STATE OF MICHIGAN

COURT OF APPEALS

ELVIRA SALAZAR, Guardian and Conservator of the Estate of ENRIQUE SALAZAR, JR.,

Plaintiff-Appellant,

v

ALICE BOWERMAN, RICHARD BRIGGS, ANGELA BRIGGS, AZAR MOHAMADI, MARJAN MOHAMADI, WILLIAM CROSS, ALEXANDER WARNECKE, MARJORIE WARNECKE, LEONA FARRELL, PAUL JACKSON, CHRISTA JACKSON, CHARLES DEVERS, ALMA DEVERS, EDWARD ELLEDGE, AGATHA ELLEDGE, MICHAEL YECK, WILLIAM MCCLINTOCK, LOWELL ENGEL, MARLENE ENGEL, HAL MUSSER, MARILYN MUSSER, QUINCY CHAIN OF LAKES TIP-UP INC, and STAR OF THE WEST MILLING COMPANY,

Defendants-Appellees.

UNPUBLISHED
May 22, 2001

No. 223121
Branch Circuit Court
LC No. 97-006334-NO

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

The present appeal arises from a personal injury action instituted by plaintiff on behalf of her son, Enrique Salazar, Jr. The second amended complaint alleged that, on June 5, 1996, at about 10:26 p.m., Salazar was driving on Liberty Street in Quincy Township. It appears from the record that Salazar turned off of Liberty Street, a public road, onto Beckwith Drive, a road

designated as private.[1] A review of photographs contained in the lower court file indicates that a "Private Drive" sign marked the entrance of Beckwith Drive.

After driving about one-half mile on Beckwith Drive, Salazar missed an almost ninety-degree turn and veered off of the road. According to the record, Salazar's vehicle traveled through a wooded area, plunging over a ten foot embankment and traveling seventy feet in the air before hitting an empty trailer and coming to rest in a nearby campground. Plaintiff initiated the present action against defendants in 1998, alleging that defendants were negligent in failing to take precautions to warn of the sudden turn in the road. Defendants, owners of property adjacent to Beckwith Drive who hold easements on the road, moved for summary disposition pursuant to MCR 2.116(C)(10). In support of the motion, defendants argued that they did not owe Salazar a duty of care because he was a trespasser.

We review a trial court's grant of summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Winklepleck v Michigan Veterans' Facility*, 195 Mich App 523, 532; 491 NW2d 251 (1992). In *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999), our Supreme Court clarified the proper standard for reviewing motions brought under MCR 2.116(C)(10).

> In evaluating a motion for summary disposition brought under [MCR 2.116(C)(10)], a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 120. (citations omitted).]

The reviewing court considers a motion for summary disposition under MCR 2.116(C)(10) by considering the "substantively admissible evidence actually proffered in opposition to the motion." *Id.* at 121. A "mere promise" that further evidence will be adduced at trial is insufficient to withstand summary disposition. *Id.*

Plaintiff argues that the trial court erred in granting summary disposition where triable issues of fact regarding Salazar's status on Beckwith Drive existed. We disagree.

To prove a prima facie case of negligence, plaintiff must demonstrate (1) that defendants owed Salazar a duty of care, (2) that defendants breached that duty, (3) that defendants' breach of duty proximately caused Salazar's injuries, and (4) that Salazar suffered damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). Because the issue whether defendants

---

[1] It appears from the record that Beckwith Drive is owned by Branch County. Branch County, along with Quincy Township, the Branch County Road Commission and Richard and Angela Briggs were initially named as defendants in this action, however they were subsequently dismissed as parties. After the trial court granted plaintiff leave to amend the complaint, she named defendants as parties.

owed Salazar a legal duty is a threshold question in this negligence action, we first consider Salazar's status on Beckwith Drive. *Helmus v Dep't of Transportation*, 238 Mich App 250, 253; 604 NW2d 793 (1999).

Ordinarily, whether a duty exists is a question of law reserved for the court's determination. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996). However, where factual disputes regarding duty exist, such disputes are properly left to the trier of fact. *MacDonald v PKT, Inc*, 233 Mich App 395, 400; 593 NW2d 176 (1999). The duty a possessor of land owes to a visitor is contingent on the visitor's status while on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000); *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). In Michigan, a visitor may be classified either as an invitee, a licensee, or a trespasser. *Stitt, supra* at 596-597; *Wymer v Holmes*, 429 Mich 66, 71 n 1; 412 NW2d 213 (1987).[2]

A trespasser is one who enters the land of another without the owner's consent. *Stitt, supra* at 596. A landowner is insulated from liability for injuries to a trespasser with the exception of those that arose from the landowner's "wilful and wanton" misconduct. *Id.* Conversely, a licensee is "a person who enters on or uses another's premises with the express or implied permission of the owner or person in control thereof." *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992), quoting *Cox v Hayes*, 34 Mich App 527, 531; 192 NW2d 68 (1971) (footnote omitted). Permission, rather than invitation, is the hallmark of a licensee's status. *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich 347, 359; 415 NW2d 178 (1987). Permission to enter the land may be express, or "may be implied where the owner acquiesces in the known, customary use of property by the public." *Thone v Nicholson*, 84 Mich App 538, 544; 269 NW2d 665 (1978) (citations omitted); see also *Alvin, supra* at 420.

Our Supreme Court has recently articulated the duty of care a possessor of land owes to a licensee:

> A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowners owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. [*Stitt, supra* at 596-597 (citations omitted); see also *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993).]

In support of her argument that triable issues with regard to Salazar's status on Beckwith Drive exist, plaintiff points to an allegation in the second amended complaint that Beckwith Drive was "open to public travel." Plaintiff also alleges that the road was used by the public as an entrance to what appears from the record to be a nearby resort. Plaintiff does not argue that defendants expressly permitted Salazar to enter Beckwith Drive. Rather, plaintiff contends that

---

[2] The record is clear that defendants did not hold Beckwith Drive open for a "*commercial* purpose." See *Stitt, supra* at 604 (emphasis in original). Consequently, Salazar cannot be said to have held the status of an invitee.

these allegations create a triable dispute with regard to whether defendant's impliedly consented to Salazar's presence on the land.

Viewed in the light most favorable to plaintiff, we conclude that the record does not contain evidence sufficient to create a triable issue about Salazar's status as a licensee. Specifically, plaintiff has failed to set forth substantively admissible evidence to support her assertion that defendants acquiesced "in the known, customary use of property by the public" to the extent that permission to enter Beckwith Drive was implied. *Thone*, *supra* at 544. As our Supreme Court stated in *Sandstrom v Minneapolis S P & S S M R Co*, 198 Mich 99, 107; 164 NW2d 472 (1917), "acquiescence in a use of the premises…must depend upon *some known customary use*" (emphasis supplied). The present record does not contain any such evidence.

Further, besides plaintiff's bare allegations, there is nothing in the record to suggest that the road was customarily used by the public, that defendants were aware of such use, or that they acquiesced in it. Mere allegations are not enough to withstand summary disposition, rather, plaintiff must "set forth specific facts showing that there is a genuine issue for trial." *Maiden*, *supra* at 120, quoting MCR 2.116(G)(4). Consequently, any argument in this regard is entirely speculative and insufficient as a matter of law to establish the existence of a genuine issue of fact regarding whether Salazar was a licensee.

We are satisfied that the present record does not allow "room for an honest difference of opinion" regarding Salazar's status. *Leveque v Leveque*, 41 Mich App 127, 131; 199 NW2d 675 (1972). Consequently, where there is no evidence defendants consented to Salazar's presence on Beckwith Drive, we hold as matter of law that he cannot properly be considered a licensee.

On appeal, plaintiff also points to a provision of the Restatement, arguing that it imposes a duty on defendants. This issue is not properly before this Court because plaintiff failed to raise it in the lower court. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc, v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) (footnote omitted). However, we have considered plaintiff's argument, and find it to be without merit. 2 Restatement Torts, 2d § 367, p 267 provides:

> A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway is subject to liability for physical harm caused to them, while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition.

In our opinion, § 367 does not apply to impose a duty on defendants in this case because there is no evidence that they misled Salazar into believing that Beckwith Drive was a public highway. In our view, plaintiff is hard-pressed to argue that an individual would "reasonably regard [Beckwith Drive] as a continuance of the [public] highway" because it was clearly posted as a private drive. Restatement, § 367, comment c. See also *Bosiljevac v Ready Mixed Concrete Co*, 182 Neb 199, 202; 153 NW2d 864 (1967); cf *Rogers v Bray*, 16 Wash App 494, 495-496; 557 P2d 28 (1976).

Because Salavar was a trespasser, defendants owed no duty to him "except to refrain from injuring him by wilful and wanton misconduct." *Stitt, supra* at 596 (internal quotations omitted). That Salazar allegedly did not believe that he was trespassing is immaterial to his status on the land, because a trespass does not require unlawful intent. See SJI2d 19.01; Dobbs, The Law of Torts, § 51, pp 98-99. To establish wilful and wanton misconduct on the part of defendants, plaintiff must prove:

> (1) [K]nowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997), citing *Jennings v Southwood*, 446 Mich 125; 521 NW2d 230 (1994).]

Moreover, wilful and wanton misconduct is demonstrated in circumstances where the conduct alleged manifests an intent to harm, or indifference to whether harm will result. *Stott v Wayne Co*, 224 Mich App 422, 429; 569 NW2d 633 (1997). Because the record does not contain evidence of wilful and wanton misconduct, the trial court's grant of summary disposition was proper.[3]

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

---

[3] Plaintiff also argues 2 Restatement Torts, 2d § 335 applies to impose a duty on defendants. This issue is not properly before this Court because it was not included in the statement of the issues in plaintiff's brief on appeal. *Hilliard v Schmidt*, 231 Mich App 316, 318; 586 NW2d 263 (1998). Nonetheless, plaintiff's reliance on this provision of the Restatement is misplaced because there is no evidence in the record to suggest that defendants were aware, or should have been aware, that trespassers "constantly intrude[d]" on Beckwith Drive.