STATE OF MICHIGAN

COURT OF APPEALS

DANIEL SCHOSSO, a minor, by his next friend TERRY REED, and TERRY REED, individually,

Plaintiff-Appellant,

v

CSX TRANSPORTATION, INC., and SANDI STANTON,

Defendants-Appellees.

UNPUBLISHED
August 5, 1997

No. 191310
Ottawa Circuit Court
LC No. 94-022072-NO

Before: Neff, P.J., and Smolenski and D. A. Roberson*, JJ.

PER CURIAM.

In this premises liability case, plaintiff Terry Reed, individually and as next friend of her son, Daniel Schosso, a minor, appeals as of right from the trial court's grant of summary disposition in favor of defendant CSX Transportation, Inc., and defendant Sandi Stanton. We affirm.

Defendant Sandi Stanton owns property behind which are located defendant CSX's railroad tracks. Next to the tracks (and behind defendant Stanton's property) is a worn "two-track" path used daily by adults and children in the community. In 1988 and pursuant to a now-expired lease between defendants, defendant Stanton constructed a fence perpendicular to the tracks and extending onto defendant CSX's right-of-way to a point approximately 4½ feet from the tracks.

In September, 1993, at approximately 9:00 p.m., then sixteen-year-old Daniel Schosso decided to race one of defendant CSX's trains with his bicycle. While riding on the two-track next to the train tracks, Daniel hit the fence. Daniel did not see the fence because it was dark and his bicycle did not have a light. Daniel rolled toward the train where his left foot was run over by the train.

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* Recorder's Court judge, sitting on the Court of Appeals by assignment.

Plaintiff Reed filed suit against defendant CSX and defendant Stanton, alleging negligence, willful and wanton misconduct, gross negligence and attractive nuisance. Defendants moved for summary disposition of all four claims. Following oral argument, the trial court issued a written opinion granting defendants' motion in total. Plaintiff moved for reconsideration. On reconsideration, the court modified its earlier opinion in certain respects. In sum, the court reasoned that Daniel's status on defendants' property was that of a known trespasser.[1] With respect to plaintiff's negligence claim, the trial court granted summary disposition pursuant to MCR 2.116(C)(10) on the ground that plaintiff could not establish the duty element necessary for a prima facie case of negligence. Specifically, the court, after surveying Michigan caselaw, determined that a possessor of land owes a duty to use ordinary care to prevent injury to known trespassers arising from active negligence, defined by the court as a defendant's affirmative acts or failure to carry on an activity with reasonable care, but that a possessor owes no duty of care to a known trespasser with respect to passive negligence, defined by the court as a physical condition of the premises. The court reasoned that plaintiff's allegation that defendant CSX had operated the train at an unreasonable speed stated a claim for active negligence, but that summary disposition of this theory was nevertheless appropriate where plaintiff had failed to offer any evidence of unreasonable speed and Daniel's deposition testimony that he had been riding his bicycle faster than the train belied this theory. (On appeal, plaintiff does not challenge this ruling). The court further reasoned that summary disposition of plaintiff's negligence claim was otherwise appropriate because the condition of the fence constituted, at most, passive negligence.

With respect to plaintiff's claims of gross negligence and wilful and wanton misconduct, the court granted summary disposition apparently pursuant to MCR 2.116(C)(8) on the ground that because plaintiff could not make out a prima facie of negligence, plaintiff could, likewise, not make out a case for those claims.

With respect to plaintiff's attractive nuisance claim, the court granted summary disposition pursuant to MCR 2.116(C)(10). Specifically, the court found that no question of fact existed that Daniel had previously discovered the fence and realized the risk involved in racing his bicycle next to the train in the area near the fence.

On appeal, plaintiff argues that the trial court erred in granting summary disposition of all four claims asserted in the complaint. We take each claim in turn. With respect to the negligence claim, plaintiff takes issue with the trial court's definition of active negligence. Plaintiff contends in reliance on *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991), that active negligence exists where a defendant has created a dangerous condition. Plaintiff contends that active negligence occurred in this case where the fence, train, train-tracks and right-of-way were created by defendants and Daniel was run over by a moving train whose clear space was infringed by the fence. Plaintiff contends that the trial court erroneously defined "active negligence" by creating a new, more strict, standard requiring some sort of immediate human involvement.

The general rule is that a possessor of land owes no duty to a trespasser except to refrain from injuring the trespasser by willful and wanton misconduct. *Wymer v Holmes*, 429 Mich 66, 71; 412

NW2d 213 (1987). However, exceptions to the general rule have developed. Prosser & Keeton, Torts (5th ed), § 58, p 395. One of the exceptions is stated in the Restatement as follows:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.
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> Comment a. The rule stated in this Section applies to determine the existence of liability for bodily harm directly and immediately caused to persistent trespassers upon land by an activity carried on by its possessor. The rule which determines the liability of a possessor of land for bodily harm caused to such trespassers by the possessor's failure to warn them of dangerous conditions created on the land by the earlier activities of the possessor or otherwise, is stated in § 335. [2 Restatement Torts, 2d, § 334, p 185.]

See also Prosser, supra at p 396.

In this state, the courts have frequently stated the following rule with respect to trespassers: "[A]fter the owner of premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence." *Schmidt Michigan Coal & Mining Co*, 159 Mich 308, 312; 123 NW 1122 (1909). In light of various decisions by our Supreme Court, we view the active negligence rule as virtually indistinguishable from the rule stated in § 334 of the Restatement, at least for purposes of the issue now before this Court. See *Nielsen v Henry H. Stevens, Inc*, 359 Mich 130; 101 NW2d 284 (1960); *Lyshak v Detroit*, 351 Mich 230; 88 NW2d 596 (1958).

Although acknowledging the difficulty of determining what may constitute active negligence in a particular case, our Supreme Court has distinguished active negligence from "negligence in maintaining the premises in a defective or dangerous condition." *Polston v SS Kresge Co*, 324 Mich 575, 579; 37 NW2d 638 (1949); see also *Lyshak*, *supra* at 249 (Smith, J., with Black and Voelker, J.J., concurring). Moreover, in *Leep v McComber*, 118 Mich App 653, 660; 325 NW2d 531 (1982), this Court specifically described passive negligence as the "failure to warn of or remedy a hazardous condition on the premises." Thus, we find plaintiff's reliance on *Williams, supra*, unpersuasive, particularly where that case involves an injured person with the status of an invitee and the issue of notice.

The distinction recognized by the courts of this state between active negligence and a condition of the premises itself is in accord with that stated in a leading treatise:

> The term "active negligence," as used in licensee cases, has been said to connote the carrying on of some operation or activity in a negligent manner. A condition of the premises, whether created through an affirmative act of a defendant or through natural causes is not an activity. An act, then, which creates a dangerous "condition of the premises" is not an activity" nor is it "active conduct," "operational conduct," or "active intervention." [62 Am Jur 2d, Premises Liability, § 166, p 536.]
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> The more recent cases take the position that the use of the term active negligence as opposed to passive negligence, when applied to the exception recognized under the premises liability doctrine, . . . refers to activities upon the premises as opposed to the condition of the premises itself. [Am Jur, § 171, pp 540-541.]

See also Am Jur, § 188, p 556 (noting that some courts allow a person to recover for injuries inflicted by active negligence whether the person is classified as a trespasser or licensee), §205, p 571-572.

Thus, the Michigan cases that have considered the active negligence rule in cases involving trespassers or licensees have typically been cases that, as found by the trial court in this case, concerned liability arising out of the possessor's affirmative acts or activities. See *Draper v Switous*, 370 Mich 468, 471; 122 NW2d 698 (1963) (icy condition caused by active negligence consisting of negligent drainage of car wash); *Nielsen, supra* (plaintiff injured in collision with defendant's truck); *Lyshak, supra* (plaintiff injured by flying golf ball); *Polston, supra* (plaintiff injured when defendant's employee lowered awning); *Schmidt, supra* (plaintiff injured by exploding air receiving apparatus); *Herrick v Wixom*, 121 Mich 384; 80 NW 117, [rehearing granted on another ground 121 Mich 389] (1899) (plaintiff injured by exploding firecracker); *Schulke v Krawczak*, 62 Mich App 675; 233 NW2d 694 (1975) (plaintiff injured by moving arm affixed to defendant's tractor).

Accordingly, we conclude that the trial court did not err in defining active negligence as negligence arising from a defendant's activities or affirmative acts on the premises. We acknowledge that determining what may constitute active negligence in a particular case may be troublesome. However, in this case, plaintiff's only remaining theory of liability for negligence concerns the fence. Although the fence was created by defendants' acts, neither the fence itself nor defendants' previous acts in creating the fence is an activity for purposes of the active negligence rule or § 334 of the Restatement. See Am Jur, § 168, pp 536-537. Rather, the fence is a condition of the property itself. Because plaintiff's allegations of negligence concern or relate to a condition of the property itself, we conclude that the trial court did not err in concluding that the condition of the fence was passive, not active, negligence. Because plaintiff has raised no issue concerning the trial court's ruling that a possessor of land owes no duty of care to a known trespasser with respect to passive negligence, i.e., a physical condition of the premises, but see Restatement, § 335 (artificial conditions highly dangerous to constant trespassers on limited area),

we affirm the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff's negligence claim. *Spagnuolo v Rudds #2, Inc*, 221 Mich App 358, 359-361; 561 NW2d 500 (1997).

Next, plaintiff argues that the trial court erred in dismissing the attractive nuisance claim. We disagree. The doctrine of attractive nuisance is another exception to the general rule limiting the liability of possessors of land to trespassers. Restatement, § 333, p 183, § 339, p 197. The doctrine of attractive nuisance concerns a possessor's liability to children for dangerous conditions upon the land. Restatement, § 339, comment a, p 197. One of the elements of a claim for attractive nuisance is that "the children because of their youth do not discover the condition or realize the risk involved in inter-meddling with it or in coming within the area made dangerous by it . . . ." Restatement, § 339(c), p 197; *Rand v Knapp Shoe Stores*, 178 Mich App 735, 740-741; 444 NW2d 156 (1989). In this case, after reviewing the record, particularly Daniel's deposition testimony, and granting the benefit of reasonable doubt to plaintiff, we conclude that no record could be developed upon which reasonable minds could differ concerning whether Daniel had previously discovered the fence and realized the risk involved in racing his bicycle next to the train in the area near the fence. Accordingly, we conclude that the trial court did not err in granting summary disposition of plaintiff's attractive nuisance claim pursuant to MCR 2.116(C)(10). *Spagnuolo, supra*.

Next, plaintiff argues that the trial court erred in dismissing her claim of wilful and wanton misconduct pursuant to MCR 2.116(C)(8). We disagree. Rather, we conclude that plaintiff pleaded no more than ordinary negligence. *Boumelhem v Bic Corp*, 211 Mich App 175, 187 (Smolenski, J.), 188 (Gribbs, J., concurring in part and dissenting in part); 535 NW2d 574 (1995). Alternatively, assuming error in this regard, we conclude that summary disposition was appropriate because no record could be developed upon which reasonable minds could differ concerning whether defendants' conduct showed an intent to harm or its effective equivalent. *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994); *Spagnuolo, supra*; see also *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997) (this Court will not reverse when the trial court reaches the correct result for the wrong reason).

Finally, plaintiff argues that the trial court erred in dismissing her claim of gross negligence, as defined in *Jennings, supra*, pursuant to MCR 2.116(C)(8). However, again, even assuming error in this regard, we nevertheless conclude that summary disposition was appropriate because no record could be developed upon which reasonable minds could differ concerning whether defendants' conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. *Jennings, supra*; *Spagnuolo, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Dalton A. Roberson

[1] On appeal, the parties do not dispute this determination.