STATE OF MICHIGAN

COURT OF APPEALS

SANDRA HENDIN and JAMES HENDIN, husband and wife, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED February 1, 2002
v	No. 213614 Oakland Circuit Court
OAKLAND COUNTY PARKS, Defendant-Appellee/Cross-Appellant.	LC No. 96-513563-NO

Before: Whitbeck, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiffs Sandra and James Hendin[1] appeal by right the trial court's orders of judgment entered against them. Defendant Oakland County Parks cross appeals the trial court's order rejecting its governmental immunity claim. We affirm.

I. The Motion For Summary Disposition

A. Overview: The Definitional Problem

At issue in this case is whether Hendin can hold Oakland County Parks liable for the injuries she sustained when she fell off a stage it had rented to the Oakland School District. The Oakland School District used the stage for square dancing during a picnic it held on its own grounds. Hendin was square dancing when she fell from the stage. The chief analytical problem in this case relates to whether Hendin sued for *premises* liability or *products* liability.

According to the record, Hendin she fell off a stage that Oakland County Parks[2] owned. Although the precise relationship is not clear, it appears from the pleadings that Oakland County

[1] Plaintiff James Hendin's claim of loss of consortium is derivative and, therefore, we refer to plaintiff Sandra Hendin as "Hendin."

[2] The record in this case refers to "Oakland County Parks," which may simply be a shortened name for the Oakland County Parks Commission.

Parks is part of the governmental apparatus of Oakland County; however, Oakland County is *not* a defendant here. Oakland County Parks asserts that it purchased the stage from its manufacturer Century, Inc., in 1988. Yet Century is *not* a defendant here.[3] Hendin sustained her injury because she was learning line dancing at a picnic the Oakland School District sponsored and held on its premises. But the School District is *not* a defendant here.

After Hendin sustained her injury, she brought a lawsuit alleging (1) defective design of the stage, (2) failure to warn, and (3) vicarious liability for instructor negligence.

B. The Defective Design Theory

Because her first claim, the defective design claim, rests on a products liability theory, Hendin must establish that Oakland County Parks was legally responsible for the alleged defective design as the owner or lessor of the stage even though it did not manufacture or sell the stage. Her remedy for the defective design of the stage would otherwise appear to be solely against Century because Oakland County Parks did not originally design the stage or alter its design once it purchased the stage.

C. The Duty To Warn Theory

(1) Overview

Hendin's second claim was a duty to warn claim and it was on this claim that the trial court granted summary disposition. Duty to warn can be both a products liability theory[4] and a premises liability theory.[5]

(2) Duty To Warn In Premises Liability Cases

In premises liability cases, duty to warn is part of a trilogy of theories that can allow recovery. As Justice Cavanagh wrote:

> [I]nvitors may be held liable for an invitee's injuries that result from a failure to warn of a hazardous condition or from the "negligent maintenance of the premises or defects in the physical structure of the building."[6]

Here, the School District, without dispute, owned the premises where the June 8, 1995, picnic was held. However, the School District is *not* a defendant here and is apparently a completely

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[3] Hendin did sue Century. What became of that suit is not clear. It is, however, clear that Century is not involved in the claims being considered in this appeal.

[4] See *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379; 491 NW2d 208 (1992).

[5] See *Riddle v McLouth Steel*, 440 Mich 85; 485 NW2d 676 (1992).

[6] *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-500; 418 NW2d 381 (1988).

separate entity from Oakland County Parks. Therefore, absent some other conceptual construct, we fail to see how Hendin can recover against Oakland Country Parks under a premises liability theory. Her remedy for the failure to warn of the condition of the premises would appear to be solely against the School District, the owner of the premises.

(3) Duty To Warn In Products Liability Cases

As noted above, there can be a duty to warn in a products liability case. As Justice Boyle put it in *Glittenberg:*

> In the products context, duty to warn has been described as an exception to the general rule of nonrescue, imposing an obligation on sellers to transmit safety-related information when they know or should know that a buyer or user is unaware of that information.[7]

Rather clearly, however, this duty to warn reposes in the manufacturer or seller of the product. Oakland County Parks was neither the manufacturer nor the seller of the stage. Therefore, Hendin's remedy for breach of the a duty to warn in the products liability context would appear to be solely against Century, the manufacturer/seller of the stage.

D. The Vicarious Liability Theory

Hendin's third claim was for vicarious liability for instructor negligence. The trial court denied the motion for summary disposition on this claim. Hendin abandoned this in the trial court and has failed to present it as an issue in this appeal.[8]

E. The Position Of The Parties Below

The initial question, therefore, remains: is this a premises liability case or is it a products liability case? If it is a premises liability case, then Hendin's sole remedy for the failure to warn of the condition of the premises is against the School District. If it is a products liability case, then Hendin's sole remedy for a failure to warn of an allegedly dangerous design defect in the stage is against Century.

The parties were not, at the trial court level, terribly clear regarding what kind of a case this is. At the hearing on the motion for summary disposition, counsel for Oakland Country Parks stated:

> Now, with regard to the Glittenberg/Riddle issue, plaintiff seems to take the position of Riddle as the applicable case law here not Glittenberg because we're not the owner of this stage.[9] Well Riddle only applies to a condition on

[7] *Glittenberg, supra* at 386.

[8] See MCR 7.212(C)(5).

[9] This is either a typographical error or a misstatement. As far as we can tell, Oakland County Parks *is* the owner of the stage.

> land. It's clear that this stage is a mobile unit. It's not a condition on land. *We're more akin to the defendants in the Glittenberg case in which that case dealt with the duties of the seller, with regard to a simple product and a product that has open and obvious hazards and dangers*. We're basically bringing this product out to the public at large. It's not a condition on land.[10]

Counsel for Hendin did little to remedy this confusion, responding:

> And, finally, to address the open and obvious basis for Mr. Potter's additional motion for summary disposition, we've cited the Court to Riddle. We've cited the Court to the subsequent case of Bertram v. Ford, which the Michigan Supreme Court put to rest the issue. *The owner premises [sic] has a duty to warn of even an obvious danger where the owner of those premises knew or should have knew [sic] of the unreasonable risk of harm being created*. The County could have purchased side rails. They were available for purchase. They chose not to purchase them. They chose not to put any warning of any kind on the exposed perimeter of this stage and now coming [sic] in and saying they should be treated as though they are the manufacturer, the seller. They are the owners of this stage and the other equipment being rented by the Parks Commission.[11]

Thus, Oakland County Parks, citing *Glittenberg*, apparently considered this a products liability case, while Hendin, citing *Riddle*, *Bertrand*, and the duty of a premises owner, apparently considered it a premises liability case.

F. The Trial Court's Ruling

The trial court denied the motion for summary disposition with respect to Oakland County Parks' governmental immunity defense, holding that renting equipment "under these circumstances where the event was not open to the general public is not a governmental function." The trial court did not, however, make a specific ruling on the nature of the case:

> Next, the defendant argues the alleged defect was open and obvious relying on Glittenberg v Doboy [sic], 441 Mich 379. Plaintiff asserts that Glittenberg is inapplicable to the defendant in that the defendant was neither the manufacturer nor seller of the mobile stage at issue.
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> Plaintiff argues the proper doctrine is open and obvious. This Court notes, however, that the doctrine applies to land owners. The Court finds that the facts in this case are more closely analogous to those in Glittenberg and that the defendant was not the end user of the product but provided the product for use by others.

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[10] Emphasis added.

[11] Presumably this means that Oakland County Parks was the owner of the stage and it was rented "by the Parks Commission" to the School District.

> Under either doctrine, however, the test for determining whether there is a duty to warn is whether the alleged dangerous condition is apparent or visible upon casual inspection.
>
> In this case, the alleged defect of lack of side rails was open and obvious to an ordinary user and plaintiff's position upon casual inspection. Therefore, as to the duty to warn claim, the defendant's motion is granted.

Thus, the trial court appeared to favor Oakland County Parks' theory that this was a products liability case. However, the trial court then ruled that the open and obvious defense applied "under either doctrine" and granted summary disposition concerning Hendin's duty to warn claim. The trial court then turned to the "balance" of Hendin's claims of negligence:

> As to the balance of plaintiff's claims of negligence, the defendant's motion is denied. The defendant has not demonstrated that no duty is owed to the plaintiff nor that no duty was breached. Whether the defendant should have attached side rails or otherwise provided some sort of device to prevent injury to the plaintiff is a question of fact for the jury.

The "balance of" Hendin's "claims of negligence" was her claim for defective design. Thus, the only claim that could have been tried was Hendin's claim for defective design, a products liability claim. Under the trial court's decision, it appears that no aspect of a premises liability claim could have been tried, regardless of whether it was for "failure to warn of a hazardous condition," "negligent maintenance of the premises" or "defects in the physical structure of the building."

G. Hendin's Position On Appeal

Hendin claims on appeal that the trial court erred in granting summary disposition for Oakland County Parks on her "claim of a failure to warn." In making this argument, Hendin relies on the analysis articulated in *Bertrand v Alan Ford, Inc*.[12] *Bertrand* requires a plaintiff to demonstrate that the activity or condition on the land causing injury was not open and obvious.[13] If the activity or condition was open and obvious, then the plaintiff may not recover without demonstrating that, despite the open and obvious nature of the harmful condition or activity, or the invitee's knowledge of it, "the risk of harm remains unreasonable."[14]

Hendin's primary argument in this appeal, however, focuses on the factual circumstances surrounding the use of the stage with particular emphasis on the edge of the stage. She argues in her brief that being on a stage is an unusual activity and that the "edge of a stage presents a hazard that is 'unusual . . . because of [its] character, location, or surrounding circumstances.'"[15]

[12] *Bertrand, supra* at 616-617.

[13] *Id*. at 610-611.

[14] *Id.* at 611, citing 62 Am Jur 2d Premises Liability, §§ 156-158, pp 523-527.

[15] Hendin takes this phrase from *Bertrand*, *supra* at 616.

In her reply brief, she comments that both experts "recommended use of 'toe strips' to alert a person on the stage to the proximity of the edge, much as a baseball outfielder is alerted by the warning track to the proximity of the fence." Thus, by her reliance on *Bertrand* and her emphasis on the edge of the stage, Hendin appears to be arguing duty to warn in the context of a premises liability case. Yet, her argument, in a somewhat vague fashion, actually tends to veer toward the two other causes of action related to premises liability recognized in *Bertrand*: negligent maintenance and defective structure, sometimes collectively referred to as a "duty to make safe."[16]

However, Hendin appears to recognize the basic problem with a premises liability argument: Oakland Country Parks was not the owner of the premises. Hendin therefore states in her reply brief that "[t]here is no reason why premises liability concepts like possession of the premises should be imported into the present case – defendant's liability in Glittenberg did not turn on whether defendant had been in possession of the premises." Thus, without actually saying so, Hendin apparently now sees this as a products liability case even though she advanced a premises liability theory in the trial court.

H. Duty To Warn Conclusion

The duty to warn aspect of this case presents both definitional and conceptual problems. By paying close attention to the language of Hendin's arguments on appeal, we can resolve the definitional problem by reaching the conclusion that this is actually a products liability case. Ignoring for the sake of analysis that Oakland County Parks appears to be the wrong party to defend against this claim, we note that in the products liability context, the law imposes no duty to warn when a danger posed by a simple product is open and obvious.[17] There is no question from the record that "the danger [of falling off the stage because it lacked guardrails or other features was] fully apparent, widely known, commonly recognized, and anticipated by the ordinary user."[18] Thus, objectively, Oakland Parks had no obligation to warn Hendin of the danger of falling of the stage, regardless of whether such a warning were toe strips or might take another form.

II. The Motion For Directed Verdict

A. The Trial Court's Ruling

Hendin's remaining claims of defective design and vicarious liability went to trial. After four days of trial, the trial court entertained Oakland County Parks' motion for directed verdict. The trial court concluded that Oakland County Parks was a lessor of a chattel, the stage. The trial court then granted the motion for directed verdict, stating:

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[16] *Id*. at 610.

[17] See *Resteiner v Sturm, Ruger, & Co, Inc*, 223 Mich App 374, ; 566 NW2d 53 (1997).

[18] *Id*.

> The lessor of the chattel to be used by the lessee for a particular purpose known to the lessor impliably [sic] warns of the reasonable suitability of the chattel to the lessees known intended use of it. Jones versus Keech [sic]at 388 Mich 164.
>
> There has been no evidence that there was an obligation to inquire any further than the defendant did with regard to the intended use of the state.
>
> Taking the evidence in the light most favorable to the plaintiff and assuming that there was such a duty there's no evidence of a breach. There's no evidence that the stage was not fit for line dancing. Even plaintiff's human factor's expert testified that it was fit for line dancing under certain circumstances.
>
> The court in Webb versus Traveler's Insurance Company, 98 Mich. App. 157, relying on Jones held that it was to conclude that where a bailor leases a machine to a bailee and injury results liability cannot attach to the bailor or as a result of an improper use over which the bailor has no control.
>
> Likewise, it would be absurd to impose a legal obligation on the defendant in this case to inquire regarding the type of dancing, the number of the participants and the instructors.
>
> Therefore, this court finds that the plaintiff has not presented evidence of a breach, therefore, I am granting the motion for directed verdict. I will not submit the case to the jury.

B. The Trial Court's Reasoning

The trial court concluded that *Jones v Keetch*[19] and *Webb v Travelers Ins Co*[20] established the duty owed by a lessor in Michigan. Indeed they do. The problem is that neither is a defective design case. In *Jones*, a motel guest sued the motel operators when a chair that the defendants owned collapsed, "causing him to fall on his fundament and suffer a ruptured disc."[21] The guest sued for negligence and breach of an implied warranty of fitness for intended use, *not* defective design.[22]

In *Webb*, the plaintiff was injured as a result of a cave-in a tunnel in which he was working.[23] The plaintiff sued Traveler Insurance on the grounds that it breached its duty to make adequate safety inspections.[24] The plaintiff also sued Don Gargaro Company, Inc., the

[19] *Jones v Keetch*, 388 Mich 164; 200 NW2d 227 (1972).

[20] *Webb v Travelers*, 98 Mich App 157; 296 NW2d 216 (1980).

[21] *Jones*, *supra* at 167.

[22] *Id*.

[23] *Webb*, *supra* at 158-159.

[24] *Id*. at 159.

owner/lessor of a machine that the plaintiff was assigned to clean in a products liability action on the basis of negligence and breach of an implied warranty, *not* defective design.[25] Thus, we do not think that *Jones* and *Webb* apply to a defective design claim.

C. Defective Design Conclusion

More importantly, as already suggested, this issue presents a definitional problem. One can reasonably reach the conclusion that this is a products liability case. The claim, as Hendin stated it, was for defective design. Hendin could certainly bring such a case. Yet, the proper defendant would have been the manufacturer of the stage, Century, and *not* its owner/lessor Oakland County Parks. Alternatively, Hendin could have sued Oakland County Parks as the owner/lessor of the stage on the sort of owner theories set out in *Jones* and *Webb.* However, the proper claim would have been for breach of implied warranty of fitness for the use intended, *not* a design defect. However, Hendin did not take either of these approaches to this case. Thus, with the defective design claim and property parties incorrectly matched, the trial court properly granted a directed verdict concerning Hendin's defective design products liability claim, although it did so for the wrong reasons.[26]

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

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[25] *Id*.

[26] See *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).