Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

164091

DEBRA B. FORD,
Plaintiff-Appellant,

v

SC: 164091
COA: 355541
Calhoun CC: 2020-000348-NO

CITY OF MARSHALL, BAILEY EXCAVATING, INC., LIBERTA CONSTRUCTION COMPANY, d/b/a CIOFFI & SON CONSTRUCTION, and GIVE-EM A BRAKE SAFETY, LLC,
Defendants,

and

CONSUMERS ENERGY COMPANY,
Defendant-Appellee.

_____/

By order of May 31, 2022, the application for leave to appeal the January 13, 2022 judgment of the Court of Appeals was held in abeyance pending the decisions in *Kandil-Elsayed v F & E Oil, Inc* (Docket No. 162907) and *Pinsky v Kroger Co of Mich* (Docket No. 163430). On order of the Court, these cases having been decided on July 28, 2023, 512 Mich ___ (2023), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE Part III.B. of the judgment of the Court of Appeals and REMAND this case to that court for reconsideration in light of *Kandil-Elsayed* and *Pinsky*. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We do not retain jurisdiction.

s1120

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2023

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DEBRA B. FORD,

Plaintiff-Appellee,

v

CITY OF MARSHALL, BAILEY EXCAVATING, INC., LIBERTA CONSTRUCTION COMPANY, doing business as CIOFFI & SON CONSTRUCTION, and GIVE-EM A BRAKE SAFETY, LLC,

Defendants,

and

CONSUMERS ENERGY COMPANY,

Defendant-Appellant.

UNPUBLISHED
January 13, 2022

No. 355541
Calhoun Circuit Court
LC No. 2020-000348-NO

Before: BOONSTRA, P.J., and CAVANAGH and RIORDAN, JJ.

PER CURIAM.

Defendant, Consumers Energy Company (Consumers), appeals by leave granted[1] an order denying its motion for summary disposition of plaintiff's claims of negligence and nuisance in this trip and fall case. We reverse and remand for proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

At approximately 12:30 p.m. on May 23, 2019, plaintiff was walking on the sidewalk near a restaurant in Marshall, Michigan. At that time, the weather was clear. As plaintiff was walking,

[1] *Ford v City of Marshall*, unpublished order of the Court of Appeals, entered March 10, 2021 (Docket No. 355541).

she was not looking at the ground. Eventually, plaintiff tripped over the leg of a construction barricade which caused her to fall forward and strike her right knee and face on the ground. The barricade sat parallel to a building that ran along the edge of the sidewalk such that the legs of the barricade protruded onto the sidewalk. Plaintiff did not see the legs of the barricade before she tripped, and she did not know whether she would have seen the legs of the barricade if she had been looking at the ground. Plaintiff acknowledged that the legs of the barricade were not concealed, and she did not recall seeing any shadows that obscured the legs of the barricade when she tripped and fell. A photograph taken by plaintiff's husband shortly after plaintiff tripped and fell showed that a leg of the barricade was partially obscured by a shadow.

According to an employee of Consumers, Consumers had been involved in an ongoing project in Marshall between March 2019 and July 2019. As part of the project, Consumers dug a trench that ran along the edge of the sidewalk in order to install a gas service line. On May 23, 2019, the trench had been filled with gravel, and the sidewalk was open for pedestrian use. At that time, Consumers was waiting for a third-party contractor to remove the gravel and fill the trench with concrete. A construction barricade that was initially used to "open and close" the sidewalk was situated on the gravel. Consumers was waiting for the barricade to be picked up by employees of the company from which Consumers rented the barricade.

Plaintiff filed suit against Consumers seeking damages under theories of negligence and nuisance. Subsequently, Consumers filed a motion for summary disposition under MCR 2.116(C)(10). Consumers argued that plaintiff's negligence claim actually sounded in premises liability and there was no genuine issue of material fact that the danger presented by the barricade was open and obvious, without special aspects that made the barricade unreasonably dangerous. Consumers also argued that plaintiff's nuisance claim was simply a restatement of her premises liability claim, and in any case, there was no genuine issue of material fact that Consumers did not create either a private or public nuisance. The trial court held a hearing in which it denied the motion for summary disposition. The trial court reasoned as follows:

> Well, I think the parties have hit on the key question and that is of possession and what defines and the different definitions that could devine – define possession in this particular matter.
>
> Was the construction project finished and if it was then is the utility then no longer "in possession"?
>
> In the Court's mind there is a question as far as who is in possession, was it done, there's some argument both ways. There's some evidence there that indicates that the construction project was finished. There is an argument that it wasn't because it was merely backfilled. The question of premises liability to me is defined as to whether or not they are in possession or not and the negligence issue falls the same way. What was the definition? Who was in possession of this? Was the utility still in possession? Was the construction project finished? I think that's the ultimate question and that's a question of fact that is not clear in my mind at this particular time. And so based upon the motion and the answer that's filed I cannot grant the motion at this point because I believe there still is a question of fact regarding that I think ultimate issue in this matter. So the motion for summary disposition is denied.

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim." *Id*. at 160. When considering a motion under MCR 2.116(C)(10), the trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id*. (citation omitted). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

III. PLAINTIFF'S NEGLIGENCE CLAIM

The trial court erred when it denied the motion for summary disposition of plaintiff's negligence claim because plaintiff's claim sounded in premises liability rather than ordinary negligence, and there was no genuine issue of material fact that the danger posed by the barricade was open and obvious, without special aspects that made the barricade unreasonably dangerous.

A. THE NATURE OF PLAINTIFF'S CLAIM

Plaintiff's claim sounded in premises liability rather than ordinary negligence. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). "In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*.

In *Finazzo v Fire Equip Co*, 323 Mich App 620, 626; 918 NW2d 200 (2018), this Court determined that the plaintiff's claim sounded in premises liability rather than ordinary negligence because the plaintiff's injury, which occurred when the plaintiff tripped over a cable lying on the floor, arose from an allegedly dangerous condition on the land. Similarly, in *Compau v Pioneer Resource Co, LLC*, 498 Mich 928 (2015), our Supreme Court determined that the plaintiff's claim sounded in premises liability rather than ordinary negligence because the plaintiff's injury, which occurred when the plaintiff tripped over a railroad tie on the defendant's property, arose from an allegedly dangerous condition on the land. In the instant matter, plaintiff labeled her first claim against Consumers as one of ordinary negligence. However, plaintiff asserted that she "tripped on the obscured barricade support and fell, suffering injury." Thus, much like the claims set forth in *Finazzo* and *Compau*, plaintiff's injury arose from an allegedly dangerous condition on the land. Accordingly, plaintiff's claim sounded in premises liability rather than ordinary negligence.

On appeal, plaintiff argues that her claim sounded in ordinary negligence rather than premises liability because Consumers lacked possession and control of the sidewalk on the date of plaintiff's injuries. Plaintiff's argument lacks merit. As already noted, the question of whether a claim sounds in premises liability or ordinary negligence hinges on the nature of the hazard. *Buhalis*, 296 Mich App at 692. On the other hand, the question of whether a particular person or entity possesses and controls the land at issue affects whether that person or entity owes a duty to those on the land. "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." *Id*. at 693 (quotation marks and citation omitted). "[F]or a party to be subject to premises liability in favor of persons coming on the land, the party must possess *and* control the property at issue but not necessarily be its owner." *Finazzo*, 323 Mich App at 627. "This rule is based on the principle that a party in possession is in a position of control, and *normally* best able to prevent any harm to others." *Id*. (internal quotation marks and citations omitted). If a particular person or entity does not have possession or control over the land at issue, that person or entity does not owe a duty to protect others from dangerous conditions on the land. See *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 565; 563 NW2d 241 (1997). Accordingly, whether Consumers had possession and control of the sidewalk had no bearing on the nature of plaintiff's claim, i.e., whether it sounded in ordinary negligence or premises liability.

Nonetheless, Consumers acknowledges that it possessed and controlled the sidewalk such that it owed plaintiff a duty to protect her from an unreasonable risk of harm caused by dangerous conditions on the land. However, "this duty does not extend to having to remove open and obvious dangers absent the presence of special aspects." *Finazzo*, 323 Mich App at 626. Accordingly, the dispositive issue is whether the danger presented by the barricade was open and obvious.

B. OPEN AND OBVIOUS DANGER

Plaintiff's premises liability claim should have been dismissed under MCR 2.116(C)(10) because there was no genuine issue of material fact that the danger presented by the barricade was open and obvious.

A possessor of land owes no duty to protect or warn of dangers that are open and obvious. *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461. "The test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008).

Here, there was no genuine issue of material fact that the danger presented by the barricade was open and obvious. Plaintiff testified that she tripped on the leg of the barricade shortly before 12:30 p.m. on a clear day. The barricade consisted of three horizontal slats fastened to two vertical metal rods. The vertical metal rods were fastened to metal legs that ran perpendicular to the horizontal slats and prevented the barricade from falling over. Plaintiff acknowledged that the legs of the barricade were not concealed, and she did not recall seeing any shadows that obscured the legs of the barricade before she tripped and fell. A photograph taken by plaintiff's husband shortly

after plaintiff tripped and fell showed that one leg of the barricade was partially obscured by the shadow of the horizontal slats. However, plaintiff failed to present any evidence that the barricade was wholly concealed or obscured by a shadow or any other condition. Photographs of the location depicted a typical construction barricade situated on a narrow portion of the sidewalk where the concrete had been removed and replaced with gravel. The barricade sat parallel to a building that ran along the edge of the sidewalk. Given these conditions, an average person of ordinary intelligence would have known that the typical barricade rested on perpendicular legs protruding from its base. Thus, an average person of ordinary intelligence would have foreseen the danger posed by the legs of the barricade.

Lastly, plaintiff does not argue that there were special aspects that made the barricade unreasonably dangerous. In any event, the leg of the barricade was not effectively unavoidable and the leg of the barricade did not present an unreasonable risk of severe harm. Therefore, there was no genuine issue of material fact regarding whether the danger presented by the barricade was open and obvious, and the trial court erred when it denied the motion for summary disposition under MCR 2.116(C)(10) with regard to this claim.

IV. PLAINTIFF'S NUISANCE CLAIM

The trial court also erred when it denied the motion for summary disposition under MCR 2.116(C)(10) as it related to plaintiff's nuisance claim against Consumers. Initially, summary disposition was appropriate because plaintiff's nuisance claim was simply a restatement of her premises liability claim. In *Fuga v Comerica Bank–Detroit*, 202 Mich App 380, 381; 509 NW2d 778 (1993), abrogated on other grounds in *Xu v Gay*, 257 Mich App 263, 267-268 (2003), the plaintiff sued the defendant for negligence, nuisance, and gross negligence after she was injured during an attack by a third party while using one of the defendant's automatic teller machines (ATM). This Court held that the defendant was entitled to summary disposition with regard to the plaintiff's negligence claim because the plaintiff did not allege that the defendant created or maintained the criminal activity, or that the defendant failed to act to end criminal activity that took place in its presence. *Id*. at 382. This Court then held that that the defendant was entitled to summary disposition with regard to the plaintiff's nuisance claim because it was simply a restatement of the plaintiff's negligence claim. *Id*. at 383. This Court stated as follows:

> With regard to plaintiff's claim of nuisance, plaintiff alleged that defendant had failed to inspect or maintain the ATM at the time of installation or thereafter, that "the existing dangerous condition . . . was a nuisance," and that defendant had failed to abate the nuisance. These allegations, to the extent that they aver a failure to act, sound in negligence, which we have discussed above, while the remaining allegations are mere conclusions. Plaintiff's complaint failed to state a claim of nuisance. [*Id*.]

In the instant matter, plaintiff's allegations of nuisance incorporated the same factual allegations upon which plaintiff relied to state a claim of premises liability. Plaintiff alleged that the "dangerous and hazardous location of the barricade" interfered with her own use and enjoyment of the sidewalk and the public's use and enjoyment of the sidewalk. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams*, 276 Mich App at 710-711. Reading the complaint as a whole, plaintiff alleged that Consumers breached its duty to protect plaintiff from a dangerous condition on the land. Accordingly, plaintiff's nuisance claim was simply a restatement of her premises liability claim, and summary disposition was appropriate.

But even if plaintiff's nuisance claim was not a restatement of her premises liability claim, plaintiff failed to establish a genuine issue of material fact existed regarding whether Consumers created either a private nuisance or a public nuisance. "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-303; 487 NW2d 715 (1992).

> The elements of a private nuisance are satisfied if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm, (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 431-432; 770 NW2d 105 (2009).

"The essence of private nuisance is the protection of a property owner's or occupier's reasonable comfort in occupation of the land in question." *Adkins*, 440 Mich at 303. Plaintiff has failed to present any evidence that she had a private interest in the sidewalk when her injuries occurred. Indeed, there is no evidence that plaintiff owned or occupied the sidewalk. Accordingly, there was no genuine issue of material fact regarding whether plaintiff was able to maintain a private nuisance claim.

Furthermore, there was no genuine issue of material fact regarding whether plaintiff was able to maintain a public nuisance claim. "A public nuisance is an unreasonable interference with a common right enjoyed by the general public." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). "The term 'unreasonable interference' includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Id*. Plaintiff does not assert that Consumers' conduct relating to the barricade was proscribed by law. Moreover, plaintiff has failed to present any evidence that the barricade significantly interfered with the public's health, safety, peace, comfort, or convenience. The sidewalk was open for public use on the date plaintiff tripped and fell. Although the legs of the barricade protruded onto the sidewalk, pedestrians could have walked around the barricade or stepped over the legs of the barricade. In short, there was no evidence that the barricade impeded the public's use of the sidewalk. Lastly, the barricade was not of a continuing nature that produced a permanent or long-lasting, significant effect on the public's use of the sidewalk. Indeed, an employee of Consumers testified that Consumers was waiting for the barricade to be picked up by

employees of the company from which it was rented at the time of plaintiff's injuries. Thus, there was no genuine issue of material fact regarding whether plaintiff was able to maintain a public nuisance claim. Accordingly, Consumers was also entitled to summary disposition of this claim.

We reverse and remand for entry of an order granting Consumers' motion for summary disposition of plaintiff's claims of negligence and nuisance. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael J. Riordan