STATE OF MICHIGAN

COURT OF APPEALS

DUVON BARNES,

Plaintiff-Appellant,

v

Q LINE DETROIT, LLC, M-1 RAIL, CITY OF DETROIT, BRINKER GROUP, L. S. BRINKER COMPANY, BRINKER TEAM CONSTRUCTION, and CHRISTMAN CONSTRUCTORS, INC.,

Defendants-Appellees.

UNPUBLISHED
August 20, 2020

No. 348511
Wayne Circuit Court
LC No. 18-000817-NO

Before: REDFORD, P.J., and METER and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants Q Line Detroit, LLC, and M-1 Rail.[1] We affirm.

[1] After the trial court granted summary disposition to Q Line and M-1 Rails, the parties stipulated to dismiss all other defendants with prejudice on condition that plaintiff did not waive her right to appeal "as it relates to all" defendants. On appeal, Christman Constructors, Inc., challenges this Court's jurisdiction and argues that plaintiff cannot create a final order by stipulation. In support of their challenge, Christman cites *Detroit v Michigan*, 262 Mich App 542, 545-546; 686 NW2d 514 (2004), which involved a stipulation to dismiss claims *without* prejudice. Christman also cites *Shane v Himelstein*, 227 Mich 465, 468; 198 NW 909 (1924); *Hoffman v Security Trust Co of Detroit*, 256 Mich 383, 386; 239 NW 508 (1931), but those cases support that parties to an appeal cannot create appellate jurisdiction by consent or waiver of a deficiency in a filing; they do not address a final order that includes a stipulated dismissal of claims. Thus, Christman has not cited a single case to support its argument that this Court does not have jurisdiction over all defendants in a case like the one now before us. We conclude that, contrary to Christman's arguments, the stipulated order that plaintiff appeals from, which included an open-ended reservation of the right

I. BACKGROUND

The Q Line tracks stretch down Woodward Avenue for approximately three miles. On June 26, 2017, plaintiff was riding her bicycle down Woodward Avenue along the Q line tracks. Plaintiff primarily rode in the bicycle lane, but would occasionally ride on the sidewalk to avoid riding over the Q Line tracks. Further down Woodward, however, the bicycle lane ended, the sidewalks filled up with pedestrians, and there was construction on the sidewalk. This caused plaintiff to ride over the Q Line tracks at the intersection of Woodward and Temple Street. When plaintiff did so, her bicycle tire slipped into the tracks causing her to fall and suffer injuries.

This led plaintiff to file the instant premises-liability action against Q Line Detroit and M-1 Rail. She later added the city of Detroit, Brinker Group, and Christman Constructors, Inc., as defendants. Eventually, defendants Q Line Detroit and M-1 Rail filed a motion for summary disposition under MCR 2.116(C)(10), arguing that the hazard presented by tracks was open and obvious. The trial court agreed that the hazard presented by the tracks was open and obvious and that there were no special aspects. Consequently, it granted the motion. This appeal followed.

II. STANDARD OF REVIEW

Appellate courts review de novo a trial court's grant of summary disposition. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). The trial court granted summary disposition under MCR 2.116(C)(10). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained the process for reviewing a motion filed under MCR 2.116(C)(10) as follows:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.]

A genuine issue of material fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

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to appeal as to all defendants, satisfies the definition of a "final order"—"the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). See *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 662-666; 516 NW2d 132 (1994) (addressing issues reserved in a stipulated final order as an appeal by right and declining to address issues that were not reserved in the stipulation).

III. ANALYSIS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 285; 933 NW2d 732 (2019) (quotation marks and citation omitted). The duty a landowner owes a visitor on his property depends on the visitor's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). The parties dispute whether plaintiff was an invitee or a licensee, but for purposes of this appeal, we assume that plaintiff was an invitee. A landowner owes an invitee a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Absent special aspects, this duty does not extend to open and obvious dangers. *Id*. at 516-517. A condition is open and obvious when an average person of ordinary intelligence would discover the danger and the risk it presented on casual inspection. *Buhl v City of Oak Park*, 329 Mich App 486, 520; 942 NW2d 667 (2019). "This is an objective test." *Id*.

We agree with the trial court that the Q Line tracks were an open and obvious condition. The tracks stretch down Woodward for approximately three miles. They were not hidden or obscured in anyway. Indeed, plaintiff testified that she could clearly see the tracks as she biked down Woodward. A person of ordinary intelligence could readily observe the tracks and discover the hazard posed by riding a bike over them; the tracks are not even with the ground, so riding a bicycle over the tracks could cause a person to fall.

Plaintiff argues that there is a question of fact whether the danger posed by the Q Line tracks was open and obvious because she testified at her deposition that she did not believe that she could potentially injure herself by riding her bike over the tracks. But the test for whether a condition is open and obvious is an objective one, so whether a plaintiff subjectively knew that the condition was hazardous is not relevant. See *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). Moreover, plaintiff's assertion that she did not subjectively know of the hazard posed by riding over the Q Line tracks is belied by her testimony that she was "afraid" of riding near the tracks and she "didn't want to go near the tracks" because she "didn't know how [her] bike would interact with the track." Regardless of this inconsistency, for the reasons explained, because the test for an open and obvious danger is an objective one and an average person of ordinary intelligence would have discovered the danger and risk that biking over the Q Line tracks presented, the tracks were an open and obvious hazard.

Because we are assuming for purposes of this appeal that plaintiff was an invitee, we next address whether special aspects existed such that liability may still exist for the open and obvious hazard posed by the Q Line tracks. As our Supreme Court explained, "as a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012).

There are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id*. at 463. An open and obvious condition may be "unreasonably dangerous" if it

imposes "an unreasonably high risk of severe harm." *Lugo*, 464 Mich at 518. Plaintiff does not explain what special aspect of the Q Line tracks imposed an unreasonably high risk of harm, and instead asserts that "[i]t is clearly evident that" the Q Line tracks were unreasonably dangerous. In *Lugo*, our Supreme Court identified "an unguarded thirty foot deep pit in the middle of a parking lot" as an example of an unreasonably dangerous condition because of the "substantial risk of death or severe injury" if a person were to fall in it. *Id*. Clearly, the risk of harm posed by falling off a bike because of the Q Line tracks is not comparable to the risk of harm posed by falling into a thirty-foot-deep pit. Thus, we disagree with plaintiff that "[i]t is clearly evident that" the Q Line tracks were unreasonably dangerous, and instead hold that no reasonable juror could conclude that any special aspect of the Q Line tracks created an unreasonably dangerous hazard.

Turning to whether the Q Line tracks were effectively unavoidable, our Supreme Court in *Hoffman* explained that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Hoffner*, 492 Mich at 469. Thus, "situations in which a person has a *choice* whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. As noted by the trial court, plaintiff clearly had a choice whether to confront the Q Line tracks while riding her bike; she could have easily gotten off and walked her bike. Alternatively, because the Q Line tracks only run down Woodward, plaintiff could have taken a different street to avoid the tracks. In the face of these readily available alternatives to riding a bike across the Q Line tracks, no reasonable juror could conclude that the danger posed by crossing the Q Line tracks on a bike was effectively unavoidable.

Because there were no questions of material fact and a reasonable juror could only conclude that the condition at issue was open and obvious without special aspects, the trial court properly granted the motion for summary disposition.

Affirmed.

/s/ James Robert Redford
/s/ Patrick M. Meter
/s/ Colleen A. O'Brien