STATE OF MICHIGAN

COURT OF APPEALS

JEAN BOUGHTON, by Conservator JUDY ZIMMERMAN,

Plaintiff-Appellant,

v

POC MANAGEMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
January 13, 2022

No. 356031
Clinton Circuit Court
LC No. 2020-011981-NI

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, by her conservator, appeals by right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact). This matter arises out of an incident in which plaintiff tripped over the base of a warning cone placed just outside one of two double-doors to defendant's gas station, immediately after she exited the gas station through the other door. Plaintiff brought this action, alleging negligence. The trial court held that plaintiff's complaint failed to state a claim of negligence and, instead, sounded in premises liability. The trial court also held that there was no question of material fact that the tripping hazard was open and obvious. We affirm.

I. BACKGROUND

In March 2020, plaintiff was injured after she tripped and fell at a gas station owned by defendant. On the day of the incident, a gas station employee placed identical orange cones around one of the double doors leading into the gas station store in order to prevent customers from using that door. The employee was concerned that high winds could have blown the door open, which could cause the door to hit and injure a customer entering the store. The employee placed one cone on the inside of this door and one cone on the outside of this door; the employee also placed a sign on this door asking customers to use the other door. While exiting the store through the door that was not blocked off by cones, plaintiff fell when she tripped over the base of the cone

that had been placed outside the other door. Plaintiff emphasizes that she fell immediately upon exiting the store.

A store video captured the cones from the vantage point of inside the store, and the video also recorded plaintiff's fall. By plaintiff's undisputed estimation, the cones are approximately four feet tall and bright orange, with a hard, square base extending one to two inches from the conical section. The base is not orange, but rather appears to be grey. The doors to the store were mostly glass, and the top of the cone is clearly visible from inside. However, according to plaintiff, the metal plate at the bottom of the door precluded her from seeing the base of the outside cone from inside the store. She had been able to see the bottom of the outside cone from outside the store when she entered, and there is no serious dispute that the identical cone on the interior side of the door was plainly visible. The video recording unambiguously shows that the outside cone was placed approximately in the middle of the blocked door, and no part of it was in front of the usable door. The inside cone, in contrast, was placed such that its base was a few inches, at the most, from the usable door. The doors opened from the center. The video shows that plaintiff paused for a few seconds at the door before opening it, and as she exited, she appeared to be looking at something in her left hand.[1] Plaintiff was also carrying a brown paper bag.

Plaintiff filed suit, alleging that defendant negligently placed a tripping hazard that was not visible upon casual inspection to persons leaving the store, failed to put a sign on the inside of the door warning invitees of the tripping hazard, and maintained the premises in a defective condition. Plaintiff's complaint did not specifically identify the tripping hazard; however, the complaint alleged that "[t]he bottom of the cones had a black rubber bottom extending several inches from the base of the cone itself running perpendicular to the floor." The complaint also alleged that the bottom of the cone was not visible to a person leaving the store, and that "[t]here was no sign warning invitees of the outside cone, and its tripping hazard that was on the other side of the door."

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), arguing that plaintiff's claim sounded in premises liability, not ordinary negligence, and that the alleged dangerous condition was open and obvious to a reasonable casual observer. Defendant argued that there was no genuine issue of material fact as to whether the cone was an open and obvious danger. Plaintiff filed a response, arguing that the complaint alleged both premises liability and ordinary negligence, and that the hazard was not open and obvious because the bottom of the cone was not visible to a person exiting the store.

Following a hearing, the trial court granted defendant's motion for summary disposition. The trial court concluded that plaintiff failed to establish that her claim sounded in ordinary negligence; the court further concluded that the bottom of the outside cone was open and obvious. Specifically, the trial court reasoned that the bottom of the outside cone was open and obvious because the top of the outside cone could be seen by a casual observer, and a casual observer would assume the outside cone had a bottom. Further, the trial court stated that because the outside and inside cones were of the same type, and the bottom of the inside cone was open and obvious, the

[1] It is not discernible from the video whether the object in her hand was a cellphone, a wallet, a small piece of paper like a receipt, or another similarly-sized item.

inside cone warned plaintiff that the outside cone also had a bottom and should be avoided. This appeal ensued.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all 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. *Id*. at 120. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks, citation, and alteration omitted). A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the non-moving party. *Maiden*, 461 Mich at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120.

III. NATURE OF ACTION

Plaintiff argues that the trial court erred by holding that her claim sounds only in negligence. Implicitly, plaintiff thus argues that the trial court erred in granting partial summary disposition under MCR 2.116(C)(8). We disagree.

Plaintiff's complaint does not specifically label a cause of action. Plaintiff's complaint alleged that defendant negligently allowed a tripping hazard to be placed in an area that was not visible upon casual inspection, negligently failed to place a sign warning people of this tripping hazard, and negligently maintained the premises. However, this Court looks to the substance of pleadings rather than the formal names or labels given by the parties; the way in which a party frames a claim is not dispositive. *Hartford v Holmes*, 3 Mich 460, 463 (1855); *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). The nature of plaintiff's claim is critical here, because the "open and obvious" doctrine applies only to premises liability claims, not to ordinary negligence claims. *Wheeler v Central Michigan Inns, Inc*, 292 Mich App 300, 304; 807 NW2d 909 (2011). A review of the complaint reveals that the trial court properly found the gravamen of plaintiff's claim sounded in premises liability.

"Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis*, 296 Mich App at 692. A premises liability claim "arises solely from the defendant's duty as an owner, possessor, or occupier of land," and if the "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*. at 692. Claims of premises liability arise "solely from the defendant's duty as an owner, possessor, or occupier of land." *Jahnke v Allen*, 308 Mich App 472, 475; 865 NW2d 49 (2014) (quotation marks and citation omitted). In a premises liability case, a landowner has a duty to warn licensees of "unreasonably

dangerous conditions, when the licensee neither knows nor has reason to know of the condition and the risk involved." *Id*. (quotation marks and citation omitted).

Claims of ordinary negligence may be brought by injured plaintiffs for the overt acts of a premises owner that occur on his or her premises. *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010). "To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of those damages." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 351813); slip op at 4. A defendant has a duty "to use due care or to act so as not to unreasonably endanger the person or property of another." *Jahnke*, 308 Mich App at 475 (quotation marks and citation omitted). A plaintiff may bring both an action in premises liability and an independent claim of ordinary negligence on the basis of defendant's conduct. *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 14; 930 NW2d 393 (2018). However, "alleging that defendant created the condition does not transform the claim into one for ordinary negligence." *Jahnke*, 308 Mich App at 475 (quotation marks omitted).

The question is whether, irrespective of the labels used, plaintiff is functionally alleging she was injured by a condition of the land or by an overt act of the premises owner. *Kachudas*, 486 Mich at 913-914. By way of example, in a case involving a technician who slipped and fell on mud in a homeowner's yard while being chased by the homeowner's dog, this Court explained that the action sounded in ordinary negligence because the plaintiff's claim was premised on the homeowner's failure to control the dog. *Hiner v Mojica*, 271 Mich App 604, 615-616; 722 NW2d 914 (2006). In contrast, a case in which the premises owner improperly stacked pallets that subsequently fell onto a business invitee sounded in premises liability only, even though the plaintiff only alleged "negligence" in his complaint. *Pugno*, 326 Mich App at 6-7, 13-16. In the latter case, this Court emphasized that although the premises owner created the dangerous condition, there was no allegation that the premises owner (or an employee) "actively knocked the pallets over or engaged in direct conduct that caused the pallets to fall onto [the] plaintiff." *Id*. at 16. Likewise, it is manifestly apparent that plaintiff essentially alleges that defendant created a hazardous condition of the land by improperly placing the outside cone and failing to warn of that danger.[2]

The trial court properly found that plaintiff's claim of negligence sounded in premises liability and properly granted defendant's motion for summary disposition under MCR 2.116(C)(8) with respect to any claim of ordinary negligence.

[2] A closer question might ensue if, for example, the doors had been opaque, the area was unlit, and defendant's employee affirmatively represented to plaintiff that there were no hazards outside the doors. Alternatively, a closer question might ensue if defendant's employee surreptitiously placed a cone into plaintiff's path while she was walking. Neither of those scenarios are present here.

IV. OPEN AND OBVIOUS DANGER DOCTRINE

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because there was a genuine issue of material fact regarding whether the bottom of the outside cone was open and obvious. We disagree.

"In general, a premises possessor owes a duty to an invitee 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). "A premises possessor generally has no duty to remove open and obvious dangers." *Jeffrey-Moise*, ___ Mich App at ___; slip op at 8. However, "if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517.

"Whether a dangerous condition is open and obvious depends upon whether it is reasonable to expect that an average person with ordinary intelligence reasonably could be expected to discover it upon casual inspection." *Jeffrey-Moise*, ___ Mich App at ___; slip op at 8 (quotation marks and citation omitted). Because this is an objective test, whether the particular plaintiff at issue should have realized that the condition was dangerous is irrelevant. *Id*. at ___; slip op at 8. The relevant question is "whether a reasonable person in that position would have foreseen the danger." *Id*. at ___; slip op at 8. Notably, "[t]he open and obvious doctrine is not an exception to the duty owed by the premises possessor," but rather a part of that duty. *Id*. at ___; slip op at 8. "[I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995) (emphasis in original).

Plaintiff relies on the fact that the base of the outside cone was not visible through the bottom of the door, from the vantage point of a person inside the store. However, there is no dispute that the entirety of the cone was readily visible from outside the store. It is axiomatic that a person must open a door to exit through the door. Once the usable door was open, the entire cone, including its base, would have been immediately and plainly visible. Furthermore, it is not disputed that the presence of the cone itself could be seen even before opening the door. Moreover, the two cones were identical, and the base of the inside cone is clearly obvious on the video recording. We agree with the trial court that an average person of ordinary intelligence would therefore have been on some degree of notice that the outside cone also had a base.[3] It is also apparent from the video that the outside cone was not placed in such a way that it would be difficult to avoid while leaving the store. Therefore, the trial court did not err by granting summary

[3] We do not believe this fact would be sufficient by itself to make the base of the outside cone open and obvious. Rather, we believe it is a supplementing factor.

disposition of plaintiff's premises liability claim under MCR 2.116(C)(10) because there was no genuine issue of fact regarding whether the alleged danger was open and obvious.

Affirmed. Defendant, having prevailed in full, may tax costs. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause