

STATE OF MICHIGAN  
COURT OF APPEALS

---

ODIS LUGO,

Plaintiff-Appellant,

v

AMERITECH CORPORATION, INC.,

Defendant-Appellee.

---

UNPUBLISHED

June 19, 1998

No. 194352

Macomb Circuit Court

LC No. 95-003108-NO

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting defendant's motion for summary disposition. We reverse.

Plaintiff was injured when she stumbled into a pothole in the sidewalk on which she was approaching defendant's building. She testified in her deposition that she was not watching the ground in front of her feet because she was trying to avoid being hit by a truck, which was backing up in the adjoining parking area.

Defendant sought summary disposition on the basis that the pothole was an "open and obvious" danger from which defendant had no duty to protect plaintiff. *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). The circuit court, however, based its decision on plaintiff's failure to watch her step, stating, "[T]here is a legal duty to look where you are walking." The court did not address the "open and obvious danger" argument.

We review the circuit court's grant of summary disposition de novo to determine if defendant was entitled to judgment as a matter of law. *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 227; 556 NW2d 180 (1996). Although the circuit court did not specify which subrule of MCR 2.116(C) formed the basis of its decision, we have reviewed the grant of summary disposition under MCR 2.116(C)(10) and not MCR 2.116(C)(8), because both parties rely on matters outside the pleadings. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis of a claim.

*Tranker v Figgie Int'l, Inc*, 221 Mich App 7, 11; 561 NW2d 397 (1997). When this Court reviews a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), it considers all relevant affidavits, deposition, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* We then determine whether there exists a genuine issue of material fact on which reasonable minds could differ or whether the moving party is entitled to judgment as a matter of law. *Id.*

We find that the circuit court erred in holding that plaintiff's "legal duty" to "look where [she] was walking" barred her claim. Under Michigan law, adults do have a duty to exercise ordinary care for their own safety. See, e.g., SJI2d 10.04. This requirement, however, must be analyzed in the context of the doctrine of comparative negligence. *Lowe v Estate Motors Ltd*, 428 Mich 439, 456; 410 NW2d 706 (1987). Under the doctrine of comparative negligence, unlike under contributory negligence, a plaintiff's negligence does not serve as an absolute bar to the plaintiff's claim. "Under pure comparative negligence, *a plaintiff's negligence does not bar the plaintiff's recovery*; instead, it reduces the amount of the plaintiff's recovery, allocating liability in proportion to fault." *Jennings v Southwood*, 446 Mich 125, 131; 521 NW2d 230 (1994) (emphasis added). In the present case, plaintiff's failure to observe the pothole and avoid it will be a factor for the jury to consider, but it will not prevent her claim from being submitted to a jury.

The circuit court did not address defendant's argument that the pothole presented an "open and obvious danger." An issue not addressed by the circuit court is not preserved for our review. *Federated Publications, Inc v Board of Trustees of Michigan State Univ*, 221 Mich App 103, 119; 561 NW2d 433 (1997). However, where the issue is a question of law and all the necessary facts are before the Court, we may address it. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). We find that the necessary facts are contained within the record. Because the circuit court will face the issue on remand, and in the interests of judicial economy, we will consider the question.

We review questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). The resolution of this matter is controlled by the Supreme Court's analysis in *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995). In *Bertrand*, the Supreme Court discussed exceptions to the "open and obvious" danger rule:

There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where *the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious*, or will

forget what he has discovered, or fail to protect himself against it. Such reason may also arise where *the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.* [Id. at 611-612, quoting 2 Restatement, Torts, 2d, § 343A, comment f, p 220. (Emphasis changed.)]

In the present case, plaintiff testified in her deposition that she was “distracted” by the danger of the approaching truck and so missed the otherwise obvious danger posed by the pothole. Whether defendant had “reason to expect” that a pedestrian on the sidewalk might be distracted by the need to avoid a moving vehicle or might even reasonably choose to step in the pothole to avoid such a vehicle is not a proper issue for summary disposition. *Id.* Defendant, therefore, was not entitled to summary disposition of plaintiff’s claim as a matter of law simply because the pothole was an open an obvious danger.

Reversed and remanded for further proceedings on plaintiff’s complaint. We do not retain jurisdiction.

/s/ Myron H. Wahls

/s/ Hilda R. Gage