STATE OF MICHIGAN

COURT OF APPEALS

WILMER FLOYD and JOYCE FLOYD, Plaintiffs-Appellants, v INSULSPAN, INC, Defendant-Appellee.	UNPUBLISHED September 29, 2009 No. 286442 Lenawee Circuit Court LC No. 07-002769-NO

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Proceedings

On February 12, 2007, plaintiff was employed as a long-distance truck driver by Melton Truck Lines. That day, Melton assigned plaintiff to take his 48-foot flatbed trailer to defendant Insulspan, Inc.'s lumberyard to pick up a load of unweathered lumber and building materials. Plaintiff was instructed to cover the unweathered materials with tarps to protect the load from the elements as he transported it. According to plaintiff, it was snowing heavily when he arrived at the lumberyard at approximately 11:30 a.m. The lumberyard supervisor showed plaintiff the materials plaintiff would be transporting. According to plaintiff, the materials were sitting on the ground uncovered and exposed to the elements. Plaintiff voiced his concern that the materials, for which plaintiff was ultimately responsible, were being exposed to the elements. The supervisor told plaintiff that the transport bill would reflect the fact that the materials were weathered at the time plaintiff had gained possession of them. Plaintiff was told that the materials could not be loaded onto his truck immediately because defendant's workers were going on break for lunch. Plaintiff estimated that he waited one and one-half hours, during which snow continued to accumulate on the lumber and building materials. After lunch,

[1] Plaintiff here refers only to Wilmer Floyd. Joyce Floyd brought a derivative claim of loss of consortium.

defendant's employees used a forklift to load the materials onto plaintiff's flatbed. The materials were placed onto the bed in the same position they had been stacked on the ground so that the snow that had accumulated on top of the materials remained on top. Plaintiff had brought two tarps, each weighing approximately 150 pounds, to cover the materials. Using a forklift, defendant's employees placed the tarps on top of the materials, although they still needed to be unrolled manually. Plaintiff climbed on top of the loaded materials and successfully unfolded the first tarp. However, plaintiff slipped on the snow-covered materials as he attempted to secure the second tarp and fell 13 feet to the concrete below sustaining injuries.

Plaintiff brought suit claiming that (1) defendant breached a duty it owed plaintiff when it failed to provide him with a "fall arrest system" or full-body harness pursuant to Occupational Safety and Health Administration (OSHA) regulations, and (2) defendant's employees were negligent in allowing snow to accumulate on the materials that plaintiff was to transport.

Defendant moved for summary disposition under MCR 2.116(C)(10). The trial court granted the motion on the basis that (1) defendant did not owe plaintiff a duty pursuant to OSHA because no employer-employee relationship existed between plaintiff and defendant,[2] and (2) plaintiff's negligence claim sounded in premises liability and was precluded pursuant to the open and obvious danger doctrine.

II. Analysis

We review a grant or denial of summary disposition de novo, *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006), considering the record "in the light most favorable to the nonmovant to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law[,]" *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005).

On appeal, plaintiff argues that the trial court erred when it concluded that plaintiff's negligence claim was based solely on a theory of premises liability, as opposed to ordinary negligence, and granted defendant's motion for summary disposition on the basis of the open and obvious danger doctrine. We agree.

"The gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim." *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (quotation marks and citations omitted). In cases such as this, it is permissible for a plaintiff to base his negligence action on both a theory of premises liability and ordinary negligence. See *Laier*, *supra* at 487. However, the nature of the defendant's duty will depend on the specific theory of liability advanced by the plaintiff. *Id.* at 493. **"**In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land." *Id.* Liability with respect to an ordinary negligence claim stems from the basic rule of the common law which "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to

[2] Plaintiff does not challenge this portion of the trial court's decision on appeal.

so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Plaintiff alleges that defendant was negligent in failing to protect the lumber and building materials from the elements, in particular the snow, and for failing to remove the snow prior to loading the materials onto his truck. Plaintiff's claim sounds in ordinary negligence. This is because plaintiff's claim is based on the conduct of defendant's employees, and does not bear any relation to defendant's ownership of the premises. See *Kwiatkowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062; 743 NW2d 917 (2008) (adopting the reasoning set forth in the dissenting opinion in *Kwiatkowski v Coachlight Estates of Blissfield, Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 3, 2007 (Docket No. 272106)); *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006) (the plaintiff, who sustained injuries after slipping on the defendant's muddy property in an effort to elude the defendant's dog, brought a negligence claim sounding in ordinary negligence, not premises liability, because alleged negligence was "based on defendant's failure to reasonably control the dog, *not* the alleged hazard presented by the muddy condition of the ground.") (emphasis in original).

With respect to plaintiff's ordinary negligence claim, the trial court erred when it invoked the open and obvious danger doctrine to dispose of plaintiff's entire lawsuit. The doctrine often arises in premises liability and products liability cases, typically in the context of a duty to warn, but is not available in claims sounding in ordinary negligence. *Laier*, *supra* at 490. Since plaintiff has not brought a claim based upon premises liability, we need not address the merits of the trial court's decision on the applicability of the open and obvious doctrine.[3]

In summary, the trial court erred in granting defendant's motion for summary disposition because plaintiff has a viable negligence claim sounding in ordinary negligence. We reverse the trial court's decision and remand this case to the trial court for further proceedings in accordance with this opinion.

Reversed and remanded. We do not retain jurisdiction.

Plaintiff may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello

[3] If plaintiff were still pursuing such a theory, the trial court properly dismissed it based upon the open and obvious danger principle. *Lugo Ameritech Corp Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Plaintiffs climbing onto a truck bed in the wintery conditions did not present any special aspects to this otherwise open and obvious condition on the truck. *Id*.