STATE OF MICHIGAN

COURT OF APPEALS

BASSAM TOUMA

Plaintiff-Appellee,

v

SAM ZORO,

Defendant,

and

FIAZA ZORO,

Defendant-Appellant.

UNPUBLISHED
February 4, 1997

No. 181798
Oakland Circuit Court
LC No. 94-DA-6098-AV

Before: Sawyer, P.J., and Taylor and M.J. Matuzak,* JJ.

MEMORANDUM.

In this premises liability action which comes before the Court on leave granted, plaintiff was injured when he tripped and fell over a bicycle while playing basketball as a social guest at defendant's home. The Oakland Circuit Court affirmed a district court judgment entered on a jury verdict in favor of plaintiff. Defendant Fiaza Zoro now appeals and we affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was one of a group of three social guests who came to defendant's home on June 16, 1992 for a backyard barbecue. All the guests were males, and the three guests and Sam Zoro, the host, began playing basketball in the driveway. While the men were thus engaged, Zoro's six-year-old daughter rode her bicycle part way up the driveway and parked it on the grass near the basketball pole, partially under the net. Defendant Fiaza Zoro, Sam's wife, observed the activity, and although acknowledging in her deposition recognition that there could be a safety hazard presented, she took no steps to warn the players, instead taking her daughter inside the house to feed her. Within a short time, plaintiff, who had leapt into the air for a rebound, was heard to scream as, descending, he noticed too late the bicycle, on which he landed, sustaining serious injuries.

* Circuit judge, sitting on the Court of Appeals by assignment.

When the child parked her bicycle in the described position, none of the basketball players was looking in this direction. Presumably, those players then defending the basket had their backs to this activity, and the offensive players were focused on the game. The trial court appears to have instructed the jury on the open and obvious danger doctrine, but the jury nonetheless found that the danger involved was unreasonable. The case was tried only against Fiaza Zoro, Sam Zoro having been absolved of liability on motion for summary disposition due to his lack of knowledge of the dangerous condition.

Since leave to appeal was granted, the Michigan Supreme Court has rendered its decision in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), in which it reaffirmed application of the open and obvious danger principle to premises liability actions. However, that case involved invitees, not social guests, who are licensees. *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759 (1970). *Bertrand* holds that, notwithstanding that a danger is open and obvious, if it is nonetheless unreasonable, liability may still be imposed.

The case at bar involves another aspect of the open and obvious danger principle, set forth in Restatement Torts, 2d, § 342, which principle has been expressly adopted as accurately representing Michigan jurisprudence on the subject in both *Preston v Sleziak, supra* and *Bradford v Feeback*, 149 Mich App 67, 71; 385 NW2d 729 (1986). Under the Restatement Torts, a possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and fails to exercise reasonable care to make the condition safe or to warn the licensees of the condition and the risk involved, provided that the licensees do not otherwise know or have reason to know of the condition and the risk involved.

Here, Fiaza Zoro's own testimony establishes that, as a possessor of the land, she knew of the dangerous condition, recognized the possibility of harm, and under the verdict of the jury must be held responsible for failing to realize the risk of harm was unreasonable to the licensees, as well as that they had not discovered and probably would not discover the danger in time to avoid injury. Fiaza Zoro failed to move the bicycle, which would have made the condition safe, or to warn the licensees, by yelling to the basketball players concerning the position of the bicycle. Because the licensees were involved in a competitive game, they not only did not know but had no reason to know of the change in condition which had occurred since last they looked in the direction of the pole on which the basket was mounted.

Accordingly, the December 8, 1994, order of the Oakland Circuit Court in this cause, affirming the judgment of the district court which was entered on the verdict of the jury, is affirmed.

/s/ David H. Sawyer
/s/ Clifford W. Taylor
/s/ Michael J. Matuzak