STATE OF MICHIGAN

COURT OF APPEALS

ROBERT VINCENT WATKINS, JR., Plaintiff-Appellant,	UNPUBLISHED September 28, 2010
v	No. 292578 Hillsdale Circuit Court
ST. FRANCIS CAMP ON THE LAKE, Defendant-Appellee.	LC No. 08-000601-NI

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Plaintiff Robert Watkins, Jr., appeals by leave granted the trial court's June 1, 2009, order granting defendant summary disposition, and its order denying his motion to amend. We affirm.

I. FACTS

Plaintiff, who is disabled, was injured using a water slide at a summer camp that defendant St. Francis Camp on the Lake runs for people with special needs. Plaintiff, who suffers from cerebral palsy and is confined to a wheelchair because he is a quadriplegic, was approximately 34 years old at the time of the accident and was living with his parents. At the time of the accident, plaintiff was employed at the Roscommon county courthouse as a mail clerk, where he worked for the previous 15 years for about 20 hours per week. Plaintiff did not have a legal guardian.

A water slide was at the camp. The water slide consisted of a tarp, which was approximately 100 feet long and 20 feet wide, placed on a hill. Water was then sprayed onto the tarp and soap was put onto the campers so that the campers would slide down the tarp faster. Some of the campers would use inner tubes when going down the hill and some would slide down the hill on their buttocks. At the bottom of the slide was a "little ditch," which was approximately two and one-half feet long, two feet wide, and 12 to 18 inches deep. There was water and mud in the ditch, and if a camper hit the ditch when sliding down the hill, which "pretty much everybody hit the ditch," the camper would flip.

Robert Seger was a camp counselor while plaintiff was at the camp. Seger indicated that the camp basically "let the campers decide what they feel they can and can't do. They try not to place any limitations on anybody. They want them to have the best experience possible there." Camp counselors kept notes throughout the week about the campers. Seger's notes about

plaintiff reflected, "July 15th, Sunday. Robert W. excited to be at the new camp. Very happy and pleasant all day. Likes to try new things and is determined to do as much as he can do on his own." Seger's notes also reflected, "July 17th, Tuesday. Robert W. says he really likes the camp. The best one he has been to. Took him on the slip and slide. He does not let his physical limitations stop him from trying anything new. He loves the water slide."[1]

Seger testified that, on Tuesday, plaintiff went down the water slide four or five times. Seger testified that plaintiff was loaded onto a tube at the top of the hill, then a camp counselor sat in a tube behind plaintiff's tube and went down the hill holding onto plaintiff's tube. Plaintiff was subsequently loaded onto a golf cart and driven back up to the top of the hill. On Wednesday, plaintiff went down the water slide approximately four more times. Seger testified:

> So Robby rolled a couple times, got up laughing. It was fine the first day. And that's when, I believe the second day, he really took a good flip. Elizabeth went down with him on the slide as well. I believe that's the day he might have, when he rolled might have hit his foot on the ground too hard. He might have caught it in the ditch down at the bottom. I am not quite too sure exactly the circumstances that led to bones being broken in his foot. But when he complained about it I noticed the bruising and said something to the nurse and had her examine it.

Seger further testified regarding the last two times that plaintiff went down the water slide on Wednesday:

> The third time I do remember him flipping. He went one time after that which he flipped as well. So–I'm sorry. Like I said, I can't necessarily–I don't remember specific times, but his last two times he flipped really hard. And that's when he decided he was done. He didn't want to go anymore. And he had some scratches caused from the gravel from the rolling over. And I think I remember that there was–he complained–got the wind knocked out of him when they rolled over, because he had lain there for a bit. And we went down to check everything out, make sure he was okay, checked his colostomy bag. Because I mean, like I said, he rolled over pretty good. And he said he just kind of had the wind knocked out of him but he was fine. So we got him cleaned up, wiped the mud off of his face, put him back in the golf cart, took him to the top of the hill. And that was close to the end of the activity, but he didn't want to go anymore anyways.

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[1] Plaintiff's mother completed plaintiff's camper medical information form and indicated on the form that plaintiff has suffered from cerebral palsy since birth, was a quadriplegic, used an electric wheelchair, and had a colostomy as well as arthritis and speech problems. One of the questions on the form provided, "Should camper's activities be limited due to physical condition or illness?" Plaintiff's mother circled "Yes" and explained "Spine/disc narrowing–disc bulging, and disc herniation."

On March 6, 2008, plaintiff filed a complaint, which alleged the following:

> 7. On or about July 19, 2007, the Defendant and its agents and employees, including all camp instructors and supervisors, owed certain duties and obligations to the Plaintiff and those similarly situated, including but not limited to:
>
> a. Ensuring that they were kept from harm;
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> b. Utilizing all means and methods to ensure that they would not cause serious and permanent injury to Plaintiff;
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> c. To abide by the wishes and request of any guardian or parent of the Plaintiff or other similar situated individuals so as to ensure that the Plaintiff was not exposed to an increase[d] risk of harm and injury in the activities undertaken during said time at the camp;
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> d. To ensure that individuals attending the facility such as the Plaintiff herein were protected from severe and permanent injury and damage during the course of normal activity;
>
> e. To ensure that injuries and damages sustained by the Plaintiff or other[s] similar[ly] situated while staying at the camp were properly and adequately diagnosed and treated and then appropriate and prompt medical attention was provided to these individuals and the Plaintiff herein by qualified and competent medical professionals;
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> f. To ensure that the facility properly and adequately trained its personnel to recognize the dangers in activities, which they may undertake with campers so as to reduce or eliminate the danger for severe and permanent injury and damage; and
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> g. Such other duties and obligations as may be identified throughout the course of discovery.

On April 17, 2009, defendant moved for summary disposition, pursuant to MCR 2.116(C)10), arguing that this was a premises liability case and that the alleged hazard was open and obvious. Plaintiff moved to amend his complaint in order to add a claim of nuisance in fact and moved to amend the scheduling order in order to extend scheduling dates 60 days so that he would have enough time to complete discovery. Plaintiff also opposed defendant's motion.

At the hearing on the motion to amend the complaint, the trial court concluded:

> This isn't a nuisance case. This isn't an issue that's something open to the general public. It is for simply the private campers. You've got a negligence action, I think. It would appear that Mr. Watkins–at least from the briefs I've read thus far, subject to the arguments of both of you, I believe it's Friday–didn't even agree to this activity. It would appear that he simply was picked up out of a wheelchair, put on an inner tube, and he was accompanied by a counselor down

> the hill. This isn't a nuisance case, it's a negligence case. Doesn't even appear to be a premises liability case.
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> So I think we're–it would be futile to amend the complaint at this time. We'll proceed with the complaint as drafted . . . .

At the hearing, the trial court also indicated that it was denying plaintiff's request to have the scheduling order dates extended.

At the subsequent hearing on defendant's motion for summary disposition, the trial court held:

> This case has been described as a premises liability case. The reason the Court doesn't consider it a negligence case in general is that I'm not sitting here with a patient that -- or an individual that is not cognizant of what is going on around him. The staff followed his directions.
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> * * *
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> [I]n this particular case I'm dealing with a ditch at the bottom of a hill where water accumulates. As I have described here, based on the depositions, the condition was open, the condition was obvious, it was observed by Mr. Watkins, it was observed by everyone around. This could not be expected that this would result in a serious injury–severe injury. The condition of the premises cannot be considered unreasonable. You don't have a situation where we could have an especially high likelihood of injury.

Hence, the trial court concluded that defendant's motion for summary disposition should be granted because plaintiff's claims were based on premises liability law and the condition was open and obvious and without special aspects that would remove the condition from the open and obvious danger doctrine. The trial court noted, however, that the claim relating to the failure to obtain proper medical services in a timely fashion remained pending. At the end of the hearing on the motion for summary disposition, the trial court entertained plaintiff's motion for entry of order to dismiss the case without prejudice, which the trial court also granted.

II. ANALYSIS

Plaintiff argues that his claims of negligence should not have been summarily dismissed as claims sounding only in premises liability because it was defendant's conduct in not properly and adequately training its personnel to recognize the dangers in activities that led to his injuries. Further, an objective reading of the complaint results in a finding that the negligence clearly involved the conduct of individuals with regard to the water slide activity. Thus, plaintiff's claims should not have been dismissed on the basis of premises liability law because premises liability law does not apply to conduct.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law.

Morales v Auto-Owners Ins, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568. 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. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568.

Generally, where an injury arises out of a condition on the land, rather than conduct or activity, the action lies in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In other words:

> In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land. However, that does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct . . . . [*Id*.]

Premises liability law has been summarized by the Michigan Supreme Court as follows:

> Generally, a premises possessor owes a duty of care to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. This duty generally does not encompass a duty to protect an invitee from "open and obvious" dangers. However, if there are "special aspects" of a condition that make even an "open and obvious" danger "unreasonably dangerous," the premises possessor maintains a duty to undertake reasonable precautions to protect invitees from such danger. [*Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328; 683 NW2d 573 (2004) (citations omitted).]

The test to determine if a danger is open and obvious is whether an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002).

We conclude, viewing the evidence in the light most favorable to plaintiff, that defendant's alleged liability emanated from its duty as the owner of the land. *Coblentz*, 475 Mich at 568; *Laier*, 266 Mich App at 493. That is, the question was whether defendant had a duty as the owner of the land to protect plaintiff from harm and thus provide a water slide activity that was free from danger by not allowing a ditch at the bottom of the slide to exist, which propelled participants into the air. *Id*. The theory of liability directly related to a condition on the land, i.e. the premises. *James*, 464 Mich at 18-19. Consequently, although some alleged conduct on the part of defendant may have been involved–i.e. failing to protect plaintiff from harm, allowing the ditch to form, and/or failing to train staff to recognize the danger involved in allowing participants to hit the ditch and be propelled into the air–this does not change the fact that, as a matter of law, this negligence claim was based on premises liability

law. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995); *Laier*, 266 Mich App at 489.[2] Indeed, in *Laier* we specifically held that the open and obvious doctrine applied to a claim pleaded as "a failure to warn of a dangerous condition *or as a breach of a duty in allowing the dangerous condition to exist*." *Id*. at 489 (emphasis added). Accordingly, the trial court correctly determined that this case was based on premises liability law and analyzed the case under that theory. *Id*.

The undisputed facts reveal that the condition was also open and obvious. *Joyce*, 249 Mich App at 238. The testimony reflected that almost every time a camper went down the water slide, they hit the ditch and flipped or became covered in mud. In addition, plaintiff specifically testified that before he went down the water slide, he saw other people go down the water slide and fly into the air. Further, the testimony established that plaintiff went down the water slide several times before he was injured and that plaintiff was enjoying the water slide. We find on the record before us that an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Id*. Based on the foregoing, the danger of going down the water slide, hitting the ditch, and flipping into the air, was open and obvious. *Id*.

Plaintiff argues that because a counselor at the camp did not recognize the danger, there was genuine issue of material fact on whether the condition was open and obvious. However, simply because one counselor did not see any danger in operating the slide (all the evidence pointed to the conclusion that all campers enjoyed the slide) does not result in a conclusion that an average user of ordinary intelligence would not have been able to discover the danger and the risk presented upon casual inspection by going down a water slide, hitting the ditch, and flipping into the air. *Joyce*, 249 Mich App at 238. Additionally, there was no evidence of prior injuries. Viewing the evidence in a light most favorable to plaintiff, there is no genuine issue of material fact whether the condition was open and obvious, *Coblentz*, 475 Mich at 567-568, and no special aspects to this condition were presented. *Lugo v Ameritech Corp*, 464 Mich 512, 516-520; 629 NW2d 384 (2001). Hence, plaintiff's claim was barred by the open and obvious doctrine.

In addition, plaintiff argues that defendant should have known or anticipated that, given plaintiff's physical condition and his parent's requested restrictions, plaintiff could have been hurt if propelled into the air after hitting the ditch. This argument fails for the simple reason that in a premises liability action when determining whether a condition is open and obvious, "the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff." *Mann*, 470 Mich at 329. Hence, plaintiff's physical condition was not pertinent to the determination that the condition was open and obvious. *Id*.

Plaintiff also argues that the trial court abused its discretion when it denied him the opportunity to amend his pleadings with additional theories of ordinary negligence. The grant or denial of leave to amend is within the trial court's discretion. *Weymers v Khera*, 454 Mich 639,

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[2] That is, of course, except for the negligence claim related to plaintiff's subsequent care and treatment at the camp, which the trial court indicated remained pending, at least until the order dismissing the case without prejudice.

654; 563 NW2d 647 (1997). Thus, "[we] will not reverse a trial court's decision regarding leave to amend unless it constituted an abuse of discretion that resulted in injustice." *PT Today, Inc v Comm'r of the Office of Financial & Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). "Leave to amend the pleadings should be freely granted to the nonprevailing party upon a grant of summary disposition unless the amendment would be futile or otherwise unjustified." *Lewandowski v Nuclear Mgt, Co, LLC*, 272 Mich App 120, 126-127; 724 NW2d 718 (2006). Specifically, "[a]n amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998).

For two reasons the trial court did not abuse it's discretion. First, the exclusive focus of plaintiff's motion to amend was to amend the complaint to allege a "nuisance", and plaintiff does not challenge the trial court's conclusion that nuisance is not properly pleaded under these facts. Second, an amendment would have been futile because plaintiff's alleged additional theories of ordinary negligence merely restated, and slightly elaborated on, the theories of negligence that plaintiff already pleaded. *Id*. And, as already stated above, the open and obvious doctrine applied because defendant's alleged liability emanated from defendant's duty as the owner of the land to protect plaintiff from harm, including in allowing the danger to exist. *Bertrand*, 449 Mich at 609; *Laier*, 266 Mich App at 493. In other words, the open and obvious doctrine applied to plaintiff's alleged theories of negligence, which were set forth in his complaint, as well as plaintiff's alleged additional theories of ordinary negligence (except as noted in footnote 2, *supra*) because defendant's alleged liability emanated from defendant's duty as the owner of the land to protect plaintiff from harm. *Id*. Thus, there was no abuse of discretion that resulted in an injustice because granting plaintiff leave to amend his complaint would have been futile. *Dowerk*, 233 Mich App at 76; *Weymers*, 454 Mich at 654.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray