STATE OF MICHIGAN

COURT OF APPEALS

DONALD A. LAIER, as Personal Representative of the Estate of RODNEY ALAN LAIER, Deceased,

Plaintiff-Appellant,

v

LEONARD K. KITCHEN,

Defendant-Appellee.

FOR PUBLICATION
May 24, 2005
9:10 a.m.

No. 251275
Washtenaw Circuit Court
LC No. 02-000839-NO

Official Reported Version

Before: Hoekstra, P.J., and Neff and Schuette, JJ.

HOEKSTRA, P.J., *(concurring in part and dissenting in part).*

I agree with the lead opinion that plaintiff's complaint arguably sounds in ordinary negligence and that, for the reasons stated in Part IV of the opinion, the open and obvious danger doctrine is inapplicable to such a claim. Accordingly, because the trial court and the parties failed to recognize ordinary negligence as a theory of recovery separate from premises liability and thus failed to develop a record sufficient to permit any meaningful review by this Court, I would remand for further proceedings regarding that theory of liability. However, to the extent that the lead opinion suggests that plaintiff may possess a viable claim for ordinary negligence, I defer to the development of evidence on remand and express no opinion regarding what that evidence may show.

With respect to plaintiff's premises liability claim, on review de novo I would affirm the trial court's grant of summary disposition, albeit on a different ground.[1] As recognized by the lead opinion, "[i]n the context of premises liability, the general rule is that "'a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable

[1] In remanding plaintiff's claim for premises liability on the ground that the trial court erred in applying a subjective analysis to determine that the dangerous condition of the tractor was open and obvious, the lead opinion fails to recognize that our review of a trial court's resolution of a motion for summary disposition is de novo and that, therefore, we may uphold the trial court's ruling where it has reached the right result albeit for the wrong reason. See *Hess v Cannon Twp*, 265 Mich App 582, ___; ___ NW2d ___ (2005).

risk of harm caused by a dangerous condition on the land.'" *Ante* at ___, citing *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Here, however, the evidence is clear that the tractor, as it was before plaintiff's decedent and defendant took it to repair it, presented no danger. Indeed, it is not disputed that the bucket was safely on the ground until repairs to the tractor's hydraulic system commenced. Moreover, the rationale for imposing premises liability is that the invitor is in a better position to control the safety aspects of his or her property when invitees entrust their protection to the invitor while entering the property. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). In this case, however, defendant was in no better position to protect plaintiff's decedent than was plaintiff's decedent himself. Indeed, it is not disputed that the bucket was raised from its innocuous position on the ground as a collective effort of plaintiff's decedent and defendant in order to effectuate the necessary repairs. Under such circumstances, the rationale for imposing premises liability is neither implicated nor advanced by application in this case. Consequently, because the evidence fails to present a question of material fact concerning breach of the duty owed by defendant as a possessor of land, I would affirm the trial court's grant of summary disposition of plaintiff's premises liability claim. MCR 2.116(C)(10); *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539-540; 683 NW2d 200 (2004).

/s/ Joel P. Hoekstra