STATE OF MICHIGAN

COURT OF APPEALS

STEFAN LONG,

Plaintiff-Appellant,

v

MICHAEL KIRCHER and BROOKE KIRCHER

Defendants-Appellees.

UNPUBLISHED
December 16, 2021

No. 355119
Oakland Circuit Court
LC No. 2020-179076-NO

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition in favor of defendants. On appeal, plaintiff argues the trial court erred when it granted defendants' motion for summary disposition on the basis that plaintiff's claims are solely grounded in premises liability, and defendants owed no duty of care to plaintiff because he was a trespasser on defendants' property at the time of the accident. Specifically, plaintiff argues he pleaded two distinct claims—one for ordinary negligence, and one for negligence under a theory of premises liability. Plaintiff also argues there was a genuine issue of material fact whether defendants' violation of the Road Commission for Oakland County's (RCOC) ordinances subjects them to liability under MCL 554.583(2)(b). For the reasons set forth below, we affirm the trial court's order granting summary disposition in favor of defendants.

I. BACKGROUND

This case arises out of a single vehicle motor vehicle accident that occurred on February 1, 2017, in which plaintiff was injured. Plaintiff was driving down a large hill located on a subdivision road. The bottom of the hill was covered in ice, and when plaintiff attempted to apply the brakes to stop for a yield sign, his vehicle slid across the ice and crashed into a boulder located on defendants' property. A landscaping company installed the boulders approximately 15 years before the accident; however, after the accident, the RCOC notified defendants that the boulders were located too close to the road, which violated RCOC ordinances, § 8.2.1, § 8.2.5, and § 8.2.9. Plaintiff asserted an ordinary negligence claim and a premises liability claim for injuries he sustained in the accident.

Each of plaintiff's claims related to the improper placement of the boulders on defendants' property. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing plaintiff's claims sound in premises liability, but plaintiff was a trespasser at the time of the accident, so defendants owed no duty to him. Defendants also contended that even if plaintiff was not a trespasser, the boulders that allegedly caused plaintiff's injuries presented an open and obvious danger. Plaintiff argued he was not a trespasser, and defendants' liability for plaintiff's injuries arose under a theory of premises liability and ordinary negligence. With respect to the ordinary negligence claim, plaintiff specifically contended that defendants' violation of RCOC ordinances was evidence of negligence. The trial court granted summary disposition in favor of defendants, finding no genuine issue of material fact that plaintiff's claims sounded solely in premises liability, and that he was a trespasser at the time of the accident. Thus, the trial court found, defendants owed no duty to plaintiff. This appeal followed.

II. STANDARD OF REVIEW

"An issue must have been raised before and addressed and decided by the trial court to be deemed preserved for appellate review." *Lenawee Co v Wagley*, 301 Mich App 134, 164; 836 NW2d 193 (2013). In the trial court, plaintiff argued he was not a trespasser at the time of the accident, and that his injuries resulted from defendants' active negligence. Plaintiff did not argue that defendants may incur liability under MCL 554.583(2)(b). In addition, plaintiff did not argue that the trial court's reliance on *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591; 614 NW2d 88 (2000), was erroneous. Thus, plaintiff has not preserved for appeal his arguments regarding MCL 554.583 or *Stitt*, but did preserve his arguments regarding his status as a trespasser, and defendants' active negligence. *Lenawee Co*, 301 Mich App at 164.

"This Court . . . reviews de novo a trial court's decision on a motion for summary disposition." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). In addition, "[t]his Court reviews a trial court's findings of fact for clear error." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 368; 937 NW2d 716 (2019). "A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Berryman v Mackey*, 327 Mich App 711, 717-718; 935 NW2d 94 (2019).

This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds may differ." *Id.*

Additionally, "[t]his Court reviews questions of statutory interpretation de novo." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006). "The role of this Court in interpreting statutory language is to ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019) (quotation marks and citations omitted). "[W]here the

statutory language is clear and unambiguous, the statute must be applied as written." *Id*. (quotation marks and citations omitted) (alterations in original).

However, unpreserved errors are reviewed for plain error. *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018). "To establish an entitlement to relief based on plain error, the injured party must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected [its] substantial rights." *Id*. (quotation marks and citation omitted) (alteration in original). "[A]n error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

III. DISCUSSION

A. PLAINTIFF'S NEGLIGENCE CLAIMS

Plaintiff argues the trial court erred when it found plaintiff failed to state an ordinary negligence claim that was distinct from plaintiff's premises liability claim. Defendants argue, and the trial court agreed, that plaintiff's claims sound only in premises liability. We agree.

The primary issue in this case relates to the characterization of plaintiff's claims. It is well established under Michigan law that "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). Instead, courts should consider "the gravamen" of the suit, which is analyzed by "reading the complaint as a whole, and 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). This Court recognizes a distinction between ordinary negligence claims and premises liability claims. A plaintiff may bring both a premises liability claim and a general negligence claim if the "separate claim [is] grounded on an independent theory of liability based on the defendant's conduct." *Laier v Kitchen*, 266 Mich App 482, 494; 702 NW2d 199 (2005). Liability in a premises liability action stems from a defendant's duty as an "owner, possessor, or occupier of land." *Buhalis*, 296 Mich App at 692, citing *Laier*, 266 Mich App at 493. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence," even if the plaintiff "alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis*, 296 Mich App at 692.

Plaintiff's argument that this case presents facts to support a general negligence claim is without merit. Plaintiff contends the basis for the general negligence claim arises from defendants' active intervention, which was their placement of the boulders. Specifically, plaintiff argues defendants' violation of RCOC ordinances is the basis of plaintiff's general negligence claim, and that a breach of an ordinance is evidence of negligence. However, this is the exact same conduct on which his premises liability claim is based. In other words, both claims stem from the improper placement of the boulders, which is an allegedly dangerous condition on defendants' land. Plaintiff cannot transform a premises liability claim into a general negligence claim by alleging that defendants created the condition on the land. *Jahnke v Allen*, 308 Mich App 472, 476; 865 NW2d 49 (2014).

The basis of plaintiff's general negligence claim, and his premises liability claim, relate to the placement of boulders on defendants' property, and the resulting violation of RCOC ordinances. The applicable ordinances state:

> § 8.2.5: Structural elements such as boulders or retaining walls may be no steeper than one (1) foot horizontally to 3 feet vertically, shall not present blunt ends to traffic, and shall be set back from the road as required in Rule 8.2.9. Such wall ends shall be blended into the grade or slope.
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> * * *
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> § 8.2.9: Aesthetic landscaping adjacent to the subdivision/residential street must be a minimum of 5 feet behind the curb or 12 feet from the edge of the pavement if the road is not curbed. Functional landscaping such as earth retaining walls will be reviewed on a case by case basis by the Permits Division. [RCOC Permit Rules, Specifications, and Guidelines, § 8.2.5, § 8.2.9 (March 14, 2013).]

Although plaintiff attempts to draw a distinction between this case, *Jahnke*, and *Compau v Pioneer Resource Co, LLC*, 498 Mich 928; 871 NW2d 210 (2015), to support his position that defendants' affirmative intervention is the basis of his negligence claim, plaintiff's arguments are misguided. In *Jahnke*, the plaintiff slipped and fell off concrete pavers on the defendant's land when the defendant was escorting the plaintiff across the property. *Jahnke*, 308 Mich App at 476. Although the plaintiff brought a negligence claim asserting the defendant was negligent in the way he escorted the plaintiff off the property, this Court found the plaintiff's claim was brought under a theory of premises liability, because the condition of the land, rather than the defendant's conduct, caused the plaintiff's injury. *Id*. Plaintiff claims *Jahnke* is distinguishable from this case simply because the *Jahnke* Court found the defendant's conduct was not the cause of the plaintiff's injury. However, the trial court in this case also implicitly found that the condition of the land, the boulders, rather than defendants' conduct, was the cause of plaintiff's injuries. In *Compau*, the plaintiff was injured when she tripped and fell over a railroad tie she saw on the ground before her fall. *Compau*, 498 Mich at 928. There, our Supreme Court found the railroad tie was a condition of the land. *Id*. Similarly, in this case, plaintiff's injuries arose when his vehicle hit a boulder located on defendants' property, which was a condition on defendants' land.

Plaintiff alleges defendants' violation of RCOC ordinances was the cause of his injury in an effort to articulate a distinct claim for ordinary negligence. While plaintiff is correct in noting that the violation of an ordinance can be evidence of negligence, *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 135; 463 NW2d 442 (1990), this is not a principle that transforms a premises liability claim into an ordinary negligence claim; rather, violation of an ordinance may also be evidence of negligence in a premises liability case. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 662; 473 NW2d 796 (1991) (analyzing whether the defendant's violation of an ordinance bore on the issue of negligence in a premises liability action). Therefore, defendants' violation of an ordinance could be considered in a claim grounded in premises liability.

Although plaintiff draws support from *Laier* for his argument that he pleaded a distinct claim for ordinary negligence, this case is readily distinguishable. In *Laier*, the plaintiff was helping the defendant, who was the landowner, repair a tractor located on the defendant's property. *Laier*, 266 Mich App at 485. The defendant negligently removed a vice grip from the tractor,

which caused the tractor's front-end bucket loader to crash down on the plaintiff, killing him. *Id*. The plaintiff's complaint alleged ordinary negligence and negligence under a theory of premises liability. The plaintiff's ordinary negligence claim stemmed from the defendant's failure to use due care in the operation of the tractor bucket, while the premises liability claim alleged that the defendant owed a duty to the plaintiff as a licensee to protect him from unreasonable risk of injury. *Id*. at 497.

In this case, the conduct underlying the RCOC violation is the same conduct that underlies plaintiff's premises liability claim—the improper placement of the boulders. In his complaint, plaintiff explicitly alleged the negligent placement of the boulders caused the vehicle to hit the boulders, and defendants are liable as a result of their negligent actions, which included violation of the RCOC ordinances. The only difference between the allegations contained in plaintiff's negligence claim and the ones contained in his premises liability claim is, in his premises liability claim, plaintiff alleged that the claim arose from defendants' "improper placement of said boulders *as it relates to a condition upon the land.*" (Emphasis added.) Thus, there is no act by defendants that is separate and distinct from the one that created the condition on the land, unlike the defendant's actions in *Laier*. Indeed, defendants were not actively engaging in any activity on their land directly before or during plaintiff's accident. Consequently, plaintiff's injuries stem from an allegedly dangerous condition on defendants' land. Therefore, the trial court did not err when it found that plaintiff's claims sound solely in premises liability.

B. DEFENDANTS' LIABILITY UNDER MCL 554.583(2)(B)

Plaintiff argues defendants' violation of RCOC ordinances creates a question of fact regarding defendants' active negligence under MCL 554.583(2)(b), because defendants should have known of plaintiff's presence on their land, and violation of the ordinances constitutes active negligence. Defendants contend that plaintiff has not preserved these arguments for appeal. We conclude that plaintiff's arguments have not been properly preserved for appellate review and are meritless, and we affirm the trial court's order.

This Court has found that if a plaintiff did not fully brief and argue an issue in the trial court, or he cites authority the trial court did not consider, he is not necessarily precluded from bringing the argument on appeal. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). As long as "the issue itself is not novel, a party is generally free to make a more sophisticated or fully developed argument on appeal than was made in the trial court." *Glasker-Davis v Auvenshine*, 333 Mich App 222, 228; 964 NW2d 809 (2020). Moreover, this Court may review an unpreserved issue where: (1) a failure to consider an issue would result in manifest injustice; (2) the "consideration of the issue is necessary to a proper determination of the case;" or (3) the issue "involves a question of law and the facts necessary for its resolution have been presented." *Steward*, 251 Mich App at 554 (citations omitted).

Plaintiff's argument regarding the applicability of *Stitt*, is not preserved for appeal because plaintiff failed to raise this argument in the trial court. Thus, it is reviewed for plain error. *Total Armored Car Serv, Inc*, 325 Mich App at 412. The trial court relied on *Stitt* to find that since plaintiff was a trespasser on defendants' property at the time of the accident, defendants only owed plaintiff a duty to refrain from injuring him through willful and wanton misconduct. *Stitt*, 462 Mich at 596. Plaintiff contends the trial court's reliance on *Stitt* was erroneous because *Stitt* is not

binding authority. However, our Supreme Court has recognized that a landowner owes no duty to a trespasser other than the duty to refrain from injuring him through willful and wanton misconduct, which is a principle the *Stitt* Court acknowledged. See also *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001) (finding that a landowner only owes a trespasser the duty to refrain from injuring him through willful and wanton misconduct). On appeal, plaintiff does not dispute his status as a trespasser, but even if he did, a trespasser "is a person who enters upon another's land, without the landowner's consent." *Stitt*, 462 Mich at 596. There is no evidence that suggests plaintiff had defendants' consent to be on their land at the time of the accident, thus, plaintiff was a trespasser. Accordingly, the trial court did not err in finding, under Michigan law, defendants are only liable to plaintiff for injuries stemming from defendants' wanton or willful misconduct.

Plaintiff's arguments regarding the applicability of MCL 554.583(2)(b) are likewise not preserved for appeal. MCL 554.583(2) states, in relevant part:

> (2) Notwithstanding subsection (1), a possessor of land may be subject to liability for physical injury or death to a trespasser if any of the following apply:
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> (a) The possessor injured the trespasser by willful and wanton misconduct.
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> (b) The possessor was aware of the trespasser's presence on the land, or in the exercise of ordinary care should have known of the trespasser's presence on the land, and failed to use ordinary care to prevent injury to the trespasser arising from active negligence.
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> (c) The possessor knew, or from facts within the possessor's knowledge should have known, that trespassers constantly intrude on a limited area of the land and the trespasser was harmed as a result of the possessor's failure to carry on an activity in that limited area involving a risk of death or serious bodily harm with reasonable care for the trespasser's safety.

Plaintiff argues the trial court should have considered defendants' duties owed to a trespasser under the Trespass Liability Act, MCL 554.581 *et seq*, which holds a landowner liable for physical injury to a trespasser if the landowner was "aware of the trespasser's presence on the land, or in the exercise of ordinary care should have known of the trespasser's presence . . . and failed to use ordinary care to prevent injury to the trespasser arising from active negligence." MCL 554.583(2)(b). Plaintiff contends this issue is not novel because, in the trial court, both parties raised the issue of whether plaintiff was a trespasser, and plaintiff is not required to rely on the same legal authority he relied on in the trial court. *Glasker-Davis*, 333 Mich App at 228. Plaintiff did not make any reference to the Trespass Liability Act in the trial court, and did not argue defendants' may incur liability for plaintiff's injuries despite his status as a trespasser. Thus, this issue is raised for the first time on appeal. Accordingly, plaintiff's argument is not preserved for appeal. *Lenawee Co*, 301 Mich App at 164.

Although this Court generally does not consider arguments raised for the first time on appeal, it may do so if the argument "involves a question of law and the facts necessary for its resolution have been presented." *Steward*, 251 Mich App at 554 (citations omitted). Plaintiff

contends that all the facts necessary for resolution regarding the applicability of MCL 554.583(2)(b) have been presented. We agree. This Court, in interpreting statutory language, must "ascertain the legislative intent that may reasonably be inferred from the words in a statute." *Mich Ass'n of Home Builders*, 504 Mich at 212. "[W]here the statutory language is clear and unambiguous, the statute must be applied as written." *Id*. (quotation marks and citations omitted) (alterations in original). The plain language of MCL 554.583(2)(b) suggests that landowners only owe a duty to use ordinary care to prevent injury to a trespasser stemming from the landowner's active negligence if the landowner knew or should have known of the specific trespasser's presence on the land. This Court can readily decide the issue of whether defendants knew or should have known of plaintiff's presence on their land, as well as the issue of whether defendants exercised ordinary care to prevent plaintiff from injury on the basis of the facts and evidence contained in the trial court record. Therefore, we will consider this issue on appeal.

Plaintiff argues that defendants are liable for his injuries because defendants were aware, in the winter, vehicles often slide down the hill and knock over a yield sign located near the bottom of the hill. Additionally, defendants admitted to violating RCOC ordinances regarding the placement of the boulders on their property. However, defendants correctly allege that plaintiff fails to argue, in his brief on appeal and in the trial court, that defendants knew, or should have known, of *plaintiff's* presence on their land. Plaintiff merely argues defendants should have known of his presence on the land because defendants were aware of the propensity of cars to slide on the ice on the hill and enter into the area near where the accident occurred. Plaintiff is the trespasser at issue, but plaintiff only presents evidence of defendants' knowledge of other people who may have trespassed on defendants' land in the past. This evidence supports an argument to hold defendants liable under MCL 554.583(2)(c), not MCL 554.583(2)(b).

MCL 554.583(2)(c) states that a landowner may be held liable for injuries a trespasser incurred when "the possessor knew, or . . . should have known that trespassers constantly intrude on a limited area of the land." However, plaintiff explicitly attempts to confer liability onto defendants on the basis of MCL 554.583(2)(b). The specific language of the two different sub-sections of the statute clearly indicate the Legislature intended two different standards for two different factual scenarios. MCL 554.583(2)(b) seeks to hold a landowner liable for injuries to a specific trespasser stemming from the landowner's active negligence when the landowner knew or should have known of the specific trespasser's presence on their land. Since plaintiff fails to allege defendants knew or should have known of his specific presence on defendants' land, defendants are not liable for plaintiff's injuries under MCL 554.583(2)(b).

Even if defendants knew or should have known of plaintiff's presence on their land, plaintiff failed to show his injuries stemmed from defendants' active negligence. Plaintiff argues the reference to "active negligence" in the Trespass Liability Act mirrors the common law concept of "active intervention." Plaintiff provides no authority for his argument other than MCL 554.583(3) states: "[T]his section does not increase the liability of a possessor of land and does not affect any immunity from or defenses to civil liability established by or available under statutes or common law . . . to which a possessor of land is entitled." The Trespass Liability Act does not define active negligence, but our Supreme Court defined active negligence as "negligence resulting from an affirmative or positive act, such as driving through a barrier." *Johnson v Pastoriza*, 491 Mich 417, 436-437; 818 NW2d 279 (2012). Conversely, passive negligence is negligence

"resulting from a person's failure or omission in acting, such as failing to remove hazardous conditions from public property." *Id*. at 437.

Plaintiff alleges that defendants' violation of RCOC ordinances caused his injuries. Specifically, plaintiff contends defendants' actions constituted active negligence because they hired a landscaper to install the boulders on their property, which were installed in violation of RCOC ordinances, and but for that violation, plaintiff would not have been injured. Despite plaintiff's attempts to characterize defendants' actions as active negligence, defendants' placement of the boulders is not an affirmative act, as recognized by the Trespass Liability Act. As indicated above, the plain language of MCL 554.583(2)(b) indicates that a landowner may be held liable in circumstances where the landowner is aware of the trespasser's presence on the land at the time of the active negligence, or "affirmative or positive act[s]." *Johnson*, 491 Mich at 436-437. Again, MCL 554.583 contains an entirely separate subsection that imposes liability on a landowner for a failure to act. See MCL 554.583(3) (imposing liability on a landowner for "failure to carry on an activity" in an area where the landowner knew or should have known trespassers constantly intrude).

MCL 554.583(2)(b) specifically indicates a landowner may be liable for injuries to a trespasser when the landowner knew or should have known of the trespasser's presence on the land, and failed to use ordinary care to prevent injury to the trespasser stemming from the landowner's active negligence. In addition, the statute contains a separate and distinct subsection that imposes liability on a landowner for his failure to act when he knew or should have known that trespassers often intrude on a specific portion of his land. Thus, defendants may not be held liable for plaintiff's injuries under MCL 554.583(2)(b). Defendants did not engage in any activity before, during, or after plaintiff's accident. Indeed, the activity plaintiff alleges his injury stemmed from is activity that occurred about 15 years before plaintiff's accident. Therefore, plaintiff's injury did not result from defendants' active negligence. Accordingly, the trial court did not err when it granted summary disposition in favor of defendants.

IV. CONCLUSION

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford