STATE OF MICHIGAN

COURT OF APPEALS

HOLLY GOERBIG, Next Friend of JOHNATHON GOERBIG,

Plaintiff-Appellant,

v

STEVEN VAN KOEVERING and CINDY VAN KOEVERING,

Defendant-Appellee.

UNPUBLISHED
May 28, 1999

No. 211011
Ottawa Circuit Court
LC No. 97028523 NO

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition in this premises liability action. We affirm.

On September 9, 1996, plaintiff's son, Johnathon Goerbig and his friend Brad Zahm, visited defendants' sons and played basketball on defendants' property. Goerbig went up for a reverse layup and tripped on a large ornamental rock that had been placed, along with other rocks, at the edge of the driveway in anticipation of an upcoming garage sale. Goerbig suffered a severely broken arm.

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider pleadings, affidavits, admissions, depositions, and any other documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Schultz v Consumers Power Co,* 443 Mich 445, 449; 506 NW2d 175 1993). Plaintiff admitted that

Goerbig was a social guest and thus a licensee for the purpose of determining the duty defendants owed him as a visitor on their property. In *Wymer v Holmes*, 429 Mich 66; 412 NW2d 213 (1987), our Supreme Court defined the duty a possessor of land owes a licensee as follows:

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent, without more. Although a social guest is normally invited, he is not an "invitee" within the legal meaning of that term. Court decisions, thus far have been all but unanimous to the effect that the social guest, however cordially invited and urged to come, is no more than a licensee. *Preston v Sleziak*, 383 Mich 442, 175 NW2d 759 (1970). A landowner only owes a licensee a duty to warn the licensee of any hidden dangers he knows or has reason to know of, if the licensee does not know or has no reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensees' visit. Prosser & Keeton, Torts (5th ed), § 60; Restatement Torts, 2d, §§ 330, 342. [*Id.*, 71 n 1.]

A possessor of land owes no duty to a licensee with respect to open and obvious dangers. *White v Badalamenti*, 200 Mich App 434, 473; 505 NW2d 8 (1993). A condition is open and obvious if an "average user with ordinary intelligence" would notice the danger upon "casual inspection." *Novotney v Burger King (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). Zahm testified that he and Goerbig noticed and commented on the rocks before beginning to play basketball. Although Goerbig denied noticing the rocks before playing basketball, he admitted that he could have seen the rocks if he had looked on the day of the accident. We conclude that the trial court correctly determined that the rocks that caused Goerbig's fall were an open and obvious condition.

Plaintiff argues that even an open and obvious condition may pose an unreasonable risk of harm and thus, liability may still be imposed. Plaintiff cites *Bertrand*, *supra*, in which our Supreme Court held that even though there may not be an absolute obligation to warn of open and obvious dangers, the invitor is not relieved from the duty to exercise reasonable care to protect invitees against known or discoverable dangerous conditions. *Bertrand*, *supra* at 623-624. *Bertrand* is inapplicable to the facts of the instant case as it dealt with an invitee as opposed to a licensee. The standard under Michigan law is clear: A possessor of land does not owe a licensee a duty to protect the licensee from an open and obvious condition. *Wymer*, *supra* at 71 n 1.

Plaintiff also argues that defendants should be held to a higher standard of care because plaintiff's son was a child licensee rather than an adult licensee. While acknowledging that our Supreme Court nullified the case, plaintiff cites *Pigeon v Radloff*, 215 Mich App 438; 546 NW2d 655 (1996), nullified 451 Mich 885 (1996), for the proposition that a different standard should apply when a child licensee is injured by an open and obvious condition. We are not persuaded. This case did not involve the type of risk that plaintiff's minor son would not be expected to realize.

Plaintiff's son admitted that a casual inspection of the driveway and the surrounding area would have made him aware of the large ornamental rocks located near the base of the basketball hoop. The condition was open and obvious as a matter of law, and therefore, plaintiff failed to prove the duty

element of her negligence cause of action. The trial court was justified in granting defendants' motion for summary disposition.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Michael J. Talbot