STATE OF MICHIGAN

COURT OF APPEALS

ROGER W. WASHBURN, JR., as Personal Representative of the Estate of TERRY WASHBURN, Deceased, and as Personal Representative of the Estate of PATRICK WILLIAM WASHBURN, Deceased,

Plaintiff-Appellant,

v

JOSEPH BIKSACKY and SHIRLEY BIKSACKY,

Defendants-Appellees.

UNPUBLISHED
June 29, 1999

No. 208461
Muskegon Circuit Court
LC Nos. 96-335022 NO
96-335023 NO

Before: Hoekstra, P.J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm.

In this tragic case, plaintiff's wife and son drowned in a backyard swimming pool while staying at defendant's home. Defendants hired plaintiff's wife, decedent Terry Washburn, to watch their children while they were away on a week-long vacation, as they had done on several occasions. Mrs. Washburn and her 2-1/2-year-old son stayed at defendants' home while they were away. Defendants have an in-ground pool in their backyard which is accessible through either a padlocked gate in the fence or doors leading from the home's interior. Defendants installed childproof locks sixty-two inches from the floor on the doors that led to the pool, including the sliding doors.

Defendants left a note for Mrs. Washburn in which they explicitly instructed her to keep all the interior doors locked and not to allow any children in the backyard. Despite these instructions, both Mrs. Washburn and her son drowned in the pool. The only witness to the accident, one of defendants' young children, told investigators that the boy had climbed the pool ladder and Mrs. Washburn had told

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

him not to slide into the pool. Unfortunately, he slid into the pool, and Mrs. Washburn jumped into the water after him. Neither decedent could swim.

Plaintiff, as personal representative of the estates of his wife and child, filed this wrongful death action claiming that his wife and son were business invitees, and defendants were negligent in failing to maintain their property in a safe, careful and prudent manner. Specifically, plaintiff alleges that defendants failed to provide adequate barriers to the backyard and adequate safety devices around the pool. Defendants denied liability and moved for summary disposition pursuant to MCR 2.116(C)(10), and the trial court granted the motion.

We review a grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). The trial court must consider the documentary evidence submitted by the parties and, giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds could differ. *Id*.

Although we do not favor summary disposition in negligence actions, it is appropriate where a plaintiff fails to establish a prima facie case. *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). To establish a prima facie case for negligence, the plaintiff must produce evidence that: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach was the proximate cause of the plaintiff's injury and (4) the plaintiff suffered damages. *Id.*

I

On appeal, plaintiff argues that there is a genuine issue of material fact, under a premises liability theory, and that summary disposition was improperly granted. We disagree.

The outcome of this case hinges on whether defendants owed plaintiff's wife and son a duty of care. Insofar as defendants hired plaintiff's wife to watch over their children and home while they were away, she was clearly a business invitee. As business invitors, defendants had a duty to plaintiff's wife to maintain the premises in a reasonably safe condition and exercise ordinary care to keep the premises safe. *Schuster v Sallay*, 181 Mich App 558, 565; 450 NW2d 81 (1989). Their duty did not require them to anticipate unreasonable risks or dangers so obvious that an invitee can be expected to discover them for herself. *Wagner v Regency Inn Corp*, 186 Mich App 158, 162; 463 NW2d 450 (1990). The pool in this case was an obvious danger, and the record leaves no doubt that Mrs. Washburn was aware of its existence. Therefore, defendants had no duty to anticipate the danger it posed to her. *Id*.

However, while Mrs. Washburn may have been an invitee, we do not think that plaintiff's son held that status when he ventured into the backyard. It is uncontroverted that defendants instructed Mrs. Washburn, in writing, that no children were allowed in the backyard. The written instructions also make clear defendants' reason for such a restrictive instruction: they sought to remove any risk that a

child, theirs or plaintiff's, would use the pool in their absence. Therefore, when plaintiff's son ventured into the backyard, he left behind the status of invitee and became, at most, a licensee. *Gilbert v Sabin*, 76 Mich App 137, 144; 256 NW2d 54 (1977).

Under the Restatement of Torts, 2d, a landowner is subject to liability for the physical harm to licensees by a condition on the land, but only if:

> (a) the possessor knows, or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved. [*Bradford v Feeback*, 149 Mich App 67, 70-71; 385 NW2d 729 (1986), citing *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970), quoting 2 Restatement Torts, 2d, § 342, p 210.]

As a licensee, defendants owed Patrick a duty to exercise reasonable care to make the pool safe. Plaintiff contends that defendants should have used a cover to prevent Patrick from climbing the pool slide ladder or used safety covers to keep him from entering the pool. However, as a licensee, Patrick took the premises as the possessor uses them, and defendants were not required to prepare the premises for him. *Bradford, supra,* 71. Additionally, a licensee is not entitled to expect that precautions will be taken for his safety when the possessors do not take such precautions for their family's safety. *Id*. We conclude that Patrick, as a licensee, was entitled to the same safety precautions that defendants use for their own children. Therefore, we conclude that there was not a genuine issue of material fact regarding defendants' duty to provide additional safety features.

Plaintiff argues that the safety locks were inadequate because his son was able to open the sliding door to the back yard by himself. However, he offers no explanation as to how the 2-1/2-year-old could reach and operate locks located six feet from the floor. Where a nonmoving party in a motion for summary disposition carries the burden of proof, he must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). A general allegation that his son could open the doors is not enough to show that defendants breached any existing duty of care. Plaintiff needed to show why the installed locks were not adequate.

We also note that defendants were not negligent because it was not foreseeable that plaintiff's wife would fail to supervise her son. This case is tragic, and we do not wish to add to plaintiff's sense of loss the suggestion that his wife was somehow culpable for their son's death. Indeed, it should be noted that she willingly risked, and ultimately gave, her life as she tried to save him. However, regardless of *how* the accident occurred, defendants could not have anticipated that young Patrick would be allowed near the pool. In determining whether defendants owed decedents a duty, we must

consider whether the alleged conduct creates a risk of harm and whether the result and intervening causes were foreseeable. *Ross v Glaser*, 220 Mich App 183, 187; 559 NW2d 331 (1996). Furthermore, in *Bradford v Feeback*, 149 Mich App 67, 71-72; 385 NW2d 729 (1986), we held:

> [A]s a matter of public policy, property owners should not be charged with the duty of supervising and controlling children of guests who have been invited onto the property. *Id*.

Mrs. Washburn had sole custody of her son, and she was the only person supervising him at the time of the accident. Defendants could not foresee that she would fail to supervise her son to the extent necessary to prevent him from entering the backyard. Plaintiff argues that his wife was supervising their son because a witness establishes that his wife told their son to climb down from the slide. This begs the question, however, of how plaintiff's son was able to enter the backyard in the first place. Even if plaintiff's wife did not unlock the back door, lack of supervision would still preclude liability. Assuming arguendo that plaintiff's son did somehow manage to unlock the door himself, we would then have to ask why his mother did not prevent him from unlocking the door. For these reasons, we find that the lack of supervision was unforeseeable.

II

Plaintiff also argues that the trial court improperly engaged in fact-finding when deciding the summary disposition motion.

Plaintiff first argues that the trial court found that Mrs. Washburn and Patrick were wearing bathing suits at the time of their deaths. We note that a court may not make findings of fact in deciding a summary disposition motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). However, the disputed factual issue must be material to the dispositive legal claims. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). Whether Mrs. Washburn and Patrick were wearing bathing suits when they died is not material to whether defendants were negligent under a premises liability theory. Although the lower court may have improperly engaged in fact-finding, the findings were not material to the dispositive legal claims. Therefore, any error was harmless.

Plaintiff also argues that the lower court improperly engaged in fact-finding when it found that Patrick could not have entered the backyard unless the doors were unlocked or open. As noted above, defendants did not have an obligation to supervise plaintiff's son, and they could not foresee that he would be allowed to enter the backyard. Therefore, whether Patrick unlocked the door or had it unlocked for him is of no consequence in determining defendants' liability. Again, any error on this point was harmless.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns