ordinary negligence claim was barred by the Recreational Land Use Act (RUA), MCL 324.73301, and holding that plaintiff failed to create an issue of fact regarding whether the Inn's conduct amounted to gross negligence or willful and wanton misconduct as required under the RUA. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. FACTS

Located on the shores of Lake Michigan and abutting frontage on Lower Herring Lake in Arcadia, Michigan, the Inn at Watervale has been in proprietor Dori Noble-Turner's family since 1917. The Inn is busy during the summer with 14 separate cottages, four buildings with rooms, and several private rental houses. The Inn owns approximately 1.5 miles of Lake Michigan beachfront property and lake-front property on Lower Herring Lake. The Inn maintains the lakefront properties for exclusive use of its guests and patrons.

Katherine Pearson works for the Grand Traverse Regional Land Conservancy (GTLC), a private nonprofit land trust, as a charitable giving specialist where she focuses on fundraising. In the early 2000's, Pearson worked on a project to complete a conservation easement on land owned by the Inn in conjunction with the GTLC's conservation of "Arcadia Dunes," a 6,000 acre Lake Michigan shoreline area that abuts the north end of the Inn's property. During the time Pearson worked on the Arcadia Dunes project, she often visited the Inn to meet with supporters of the GTLC and to hold fundraising events. Pearson also met and befriended Dori, who was a

GTLC board member. The GTLC successfully completed the Arcadia Dunes conservation project in 2006.

Plaintiff is the mother and next friend of Bailey Ann Marie Noble. Bailey is a friend of Pearson's daughter Sophie. On Friday August 23, 2013, Pearson, Pearson's husband Stephen Cruzen, Sophie and Bailey, then age 10, went on a camping trip in Elberta, Michigan, which is approximately 10 minutes away from the Inn. Before the camping trip, Dori invited Pearson to use the Inn's beach while she was in the area. Pearson took Dori up on the offer and on the morning of Saturday August 24, 2013, Pearson and Cruzen drove the girls to the Inn, parked at the end of Watervale Road, and accessed the Inn's private Lake Michigan beach after traversing a sand dune and passing a "private property" sign. The four beachgoers went about halfway between the water and the beach grass and spread out beach towels; Pearson and Cruzen had books while the two girls played in the sand nearby. The beach was empty other than a single family way off to the right. For about an hour, while the adults lounged with books, the girls were "building sand castles, throwing stones in the water, splashing around. It seems like the water was pretty cold that day maybe." Pearson described what happened next as follows:

> all at once I heard screaming and looked to my left and Bailey was rolling around in the sand and I jumped up and immediately we were all running toward her and I was calling out, "Did you get stung?" . . . And she yelled back, "I stepped in hot coals."

According to Pearson, Bailey's foot "look[ed] horrible," and Bailey was screaming and sobbing. Pearson brought Bailey over to the lake and put her foot in the cold water. A doctor, who happened to be a member of the other family on the beach, also came over to assess Bailey and instructed Pearson to keep the foot in the water until an ambulance arrived. The doctor then helped escort Bailey up to the end of Watervale Road where the ambulance arrived. Upon arrival, the ambulance driver indicated to Pearson that the paramedics had "problems" with people extinguishing fires with sand along the lakeshore and estimated they received about four calls per year for similar injuries. However, the paramedic did not specifically state that there were prior injuries at the Inn's beach. Bailey was transported and received emergency medical services; plaintiff testified that Bailey suffered second degree burns to her left foot and one "eraser sized" third degree burn.

Pearson testified that immediately after the accident, Dori informed her that the Inn previously had "fire rings" on the beach for guests to use, but blowing wind during the fall covered them up and the Inn had yet to uncover the rings from the prior fall season. However, at a deposition, Dori offered conflicting testimony, explaining that there were four fire rings on the beach at the time of the accident. Dori explained that the Inn acquired the rings to prevent people from having fires "all over" the beach, yet, even after the rings were installed, patrons still started fires on the beach outside the rings.

Jennie Turner-Schmitt, general manager at the Inn, also testified that there were fire rings on the beach at the time of Bailey's injury. Schmitt testified that at some point, the Inn procured the fire rings because "so many people will put out a fire with sand." Schmitt explained that Inn staff would clean the pits out and remove embers every Saturday during guest changeover. Schmitt also explained that the Inn placed notices in the cottages instructing patrons to

extinguish fires with water as opposed to sand. While there was testimony that the Inn placed buckets in the cottages, Schmitt agreed that there were no buckets provided on the beach.

Maintenance manager Cletus Swanson testified that the Inn provided three or four fire rings on the beach, but he was not sure who was in charge of maintaining them. He stated that Inn staff would "occasionally" empty out the fire pits. Swanson did not inspect the beach on the day that Bailey burned her foot. He was not sure if the fire rings were installed on the beach that day and he stated that "it varies" as to when the fire rings are on the beach. Swanson testified that he was "absolutely" aware that guests started fires on other parts of the beach and buckets were provided in the cottages for water. Swanson explained that there was no set schedule as to when the beach was inspected; instead, staff responded to management's requests. Swanson was not aware of anyone else being injured on the beach.

On May 20, 2014, plaintiff, as next friend of Bailey, commenced this suit alleging a single count of negligence. The Inn moved for summary disposition, arguing that the negligence claim was barred by the RUA, MCL 324.73301, which provides in relevant part as follows:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration *for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use* or trail use, with or without permission, against the owner, tenant, or lessee of the land *unless the injuries were caused by the gross negligence or willful and wanton misconduct* of the owner, tenant, or lessee. [MCL 324.73301(1).]

The Inn argued that Pearson and Bailey used the beach without paying consideration because they accepted Dori's invitation to use the beach as opposed to using the beach as a paying customer of the Inn. The Inn also argued that Bailey, as Pearson's guest, was engaging in "other outdoor recreational use" of the beach area under the RUA when she was injured. Therefore, recovery was permissible only for injury arising from gross negligence or willful and wanton misconduct and the Inn was entitled to summary disposition as to the negligence claim.

Plaintiff responded, arguing that the RUA does not apply to every "recreational activity," and that the Legislature intended the RUA to immunize landowners from liability associated with certain enumerated recreational activities. Plaintiff argued that playing on a beach was not akin to fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling or snowmobiling; thus, the RUA did not apply. Alternatively, plaintiff moved to amend the complaint to add gross negligence and willful and wanton misconduct claims.

Following oral argument, the trial court held that the RUA applied and barred plaintiff's negligence claim, explaining as follows:

> What's at issue in this case is the application of the Michigan Recreational Land Use Act. The defense is relying upon the statutory language for essentially its defense in this case, affirmative defense, claiming that the activities engaged in by the young lady . . . Bailey . . . are those types of activities that fit squarely within

> the [RUA]. The protections of the [RUA] extend to other outdoor recreational use. And that's language that the Michigan Supreme Court stated in [*Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004).]
>
> And the court concluded in that case that other outdoor recreational use includes uses of the same kind, class, character and nature of those specifically enumerated.
>
> [] This Court notes the behaviors or the activities engaged in by this young lady . . . on the date in question . . . they included building sandcastles. Essentially, it was a day at the beach. I can't recall from the actual pleadings if there were allegations that there was swimming that took place, but the purpose of being at the beach that day was simply to have a beach day. This Court is persuaded by the defense that that type of behavior is exactly, and fits squarely within, the statutory scheme as set forth in the Recreational Land Use Act. Although it's not fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, it is other – a different form of outdoor recreational use that this Court finds fits within the act and that the act does apply in this case.

After finding that the RUA applied, the court dismissed plaintiff's negligence claim, but granted plaintiff leave to amend the complaint to add gross negligence and willful and wanton misconduct claims. Thereafter, plaintiff amended the complaint accordingly. Plaintiff alleged that the Inn promoted beach bonfires in its advertising, was aware that guests built fires on the beach and extinguished them with sand, yet failed to take safety measures to protect beachgoers. Plaintiff alleged that the Inn did not provide buckets on the beach or post signs on the beach instructing guests to extinguish fires with water. In addition, plaintiff alleged that the Inn failed to prepare the fire rings at the time of the injury. The Inn's failure to take proper safety precautions constituted reckless conduct that amounted to gross negligence and willful and wanton misconduct. In addition, plaintiff re-alleged the negligence claim, arguing that the RUA did not apply because access to the Inn's beach was part of compensation provided to Pearson for her work acquiring the preservation easement.

On July 24, 2015, the Inn again moved for summary disposition. The Inn argued that there was no genuine issue of material fact to support that Bailey's injury was caused by the Inn's willful and wanton misconduct or gross negligence. There were no prior injuries at the Inn's beach, the Inn provided notices to guests to extinguish fires with water, the Inn provided fire rings on the beach for fires and buckets in the cottages to use for extinguishing fires. In addition, the Inn's employees cleaned embers from the rings on a weekly basis. The Inn argue that the embers that caused the injury were buried under sand so no inspection would have revealed the danger and argued that it was unreasonable to police the entire shoreline. The Inn argued that there was no evidence to support that it acted with intent to harm or reckless indifference that harm would be caused or showed a lack of concern for whether an injury resulted.

Following oral arguments, on September 24, 2015, the trial court issued an opinion granting the Inn's motion for summary disposition. The court held that the RUA governed plaintiff's claim where Pearson's work involving the conservation easement did not amount to

consideration in connection with Bailey's use of the beach. The court stated that there was nothing to support that Pearson's work with the conservation project amounted to a bargained-for-exchange for access to the beach. Therefore, the RUA applied and dismissal of the ordinary negligence claim was proper under MCR 2.116(C)(8).

The court proceeded to hold that there was no genuine issue of material fact to support that the Inn was grossly negligent as required under the RUA. The court found that the Inn provided buckets in the cottages and provided notes to guests notifying them to extinguish fires with water. The court found that it was not reckless for the Inn to fail to police the entire shoreline, which would not be reasonable. The court noted that there was a conflict as to whether the Inn provided fire rings on the beach, but reasoned that even if the rings were missing, that did not create a question of fact as to whether the Inn was grossly negligent.

The court also held that there was no genuine issue of material fact with respect to plaintiff's willful and wanton misconduct claim where there was nothing to support that the Inn's conduct amounted to an intent to harm Bailey or an indifference as to whether harm did occur. Here, the Inn had no prior injuries, the shoreline was too vast to police at all times, and the Inn provided notices and buckets for extinguishing fires. Furthermore, the potential failure to clear and prepare the fire rings did not create an issue of fact as to whether the conduct was willful and wanton misconduct. The court granted summary disposition as to the gross negligence and willful and wanton misconduct claims pursuant to MCR 2.116(C)(10). The court entered an order on September 29, 2015. This appeal ensued.

II. ANALYSIS

"We review de novo a trial court's decision on a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law." *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Resolution of these issues requires that this Court determine the applicability of the RUA, which involves an issue of statutory construction that is reviewed de novo. *Id*.

This case requires that we interpret and apply the relevant portions of the RUA. "The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011). "[U]nless explicitly defined in a statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Yudashkin v Holden*, 247 Mich App 642, 650; 637 NW2d 257 (2001) (quotation marks and citation omitted).

The RUA is part of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. As noted above, the RUA provides in relevant part as follows:

> Except as otherwise provided in this section, a cause of action shall not arise for injuries to a person who is on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration *for the purpose of fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use*, with or without

> permission, against the owner, tenant, or lessee of the land *unless the injuries were caused by the gross negligence or willful and wanton misconduct* of the owner, tenant, or lessee. [MCL 324.73301 (emphasis added).]

In *Neal v Wilkes*, 470 Mich 661; 685 NW2d 648 (2004), our Supreme Court addressed the applicability of the RUA. In that case, the plaintiff was riding as a passenger on an ATV that was being driven on the mowed portion of the defendant's residential property. *Id*. at 663. When the driver drove over an uneven portion of the lawn, the plaintiff bounced on the ATV and injured her lower back. *Id*. The trial court dismissed the suit after holding that the RUA barred the plaintiff's ordinary negligence claim. *Id*. This Court reversed, holding that the RUA only applied to "large tracts of undeveloped land." *Id*. at 663-664.

On appeal, our Supreme Court reversed, explaining that the RUA was limited by the types of activities that a plaintiff may have been engaged in but it was not limited to undeveloped tracts of land, explaining that "[t]he statute contains no limitation on the type of land involved, but rather applies to specified activities that occur on the land of another . . . . That is, the act limits its application to specified activities, but it does not limit its application to any particular type of land." *Id*. at 667-668. Because the plaintiff did not dispute that she was engaged in an "outdoor recreational use" covered by the RUA without having paid compensation to participate in the activity, the statute barred plaintiff's ordinary negligence claim. *Id*. at 670-671.

In dissent, Justice CAVANAUGH stated that the Court's interpretation would "eliminate[] the liability of a landowner, tenant, or lessee when a person who does not pay consideration and who participates in *any* outdoor recreational activity is injured." *Id*. at 673 (CAVANAUGH, J., *dissenting*). The *Neal* majority, responded, stating that "*the RUA does not apply to any outdoor recreational activity*. Rather, it only applies to 'fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use . . . .' " *Id*. at 669 (quotation marks and citations omitted). The Court proceeded to expand on what type of "other outdoor recreational use" may be covered by the RUA, explaining:

> Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, 'the general term is interpreted to include only things of the same kind, class, character, or nature as those specifically enumerated.' *Therefore, the language 'other outdoor recreational use' must be interpreted to include only those outdoor recreational uses' of the same kind, class, character, or nature,' as 'fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, [and] snowmobiling* . . . .' While the dissent apparently believes that jump-roping and playing hopscotch, pin-the-tail-on-the-donkey, shuffleboard, and horseshoes are of the 'same kind, class, character, or nature' as 'fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, and snowmobiling . . .' we see no need to address these or any other activities that are not at issue in this case. [*Id*. at 669 (emphasis added) (internal quotation marks and citations omitted).]

In this case, applying the doctrine of ejusdem generis indicates that child's play on the beach is not an activity that is "of the same kind, class, character, or nature" as "fishing, hunting, trapping, camping, hiking, sightseeing, motorcycling, [or] snowmobiling." *Id*. While age is not

a consideration for purposes of the RUA, Bailey's age in this case sheds light on the nature of the activity she was engaged in—namely, child's play on the beach. Child's play on the beach is dissimilar to the enumerated activities set forth above. The enumerated activities are of a higher-intensity that involve inherent risks that are not inherent in child's play on the beach. For example, hunting, trapping, and fishing involve higher intensity activity and inherent risks that are not inherent in making sand castles and digging in the sand on the beach. The potential for injury during hunting, trapping and fishing is much greater than the passive activity of building sandcastles on the beach. Similarly, camping, hiking, sightseeing, motorcycling and snowmobiling involve higher-intensity outdoor recreation activities that are not of the same kind, class or character as child's play on the beach. Each of those activities involves inherent risks that are not akin to the risks one would reasonably expect to encounter while building a sandcastle on the beach. Thus, Bailey was not engaged in an "other outdoor recreational use" for purposes of the RUA and the RUA did not govern in this case. *Id*.

The Inn argues that swimming is a type of activity that falls within the ambit of the RUA, such that Bailey's activities on the beach should also fall within the RUA. This argument is not persuasive. The Inn relies on *Anderson v Brown Brothers, Inc*, 65 Mich App 409, 416; 237 NW2d 528 (1975) to support this aspect of its argument on appeal. In that case, a 14-year-old boy went swimming with his friends at a lake at the defendants' gravel pit that was not fenced-off or restricted to the public. *Id*. at 14. At some point, the boy attempted to dive from an edge of the pit into deep water, but the ground beneath him crumbled and he landed in shallow water, fracturing vertebrae in his neck and causing nearly complete paralysis. *Id*. at 413. The plaintiff, the boy's next friend, brought suit against the defendants, alleging, *inter alia*, ordinary negligence. *Id*. at 414. The trial court dismissed the ordinary negligence claim, holding that the claim was barred by the RUA. *Id*. On appeal, this Court affirmed, holding that swimming and diving amounted to "similar outdoor recreational use" that was covered under the RUA. *Id*. at 416. This Court explained as follows:

> The trial court, however, in its opinion granting the motions for summary judgment in the present case, very logically stated the reason for including "swimming" and "diving" within the words "similar outdoor recreational use". 'It is the opinion of this court that swimming is the type of recreation that is a natural extension of many of the activities specifically enumerated in the statute and, in the absence of any reason to the contrary, should fall into the category of a 'similar outdoor recreational' activity. To construe the statute otherwise would be to say that a man who wades out in another's lake to fish has no cause of action for injuries, but he is not barred from suit if he changes his mind and goes swimming, and is injured. Equally untenable would be to bar from recovery a person who sustains injuries while he is merely sightseeing or hiking across the land of another and yet to allow the same trespasser to get into court if he should, in the course of his hike, pause for a swim, or if he should purposely go onto Defendants' property and go swimming, and sustain injuries." [*Id*. at 416.]

Initially we note that because *Anderson* was decided before November 1, 1990, it is not binding precedent on this Court. MCR 7.215(J)(1). Moreover, *Anderson* is dissimilar to the instant case. In *Anderson*, the injured boy was swimming and diving at a gravel-pit lake when he was injured. In this case, Bailey was not swimming or diving when she stepped in hot coals

buried on the beach. Instead, Bailey was engaged in a more docile activity—playing in the sand on the beach. Playing in sand on the beach, making sandcastles, tossing stones into the water, etc. etc. is significantly different than swimming and diving. Swimming and diving are high-intensity outdoor activities that involve inherent risks that are not inherent in building sandcastles on the beach. Swimming and diving involve a significantly higher inherent risk of injury and drowning; these activities require a level of know-how and skills and pose a greater risk of harm than simply playing on a beach. Thus, while swimming and diving may be "natural extensions" of the specifically enumerated activities in the RUA, child's play on the beach is not.

The Inn also argues that, even if Bailey's activity did not fall within the RUA, there was no evidence to support her negligence claim. Essentially, the Inn argues that summary disposition under MCR 2.116(C)(10) would have been proper as to the ordinary negligence claim irrespective of whether the RUA applied. However, the trial court dismissed the ordinary negligence claim pursuant to MCR 2.116(C)(8) on ground that the RUA barred the claim. The court did not dismiss the claim under MCR 2.116(C(10), thus, the Inn's argument lacks merit.

Moreover, there were questions of fact regarding whether the Inn was liable under a negligence theory where, contrary to the Inn's argument, there were genuine issues of fact regarding whether the Inn should have known of the dangerous condition on the beach. See e.g. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000) (holding that a landowner owes a licensee a duty to "warn the licensee of any hidden dangers the owner knows or has reason to know of. . . .") Here, even if the Inn did not know of the presence of the coals, there was evidence that would allow reasonable jurors to conclude that the Inn had reason to know of the buried coals. Testimony showed that the Inn had knowledge that guests started fires on the beach and that patrons would often extinguish the fires with sand instead of water. The injury occurred on a Saturday, a changeover day, indicating that guests were at the hotel using the beach the previous day and evening. In addition, there was conflicting testimony as to whether the Inn provided fire rings during the summer of 2013. The absence of fire rings would have served as additional notice to the Inn that patrons started fires on the walkable parts of the beach and extinguished the fires with sand. Furthermore, the Inn was aware that it did not provide buckets or other means to extinguish the fire on the beach and there was no dispute that the Inn did not post notice on the beach of the dangerous posed by fires extinguished with sand. Based on this evidence, a reasonable jury could conclude that the Inn breached its duty to warn of the hidden coals. *Stitt*, 462 Mich at 596.

In sum, Bailey was not engaged in an activity enumerated in the RUA when she was playing in the sand at the beach nor was she engaged in an "other outdoor recreational use" when she was injured. Accordingly, the RUA did not apply in this case and the trial court erred in dismissing plaintiff's negligence claim on that basis and in holding that plaintiff was required to prove gross negligence or willful and wanton misconduct.[1]

[1] Given our conclusion that the RUA did not apply in this case, we need not address plaintiff's argument that there was evidence to create a genuine issue of material fact with respect to her

Reversed and remanded for further proceedings consistent with this opinion. Plaintiff having prevailed, may tax costs. MCR 7.219(A). We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

gross negligence claim under the RUA and her argument that the RUA did not apply because Pearson provided compensation to access the beach.