STATE OF MICHIGAN

COURT OF APPEALS

KATHY GRZESIK, Next Friend of DANIEL GRZESIK, a Minor,

Plaintiff-Appellee,

v

VILLAGE GREEN MANAGEMENT COMPANY, d/b/a VILLAGE GREEN APARTMENTS,

Defendant,

and

DETROIT EDISON COMPANY,

Defendant-Appellant.

UNPUBLISHED
April 3, 1998

No. 194524
Wayne Circuit Court
LC No. 95-503181 NO

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, J.J.

PER CURIAM.

Defendant Detroit Edison (hereafter "defendant") appeals by leave granted from the trial court order denying its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this premises liability action. We reverse.

Plaintiff's ward, Daniel Grzesik, lived with his family in the Village Green Apartment complex. He climbed a tree located on the grounds of the complex. The branch he was standing on broke, causing him to fall on an electrical transformer box which was owned by defendant and which was located under the tree. Daniel injured his arm as a result.

Defendant moved for summary disposition, arguing there was no genuine issue of material fact as to plaintiff's claim for attractive nuisance and that, pursuant to the open and obvious danger doctrine, it was entitled to judgment as a matter of law on plaintiff's negligence claim based on failure to warn.

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

The trial court found that questions of fact existed and denied defendant's motion. This Court granted defendant's application for leave to appeal the denial of its motion for summary disposition.

Although defendant raised its motion under both MCR 2.116(C)(8), failure to state a claim, and MCR 2.116(C)(10), lack of a genuine issue of material fact, when the court considered the motion, it considered alleged factual disputes. Further, defendant's argument on appeal addresses the denial of its motion as if it were denied under MCR 2.116(C)(10). This Court reviews de novo the trial court's decision regarding a motion for summary disposition. *Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Ladd v Ford Consumer Finance Co*, 217 Mich App 119, 124; 550 NW2d 826 (1996), lv gtd 456 Mich 898 (1997). All relevant affidavits, depositions, admissions and other documentary evidence submitted by the parties must be considered in a light most favorable to the nonmoving party. MCR 2.116(G)(5); *Tranker*, *supra*, citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This Court must then decide whether there is a genuine issue of material fact upon which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law. *Tranker*, *supra*.

Defendant first argues that the trial court erred in concluding that plaintiff had presented a factual question regarding the first two elements of the attractive nuisance doctrine. We agree in part.

This Court has adopted the doctrine of attractive nuisance as stated in the Restatement of Torts, 2d, § 339:

> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. [*Rand v Knapp Shoe Stores*, 178 Mich App 735, 740-741; 444 NW2d 156 (1989).]

A plaintiff must establish all five elements in order for a defendant to be liable for injury under the doctrine. *Id*., 741. Because plaintiff failed to establish the second of the elements, the trial court erred in denying defendant's motion for summary disposition on plaintiff's attractive nuisance claim.

Defendant argues that there was no genuine issue of material fact regarding the nature of the transformer box. Relying on *Rand, supra, Murday v Bales Trucking, Inc*, 165 Mich App 747, 751-752; 419 NW2d 451 (1988), and *Taylor v Detroit*, 182 Mich App 583; 452 NW2d 826 (1989), defendant asserts that the transformer box in and of itself was not a dangerous condition, but that it was Daniel's use of the box that created the dangerous condition. We agree. Plaintiff's photographs establish that the transformer box was solid on three of its exposed sides, with eight-inch "fins" extending from one side of the box. The box itself was not a dangerous condition. Rather, it was only Daniel's use of the transformer box that made it dangerous. By climbing the tree and falling from it onto the box, Daniel created a dangerous condition. Because the transformer box itself was not a dangerous condition, plaintiff failed to establish the second of the attractive nuisance elements. We need not address the issue further.

Defendant also argues that the trial court erred in denying its motion for summary disposition as to plaintiff's claim of negligence based on defendant's alleged failure to warn Daniel of the dangerous condition of the transformer box. Defendant's motion for summary disposition was based on the open and obvious danger doctrine. *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995); *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992).

We have already concluded that the transformer box, in and of itself, was not a dangerous condition. Moreover, even a very young child understands "fall down go boom." Finally, it was simply fortuitous that Daniel hit the transformer box, as opposed to hitting a bicycle, a car or cement.

Reversed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan