STATE OF MICHIGAN

COURT OF APPEALS

DONALD T. MCCUE, individually and as the conservator of the ESTATE OF DEBRA K. MCCUE, Plaintiff-Appellant,	UNPUBLISHED November 4, 2010
v	No. 294661 Mackinac Circuit Court
O-N MINERALS (MICHIGAN) CO, Defendant-Appellee.	LC No. 08-006594-NO

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover damages sustained in a bicycle accident, plaintiff Donald T. McCue, individually and as the conservator of the Estate of Debra K. McCue, appeals as of right the trial court's order granting defendant O-N Minerals (Michigan) Co.'s motion for summary disposition and denying his motion for partial summary disposition. Because we conclude that the trial court erred when it granted summary disposition in favor of O-N Minerals, but did not err when it denied McCue's motion for partial summary disposition, we reverse in part, affirm in part, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In September 2007, Donald and Debra McCue participated in an annual bicycle tour that started in Lansing and proceeded to the Upper Peninsula. On September 2, 2007, Debra was riding east on State Highway M-134 when she rode onto a section of the highway where a private gravel road connected to the highway. O-N Minerals owned the land on both sides of the highway including the private gravel road. It used the private road to move heavy mining equipment and limestone to and from its properties on both sides of the highway. The highway was paved with concrete and reinforced with six railroad rails at the point where the gravel road connected to the highway. However, the concrete around the rails had deteriorated and left ruts in the road. While travelling along the highway at this point, Debra McCue struck a defect in the highway and was thrown to the ground. She suffered numerous injuries including a fractured skull and head trauma that left her with permanent brain damage.

Donald McCue sued O-N Minerals in April 2008 on his own behalf and as the conservator of his wife's estate. In his complaint, he alleged that O-N Minerals had a duty to maintain the highway at the point where his wife fell and breached that duty by permitting the intersection to fall into disrepair. He further alleged that O-N Mineral's failure to maintain the highway at that point caused his wife to be thrown from her bike and sustain severe injuries. He claimed that, as a result of the injuries sustained by his wife through O-N Mineral's failure, he too suffered damages through loss of consortium.

McCue also sued the State of Michigan and the Michigan Department of Transportation (the Department) for failing to maintain the highway. However, on December 22, 2008, the trial court, sitting as the Court of Claims, dismissed his claims under MCR 2.116(C)(7) because Debra McCue executed a waiver of liability in favor of the State and its agencies in exchange for permission to participate in the tour.[1]

In February 2009, McCue filed an amended complaint. In the complaint, McCue alleged that O-N Minerals had a duty to maintain the highway in reasonable repair at the point where its private road connected to the highway, which it failed to do. He also alleged that O-N Mineral's use of the highway at that point to move heavy equipment caused the highway to deteriorate and the resulting hazardous condition amounted to a nuisance. Finally, McCue alleged that the failure to properly maintain the highway proximately caused his and his wife's injuries.

In July 2009, O-N Minerals moved for summary disposition of McCue's claims under MCR 2.116(C)(10). In support of its motion, O-N Minerals presented evidence that the highway was under the exclusive jurisdiction of the Department and, therefore, the Department had the sole duty to maintain the highway. O-N Minerals also argued that, for the same reason, if the highway's condition at that point amounts to a nuisance, it is the Department's nuisance because it alone has a duty to inspect and repair the highway.

In response to O-N Mineral's motion for summary disposition, McCue argued that a duty to maintain or repair a public right-of-way may arise where the adjacent landowner creates a new hazard on the right-of-way, increases an existing hazard on the right-of-way, or has a servitude through physical intrusion or otherwise onto the right-of-way that affects the safety of the right-of-way. He stated that, because the evidence showed that O-N Minerals crossed the highway at the point where the private road connected to the highway with very heavy vehicles and the highway had only deteriorated at that point, there was evidence that O-N Minerals caused or increased the deteriorated condition and the deteriorated condition was a public nuisance. For these reasons, he asked the trial court to deny O-N Mineral's motion for summary disposition. He also argued that the undisputed evidence showed that, as a matter of law, O-N Minerals had a duty to maintain the highway at the point where the private road connected to the highway,

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[1] McCue eventually applied for delayed leave to appeal the order granting summary disposition in favor of the State and the Department, which this Court denied for "lack of merit in the grounds presented." See *McCue v Department of Transportation*, unpublished order of the Court of Appeals, entered April 2, 2010 (Docket No. 295235).

breached that duty, and proximately caused Debra McCue's injuries. For that reason, he asked the trial court to grant summary disposition in his favor under MCR 2.116(I)(2).

At the hearing on the parties' motions for summary disposition, the trial court indicated that there was nothing in the factual submissions that would give rise to an inference that O-N Minerals had a duty to maintain the section of the highway where its private road connected with the highway. For that reason, any deterioration in the highway at that point—even if it were a nuisance—was the responsibility of the Department. On August 31, 2009, the trial court signed an order granting O-N Minerals' motion for summary disposition and denying McCue's motion for partial summary disposition under MCR 2.116(I)(2).

McCue now appeals.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

We shall first address McCue's claim that the trial court erred when it determined that, as a matter of law, O-N Minerals had no duty to repair or maintain the highway at the point where O-N Minerals' gravel road connected to the highway. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo, as a question of law, whether O-N Minerals' use of the section of the highway at issue gave rise to a duty. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

B. ANALYSIS

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A party is entitled to summary disposition under this rule if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact . . . ." MCR 2.116(C)(10). In evaluating the motion, the court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, in the light most favorable to the part opposing the motion, and determine whether there is a genuine issue as to any material fact. *Maiden*, 461 Mich at 120, citing MCR 2.116(G)(5). If the party opposing a properly supported motion for summary disposition fails to present documentary evidence establishing the existence of a material factual dispute, the trial court should grant the moving party's motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

In order to prevail on his negligence claim, McCue had to establish that O-N Minerals had a duty to Debra McCue. *Fultz*, 470 Mich at 463 (listing the elements of a negligence cause of action and stating that whether there was a duty is a threshold question to the imposition of liability). The duty element of a negligence claim encompasses whether the defendant was under any obligation to the plaintiff to avoid negligent conduct. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). Thus, if O-N Minerals' use of the highway at the point where its private road connected to the highway did not give rise to a duty to avoid negligent conduct, then McCue's claim for negligence fails as a matter of law.

It is generally for the courts to decide whether a duty exists. *Id.* at 438. However, under some circumstances, whether a defendant owes a duty to the plaintiff will depend on the resolution of factual disputes. In such cases, it is for the jury to resolve the factual dispute. See *MacDonald v PKT, Inc*, 464 Mich 322, 339; 628 NW2d 33 (2001); *Bonin v Gralewicz*, 378 Mich 521, 526-528; 146 NW2d 647 (1966) (noting that, where the duty depends on the resolution of fact questions, the issue should be submitted to the jury with an appropriate conditional instruction regarding the duty). In this case, it is undisputed that Debra McCue fell and suffered injuries while riding within the right-of-way of a state highway. And, normally, a landowner has no duty to repair or maintain an adjacent public right-of-way. See *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998) (stating that premises liability is conditioned upon the presence of both possession and control over the land); see also *Stevens v Drekich*, 178 Mich App 273, 277; 443 NW2d 401 (1989) (holding that, whatever rights to a public right-of-way that are retained by the adjacent landowner, they are not possessory in nature and so cannot give rise to premises liability). Instead, the duty to maintain the highway in reasonable repair rests exclusively with the State. See MCL 691.1402. Nevertheless, there are circumstances where an adjacent landowner's conduct can give rise to a duty with regard to an adjacent right-of-way.

In order to be liable for a condition in a public right-of-way, the adjacent landowner must have "physically intruded upon the area in some manner" or must have "done some act which either increased [an] existing hazard or created a new hazard." *Berman v LaRose*, 16 Mich App 55, 57; 167 NW2d 471 (1969). "Where the occupant of one parcel of land has been held responsible for the condition of an adjoining parcel to which another has title or possession, such responsibility is predicated on the fact that he exercised control over the land beyond his boundaries." *Rodriguez v Sportsmen's Congress*, 159 Mich App 265, 271; 406 NW2d 207 (1987); see also *Ward v Frank's Nursery & Crafts*, 186 Mich App 120, 133; 463 NW2d 442 (1990) (relying on *Berman* to conclude that the defendant in that case could be liable for the plaintiff's injuries under the facts of that case because there was evidence that the defendant may have cast debris into the right-of-way or through its actions increased or caused the hazardous condition in the right-of-way). In this case, it is undisputed that the hazard at issue was a defect in the surface of the highway and did not involve a private servitude in favor of O-N Minerals.[2] Likewise, it is undisputed that the hazard does not involve an improvement on O-N Minerals' land that somehow affects the safety of travel on the highway. See *Langen v Rushton*, 138 Mich App 672; 360 NW2d 270 (1984). Thus, in order to demonstrate that O-N Minerals had a duty

[2] In the original deed granting the right-of-way at issue, O-N Minerals' predecessor in interest retained the right to cross the right-of-way. This, however, did not give O-N Minerals' predecessor a private servitude over the surface of the highway. Rather, O-N Minerals' predecessor reserved the right to connect its private roads to the right-of-way and to have the State take steps to ensure that its maintenance of the right-of-way did not interfere with this right to cross. But, with respect to the actual surface of the highway, O-N Minerals had only the same right of travel that every other member of the public had.

with regard to the defective condition of the highway, McCue had to present evidence that O-N Minerals caused the defect at issue or, at the very least, increased the hazard posed by the defect.

In its motion for summary disposition, O-N Minerals presented evidence that the Department had exclusive jurisdiction over the right-of-way and argued that it, therefore, could not be liable for the condition of the highway at the point where its private gravel road connected to the highway. Once O-N Minerals presented evidence that it did not have a duty to maintain the highway at the point where Debra McCue fell, McCue had to respond by presenting evidence that established a factual question as to whether O-N Minerals had a duty with regard to the hazard at issue. *Barnard Mfg*, 285 Mich App at 374.

In response, McCue presented the affidavit from a retired employee of O-N Minerals. The employee averred that she had frequently crossed the highway at the point at issue with vehicles that O-N Minerals admitted weighed between 46,000 pounds and 213,000 pounds. McCue also presented evidence that the surface of the highway was reinforced at the point where O-N Minerals' private road connected to the highway, had deteriorated into a state of general disrepair, and that the surface of the highway immediately adjacent to that point was in reasonable repair. This evidence included photographs of the highway and intersection at issue. These evidentiary submissions were sufficient to establish a question of fact as to whether O-N Minerals had created or increased the hazard at issue.

The evidence submitted by McCue in support of his position at summary disposition established that O-N Minerals used the surface of the highway to cross from one section of its property to another section of its property.[3] And there is evidence that the vehicles that crossed the highway at that point were particularly heavy—so heavy that a finder-of-fact could reasonably conclude that the vehicles would directly damage the highway at the crossing point or cause it to deteriorate at an accelerated pace. Indeed, there was evidence that the intersection was reinforced with railroad rails for this very reason. Further, the evidence that the highway was generally in good repair except at the point where O-N Minerals' vehicles crossed the road permits—but does not require—an inference that the regular traffic along the highway did not cause the deterioration at issue. For this reason, a reasonable fact-finder could conclude that, more likely than not, O-N Minerals' negligent use of the highway at that point caused or at least increased the hazard of the condition that caused Debra McCue's fall. See, e.g., *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994) (stating that, in the causation context, the plaintiff must present evidence that the defendant's acts more likely than not caused the injury). Because McCue presented evidence from which a reasonable fact-finder could conclude that O-N Minerals used the highway in a way that created a hazard or increased an existing hazard on the highway, and thereby breached a duty owed, the trial court could not properly dismiss McCue's claim for negligence on the ground that O-N Minerals did not owe a

[3] There was no evidence that O-N Minerals actually maintained, constructed or otherwise physically altered the highway at the point at issue in any way other than through its use of the surface as a crossing point.

duty to Debra McCue. See *Bonin*, 378 Mich at 526-528 (noting that, where the duty depends on the resolution of fact questions, the issue should be submitted to the jury with an appropriate conditional instruction). Moreover, for the same reason, the trial court erred in dismissing McCue's public nuisance claim. See *Capitol Properties Group, LLC v 1247 Center St, LLC*, 283 Mich App 422, 427-428; 770 NW2d 105 (2009) (stating that, in order to prove a public nuisance the plaintiff must show that the defendant acted in a way so as to unreasonably interfere with a common right enjoyed by the public). We do not, however, agree with McCue's contention that the trial court should have granted partial summary disposition in his favor because the undisputed evidence showed that O-N Minerals had a duty to repair the highway, failed to repair it, and that that failure caused Debra McCue's fall. Although a reasonable fact-finder could find that O-N Minerals negligently caused the highway to deteriorate at the point where its vehicles crossed the highway, it could also conclude that the specific defect at issue was not caused by O-N Minerals' use of the highway or that O-N Minerals' use was otherwise reasonable under the circumstances. Therefore, the trial court did not err when it declined to grant summary disposition in favor of McCue.

The trial court erred when it granted O-N Minerals' motion for summary disposition, but did not err when it denied McCue's motion for partial summary disposition. Because of our resolution of this issue, we need not consider McCue's remaining argument on appeal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, McCue may tax costs. MCR 7.219(A).

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly