STATE OF MICHIGAN

COURT OF APPEALS

KAMAL FAYAD,

Plaintiff-Appellant,

v

SOUHA DARWICH,

Defendant-Appellee.

UNPUBLISHED
May 5, 2009

No. 284181
Wayne Circuit Court
LC No. 06-631864-NO

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff volunteered to help defendant cut down a tree; plaintiff and defendant were each holding ropes to guide the tree as it fell, and a third person, Ismail Darwich, was operating the chainsaw. Before Ismail cut the tree through, he double-checked with the two rope-holders to ensure that they were ready and up to the task; they both indicated that they were ready. However, when Ismail completed the cut and the tree began to fall, defendant let go of her rope and ran, fearing she would get hit by the branches. The tree fell onto plaintiff, injuring his back.

Plaintiff's complaint did not identify any separate counts or theories of liability. The allegations stated, *inter alia*, that defendant breached a duty to "properly secure the rope which in turn would insure that such defective condition would not harm plaintiff"; and that defendant owed plaintiff a duty to protect against hazards, but breached that duty by failing to exercise reasonable care, failing to keep the premises free of hazards after affirmatively creating them, failing to remove a dangerous condition, maintaining a hazardous condition, failing to provide plaintiff safe access to the premises, failing to keep the premises fit for foreseeable uses, and negligently letting go of the rope without giving notice to plaintiff.

Defendant moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), arguing that defendant owed no duty to plaintiff because the risks involved in tree cutting are considered open and obvious to an average person of ordinary intelligence. *Zelenko v Stites*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 254691). At the motion hearing, plaintiff's counsel stated that this matter involved

"regular negligence," and that plaintiff had sufficiently established a question of fact. Defendant had taken on duties to warn and to guide the rope, and she failed to do either. The trial court agreed with defendant that the danger was open and obvious, and granted the motion.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

The trial court correctly concluded that plaintiff's premises liability claim was precluded regardless of plaintiff's status. There was no hidden, dangerous condition of the premises. While a landowner must protect from open and obvious dangers when an invitee might fail to protect himself from them, *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000), in this case the parties *had* attempted to protect themselves, by using the two ropes to jointly control the tree's fall.

However, plaintiff asserts that he sought relief under both premises liability and ordinary negligence theories. Both parties agree that a defendant's conduct can give rise to both a premises liability claim and an ordinary negligence claim. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In *Laier*, the plaintiff's allegation that the defendant's *conduct* was negligent placed the claim within the ambit of general negligence. *Id*. at 493-494. Hence, plaintiff is not legally limited to only maintaining a premises liability theory. The remaining question is whether plaintiff actually pleaded a negligence claim.

Plaintiff argues on appeal, and had argued in his brief in support of his motion for reconsideration, that he pleaded a negligence claim based both on premises liability and ordinary negligence theories. The difficulty we have in discerning that argument is there are no separately numbered counts within plaintiff's complaint, which delineate what causes of action are actually being pleaded. See MCR 2.113(E)(3). And, as the trial court noted, the *vast* majority of the allegations within plaintiff's complaint were directly related to allegations that defendant was liable to plaintiff on a premises liability theory. Indeed, in paragraph 12 of the complaint, where plaintiff sets forth the duties that were allegedly breached by defendant, six of the seven subparagraphs (a-f) are specifically based upon a premises liability theory. It is only subparagraph g, which can be reasonably construed to contain an ordinary negligence allegation. That specific allegation, coupled with the general factual allegation in paragraph 10, could really be construed to contain a factual and legal basis to comprise an allegation of ordinary negligence.

Of course, the other difficulty plaintiff faces is that his argument regarding having a separate cause of action for ordinary negligence was not made in his reply to defendant's motion

for summary disposition.[1] Instead, plaintiff's counsel raised the argument to the court during oral argument on defendant's motion, and then provided written argument only in his motion for reconsideration. Normally, that would be too late. *Charbenau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). And, it is certainly not an abuse of discretion for the trial court to deny the motion for reconsideration when the argument presented in that motion could have been raised before the motion for summary disposition was decided. *Id*. However, we conclude that because plaintiff raised the issue of a separate allegation of ordinary negligence during oral argument, it was properly preserved and, liberally construing plaintiff's complaint as much as allowed by law, we hold that plaintiff did allege the bare minimum allegations necessary to assert an ordinary negligence claim.

Defendant asserts that an alleged failure to warn "sounds in premises liability," but premises liability is not the only tort theory that can include failure to warn as actionable. See, e.g., *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289 (1996) (general negligence); *Gregory v Cincinnati Inc*, 450 Mich 1; 538 NW2d 325 (1995) (products liability). Defendant's duty here arose in part because of her participation in the activity, not just because of her status as landowner. See *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006) (where the injury was caused by a dog on the property, this Court held the duty owed by a landowner is separate and distinct from the duty owed by the dog's owner).

Defendant's motion, not unreasonably, attacked only the premises liability theory of plaintiff's complaint. To the extent plaintiff and defendant argue over the merits of plaintiff's ordinary negligence theory or whether there exists a genuine issue of material fact on that issue, these are better left to the trial court to decide on remand.

We reverse the trial court's decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens

[1] Interestingly enough, though, plaintiff did rely on the federal standard under Fed R Civ P 12(b)(6) for failure to state a claim upon which relief can be granted. That law was inapplicable to defendant's motion brought pursuant to MCR 2.116(C)(10).