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STATE OF MICHIGAN

COURT OF APPEALS

TAREK HAMADE,

Plaintiff-Appellant,

v

NEW LAWN SOD FARM, INC., DEBUCK'S CORN MAZE AND PUMPKIN PATCH, NORMAN DEBUCK, and LINDA DEBUCK,

Defendants-Appellees.

UNPUBLISHED
February 11, 2021

No. 352652
Wayne Circuit Court
LC No. 18-015562-NO

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(I)(2), and denying plaintiff's motion for summary disposition under MCR 2.116(C)(10). On appeal, plaintiff argues that the trial court erred by determining that there was an open and obvious danger. Plaintiff further argues that the trial court erred by dismissing his motion for summary disposition. We reverse in part and remand.

I. BACKGROUND FACTS

Plaintiff and his family visited defendants' pumpkin patch and corn maze (the "corn maze") in Belleville, Michigan, for a day of amusement. While there, plaintiff noticed defendants' "Tough Farmer" obstacle course. Participants of the course were expected to walk or run across a balance beam and a series of vertical tires buried halfway in the ground, and climb over haystacks. Plaintiff challenged his 14-year-old niece to a race through the course. While waiting his turn, plaintiff observed others traverse the course, including the vertical tires, without issue. Some of the participants that completed the obstacle course while plaintiff was waiting were the same size as, or larger than, plaintiff. When plaintiff ran across the vertical tires, one of the tires bent significantly, resulting in plaintiff fracturing his foot.

Scott Debuck, the manager of the corn maze, testified he was unaware of the defective tire until after plaintiff's accident. Scott admitted knowledge that the tire was "spongy," yet stated that

no other participant had reported issues with the tire area in the three years the obstacle course had been in place. Indeed, plaintiff stated that before the accident, the tires appeared "sturdy."

Plaintiff filed a complaint asserting a claim of premises liability. Plaintiff moved for summary disposition under MCR 2.116(C)(10), arguing that there was no dispute of material fact that plaintiff established all elements of his premises liability claim and that the dangerous condition of the tire was not open and obvious. Defendants filed a countermotion for summary disposition under MCR 2.116(I)(2), alleging that plaintiff failed to establish the elements of negligence and that the dangers posed by the obstacle course were open and obvious. The trial court concluded that the tire was an open and obvious danger. Thus, the trial court granted defendants' countermotion and denied plaintiff's motion. This appeal followed.

II. OPEN AND OBVIOUS

Plaintiff argues the trial court erred in finding the tire was an open and obvious danger because the tire appeared sturdy and able to support a person's weight, and that there were no genuine issues of fact with regard to plaintiff's premises liability claim. We agree in part.

A. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. *Magley v M & W Inc*, 325 Mich App 307, 313; 926 NW2d 1 (2018). A party's motion under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint, [and] this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). However, "[s]ummary disposition may be granted in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law." *Holland v Consumers Energy Co*, 308 Mich App 675, 681-682; 866 NW2d 871 (2015).

We consider the "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." *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). "Our review is limited to the evidence that has been presented to the circuit court at the time the motion was decided." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475-476; 776 NW2d 398 (2009).

B. LAW AND ANALYSIS

In a premises liability action, the 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." *Mouzon v Achievable Visions*, 308 Mich App 415, 418; 864 NW2d 606 (2014) (quotation marks and citation omitted). The standard of care, and thus the duty, owed by a landowner to a visitor depends on

whether the visitor is a trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).

Here, the parties do not dispute that plaintiff was an invitee. Invitees are afforded "the highest level of protection under premises liability law." *Id*. at 597.

> With regard to invitees, a landowner owes a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land. Michigan law provides liability for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect. [*Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (citations omitted).]

A landowner may be liable for a dangerous condition if he either participates in active negligence or where the landowner had notice of the dangerous condition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10-11; 890 NW2d 344 (2016). "Active negligence exists where a defendant or his agents have created a dangerous condition. In that case, proof of notice is unnecessary." *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991). Even if a landowner is not actively negligent, the landowner may still be liable if he or she had notice of the dangerous condition. *Lowrey*, 500 Mich at 11. Notice can be either actual or constructive. *Id*. Actual notice exists when the landowner knows about the dangerous condition. *Id*. Constructive notice exists when there is evidence "that the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." *Id*. at 11-12.

However, "[p]erfection is neither practicable nor required by the law" and "[t]he possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 460-461 (citation omitted). Accordingly, to determine whether a dangerous condition is open and obvious, courts will employ an objective standard which considers whether "an average person with ordinary intelligence would have discovered [the dangerous condition] upon casual inspection." *Id*. at 461. "Our Supreme Court has explicitly cautioned that when applying this test, 'it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff.' " *Price v Kroger Co of Mich*, 284 Mich App 496, 501; 773 NW2d 739 (2009), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001). Thus, "[t]he proper question is not whether *this plaintiff* could or should have discovered the [condition], but whether the [condition] was observable to the average, casual observer." *Price*, 284 Mich App at 501.

The facts presented by both parties evidence that the dangerous condition of the tire was not observable until after plaintiff was injured. Plaintiff watched others running across the vertically placed tires without falling or otherwise having difficulty. Plaintiff also viewed the tires himself and later testified: "They looked very sturdy. When walking up to them, they looked like they were full tires, they were sturdy tires." Likewise, Scott visually inspected the corn maze that morning and did not observe any defects in the vertical tire area of Tough Farmer. Nor had Scott received any complaints about a problem at the obstacle course.

Despite these facts, the trial court determined there was an open and obvious danger:

> What we have here is an open and obvious situation. There is some risk involved when people—I personally couldn't be something like that. I'd probably bake [sic] more than just my ankle.
>
> And let me just say this. It is unfortunate that [plaintiff] got injured. But there is, there's some risk involved when people want to engage in this type of activity . . . .
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> * * *
>
> And, people with just a general sense of common sense that there's a potential that one of the tires might bend a certain way and cause somebody to fall or otherwise, in this case, be injured.

In reaching this conclusion, the trial court viewed the issue as whether the activity in general posed an open and obvious danger, rather than whether the particular condition, here the "spongy" tire, was an open and obvious danger. Plaintiff argues that this assessment by the trial court amounted to an improper assumption of risk analysis.

The assumption of risk doctrine is generally unavailable in negligence actions. See *Ritchie-Gamester v Berkley*, 461 Mich 73, 78; 597 NW2d 517 (1999) (stating that, except for cases involving an employment relationship, *Felgner v Anderson*, 375 Mich 23; 133 NW2d 136 (1965) abolished the assumption of risk doctrine in negligence actions). Yet, as defendants point out, the question for us is whether a landowner remains liable against "an adult . . . who *chose* to confront an obstacle course in broad daylight." In essence, defendants argue that an obstacle course contains inherent dangers that are open and obvious.[1] While defendants' argument appears to hold weight, this Court has previously addressed and rejected a similar argument. In *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 105; 804 NW2d 569 (2010), the plaintiff slipped and fell on a wet floor at the defendant's fast-food restaurant. *Id*. at 99. The plaintiff testified that she did not notice the wet floor before her fall, and even after she fell, the floor did not appear to be wet. *Id*. at 103. The defendant argued the wetness of the floor was open and obvious because "a wet floor in a restaurant is a common everyday hazard of which customers are expected to be aware . . . ." *Id*. at 104. Stated differently, the defendant essentially argued that by entering a restaurant, patrons are on notice of potentially wet floors, even when the floor is not visibly wet. *Id*. at 104-105. This Court rejected that argument, reasoning that it "is not consistent with the open and obvious doctrine, but instead rests upon a broadened version of the assumption of the risk doctrine which, even in its narrower form, was abolished in Michigan 45 years ago, and has no place in the 'open and obvious' doctrine." *Id*. at 105.

[1] We note that defendants rely on a number of cases from different jurisdictions to illustrate and support their argument. Caselaw from federal courts and other states are not binding on this Court. *Estate of Voutsaras v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019). Because Michigan caselaw readily applies, we decline to consider defendants' provided cases.

The idea that courts should focus on the specific hazard, rather than a "broadened version of assumption of the risk," was also discussed in *Hughes v PMG Bldg, Inc*, 227 Mich App 1; 574 NW2d 691 (1997). The *Hughes* plaintiff was a construction worker hired by the defendant to do roofing work on a new house. *Id*. at 3. The plaintiff shingled the garage of the house before moving to shingle an overhang area that extended two feet out from the house. *Id*. From his vantagepoint, the plaintiff could not see that the supports to the overhang had not yet been installed. *Id*. After stepping on the overhang to install the shingles, the overhang collapsed and the plaintiff was severely injured. *Id*. In framing the issue, this Court stated, "Clearly, the danger of falling off the roof overhang is open and obvious. However, the particular risk at issue in this case—that the overhang would collapse when plaintiff put one foot on it—is not so obvious." *Id*. at 11. This Court concluded that there was a question whether the danger posed by the roof overhang was open and obvious because "a person in plaintiff's position could reasonably believe that the roof overhang was sturdy enough to support his weight." *Id*. at 11-12.

Applying the reasoning of *Watts* and *Hughes*, there is inherent danger associated with all activities—whether a person is eating at a restaurant, shingling a roof, or running an obstacle course. Yet, a landowner's liability for injury is only extinguished by looking to the *particular cause* of the injury. That is, a landowner is not immune from liability even though there is some generalized danger associated with the activity on their property. Rather, a landowner will be relieved of liability under the open and obvious doctrine, by looking at the "particular risk at issue," *id*. at 11, and whether an "average person with ordinary intelligence would have discovered [the dangerous condition] upon casual inspection," *Hoffner*, 492 Mich at 461.

Thus, we focus our analysis on the particular dangerous condition that caused plaintiff's injury—the tire. The evidence showed that no one reported any issues in the vertical tire area. According to both parties, the defective tire appeared "sturdy" and it was only when pushed that it bent. Further, none of the participants who went before plaintiff had difficulty traversing the vertical tires. In fact, Scott testified in the three years that Tough Farmer had been in place, defendants had observed no issues with the vertical tire area. Thus, considering these facts in a light most favorable to plaintiff, an average person in plaintiff's position would not have been able to discover the dangerous condition of the tire upon casual inspection, and therefore, the tire was not an open and obvious danger. *Hoffner*, 492 Mich at 461.

Further, we are not persuaded by defendants' argument that *Singerman v Muni Serv Bureau, Inc*, 455 Mich 135, 142-143; 565 NW2d 383 (1997) and *Davis v Lenhart*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket No. 329092), are dipositive on the open and obvious nature of the dangerous condition in this case. Our Supreme Court's analysis in *Singerman* did not focus on the open and obvious nature of the hockey rink's inadequate lighting. Rather, the parties agreed that the inadequate lighting was an open and obvious danger, and the Court focused on whether there was an unreasonable risk of harm, despite the open and obvious danger. *Singerman*, 455 Mich at 141-144. And, not only is *Davis* factually distinct because the dangerous condition was open and obvious, *Davis*, unpub op at 8, but, under MCR 7.215(C)(1), it does not hold precedential value, *Olin v Mercy Health Hackley Campus*, 328 Mich App 337, 342 n 2; 937 NW2d 705 (2019).

Finally, we turn to plaintiff's argument that the trial court erred in dismissing his motion for summary disposition because there was no genuine issue of material fact as to his premises

liability claim. We note that because the trial court determined that the tire was an open and obvious danger, it did not address the elements of premises liability. This Court does not ordinarily "address issues . . . that were not decided by the trial court." *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). Because the trial court did not address any questions of fact with respect to defendants' negligence under a theory of premises liability, we decline to do so.

III. CONCLUSION

The tire that caused plaintiff's injury was not an open and obvious danger because its dangerous condition was not readily discoverable upon casual inspection. Therefore, we reverse the trial court's grant of summary disposition in favor of defendants. However, we decline to address plaintiff's remaining argument that the trial court erred by denying his motion for summary disposition because the trial court did not address the elements of the premises liability claim.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica