

STATE OF MICHIGAN
COURT OF APPEALS

JONATHAN C. GAMZE, as Next Friend for
JULIE GAMZE, a Minor,

UNPUBLISHED
June 21, 2012

Plaintiff-Appellant,

v

No. 299433
Charlevoix Circuit Court
LC No. 09-054822-NO

CAMP SEA-GULL, INC. and WILLIAM P.
SCHULMAN,

Defendants-Appellees,

and

EMILY LISNER,

Defendant.

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

In this case, plaintiff appeals from an order granting summary disposition in favor of defendants¹ Camp Sea-Gull, Inc. (the Camp) and William Schulman, a part-owner and associate director of the Camp, on plaintiff's claims of negligence and premises liability. Because genuine issues of material fact remain regarding plaintiff's negligence claim, we affirm in part, reverse in part, and remand.²

¹ Emily Lisner was dismissed by stipulation and is not involved in this appeal. Thus, our reference to "defendants" will refer to appellees.

² Defendants have raised a question as to this Court's jurisdiction over the appeal. Plaintiff filed the initial appeal of the order granting summary disposition before Lisner had been dismissed from the case. Accordingly, this Court dismissed the appeal for lack of jurisdiction. *Gamze v Camp Sea-Gull, Inc.*, unpublished order of the Court of Appeals, entered July 13, 2010 (Docket No. 298202). We informed plaintiff, however, that he could seek to appeal the grant of summary disposition by filing a delayed application for leave under MCR 7.205(F). Defendants subsequently requested that the trial court tax their costs against plaintiff. On July 29, 2010, the

I. BASIC FACTS

Julie Gamze and defendant Emily Lisner were both campers at the Camp in the summer of 2007. As part of a “Pirate Day” on July 15, 2007, the Camp organized a game of capture the flag on a large field divided into two halves. In the middle of each half was a circle, and in the middle of the circle was a five-foot tall flagpole³ with a colored flag on top. While the object of the game was to “capture” the opposing team’s “flag,” the “flag” to be seized was actually a piece of cloth or towel lying on the ground at the base of the flagpole. Participants were not supposed to attempt to capture the flag on top of the pole or the pole itself. Lisner testified that no one told her that the flagpole flag was not the correct flag to capture, and the counselor who explained the rules does not remember if she clarified that point. In the course of the game, Lisner grabbed the flagpole and began running with it. Gamze was running nearby, being chased by another camper, and the metal stake at the bottom end of the flagpole hit her in the mouth. She lost one tooth, and three others were broken.

Plaintiff filed suit against defendants, alleging negligence and premises liability. The trial court granted defendants’ motion for summary disposition and stated the following at the hearing:

I can’t see where the camp and Mr. Schulman did anything wrong. I can’t see where this individual’s grabbing of the marker was a foreseeable event by the camp and those in charge of this particular camp and the camp’s owner.

Anything that they did or failed to do was not the proximate cause of this Plaintiff’s injury. And, I don’t believe there is any material facts that are in dispute that would prevent the granting for the Motion for Summary Disposition under [MCR 2.116(C)(10)]. So that’s my ruling.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When reviewing a motion brought under MCR 2.116(C)(10), we consider the pleadings, admissions, trial court denied this motion except for a \$20 motion fee. Plaintiff then filed the current appeal. The arguments on appeal do not concern the motion for costs but, instead, are exclusively aimed at the trial court’s decision to grant the motion for summary disposition.

When an appeal of right is dismissed for lack of jurisdiction or is not timely filed, an appellant may file an application for leave to appeal up to 12 months after entry of the final order to be appealed. MCR 7.205(F)(1) and (F)(3). Plaintiff filed this appeal on August 2, 2010, less than 12 months after May 21, 2010. Given the trial court’s notation in the orders below concerning which order was—or was not—intended as the final order in this case, we treat plaintiff’s claim of appeal as an application for leave and hereby grant it. MCR 7.205(D)(2); see also *In re Morton*, 258 Mich App 507, 508 n 2; 671 NW2d 570 (2003).

³ The flagpole also had a metal tapered end or “stake” so it could be inserted and anchored into the ground.

and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). A grant of summary disposition “is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 552.

III. ANALYSIS

A. NEGLIGENCE

The elements of a negligence claim are “(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). It is not entirely clear which element(s) the trial court found to be deficient in plaintiff’s claim. While only explicitly referencing causation, the trial court’s statement seemed to encompass three of the elements: duty (“I can’t see where this individual’s grabbing of the marker was a foreseeable event”); breach (“I can’t see where the [defendants] did anything wrong.”); and causation (“[a]nything that they did or failed to do was not the proximate cause of this Plaintiff’s injury.”). With the damages element not being disputed, we will address the remaining three elements.

The question of whether a defendant owes a plaintiff a duty of care is a question of law. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). When determining whether a duty should be imposed, the ultimate inquiry is “whether the social benefits of imposing a duty outweigh the social costs of imposing a duty.” *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 505; 740 NW2d 206 (2007). “This inquiry involves considering, among any other relevant considerations, the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.” *Id.* (quotation marks omitted). But the most important factor is the relationship of the parties. *Id.*

Here, we conclude that defendants owed Gamze a duty to provide proper instructions for the game of “capture the flag.” In 2007, Gamze was a summer camper at the Camp. She and her family entrusted defendants with her safety during her stay. It was foreseeable that if the campers were not properly instructed, then a camper could pick up the actual flagpole instead of picking up the flag/towel lying on the ground next to the flagpole. It is also foreseeable that, if a camper did remove the flagpole from the ground, the camper could injure another camper while running with the pole.⁴ Finally, the burden to properly instruct the campers to pick up the towel from the ground is negligible.

Once the existence of a duty toward Gamze is established, the reasonableness of the defendant’s conduct is a question of fact for the jury. *Arias v Talon Development Group, Inc*, 239 Mich App 265, 268; 608 NW2d 484 (2000). Thus, the next question is whether there is a

⁴ This is especially foreseeable when the opposing team’s goal is to pursue and tag the flag carrier.

genuine issue regarding whether defendants breached this duty by failing to provide the proper instructions.

In support of their motion for summary disposition, defendants provided, *inter alia*, the unsworn “statements” from two people who were camp counselors at the time of the accident. However, these statements do not comply with the requirements of MCR 2.116(G)(2) since they are not “affidavits, depositions, admissions, or other documentary evidence,” and consequently cannot be considered. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 321; 575 NW2d 324 (2009). Moreover, even if the statements were considered, they would not support granting defendants’ motion for summary disposition. The first statement was by Leah Glowacki, who was the programming counselor at the time of the incident. With regard to the instructions, she stated, “I instructed the campers to attempt to obtain the flag that was inside the circle on the opposite side of the field from where their team was stationed.” This statement does not establish that the correct instructions were given. In fact, when viewing the statement in a light most favorable to plaintiff, one could conclude that Glowacki’s instructions might possibly have been construed by at least some campers as a directive to remove the flag itself instead of the towel on the ground. The other statement was provided by Stephanie Plaine, who stated that she instructed the campers “to capture the team’s flag on the other side of the field which was located inside the circles drawn onto the grass.” Again, this statement does not specify that the instruction was to get the towel lying next to the flag.

Defendants did properly submit the depositions of six people, however. But none of the submitted testimony indicated that the campers were instructed to ignore the flagpole and only pick up the towel on the ground: Gamze could not recall what specific instructions were given; Lisner testified that she did not hear any specific instructions to take the towel on the ground instead of the pole itself; Jack Schulman and William Schulman both admitted that they did not hear the instructions that Glowacki and Plaine provided; Marsha Schulman admitted that she was not present when the instructions were given; and Plaine, herself, testified that she could not recall the specifics of the instructions that she gave. Therefore, when viewing all of this evidence in a light most favorable to plaintiff, there is a question of material fact on whether the Camp instructed the campers to only take the towel lying at the base of the flagpole instead of the flag or flagpole itself.

Finally, the trial court indicated that it found as a matter of law that defendants could not have proximately caused plaintiff’s injuries. But proximate cause is a factual question for the jury unless reasonable minds could not differ. *Lockridge v Oakwood Hosp*, 285 Mich App 678, 684; 777 NW2d 511 (2009). Proximate cause normally involves examining the foreseeability of consequences and whether a defendant should be held liable for those consequences. *Campbell v Kovich*, 273 Mich App 227, 232; 731 NW2d 112 (2006). Here, a reasonable juror could have concluded that a failure to instruct the campers properly could foreseeably result in an enthusiastic camper grabbing and removing the flagpole in order to “capture the flag” affixed to the top of it. And because the object of the game was for the camper to run the flag back to her team’s territory while other campers tried to tag her, a reasonable person could conclude that it was foreseeable that other campers might be hit and injured by the five-foot tall flagpole as it was being moved. Therefore, the trial court erred by holding as a matter of law that defendants could not have proximately caused Gamze’s injuries.

B. PREMISES LIABILITY

We now turn to plaintiff's premises liability claim. Because Gamze was an invitee on the Camp's premises, defendants owed a duty to "exercise reasonable care to protect [her] from an unreasonable risk of harm caused by a dangerous condition *on the land.*" *Benton v Dart Properties, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006), quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (emphasis added). Plaintiff must show that the duty was breached and that the breach proximately caused her injuries. *Benton*, 270 Mich App at 440.

However, Gamze was not harmed by a dangerous condition "on the land." Instead, she was harmed when Lisner pulled the flagpole out of the ground and began running with it. The danger arose solely because of the actions of the participants and not because of an inherent condition of the premises. Thus, plaintiff's claim properly sounds in negligence, not premises liability.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are taxable pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello