STATE OF MICHIGAN

COURT OF APPEALS

ARIK L. SANDERS,

Plaintiff-Appellant,

and

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

GLEN BELLINGER and SUE BELLINGER,

Defendants-Appellees.

UNPUBLISHED
February 12, 2004

No. 245825
Isabella Circuit Court
LC No. 02-001346-NO

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants. We affirm.

Plaintiff was rendered a paraplegic after diving one evening into a four-foot-deep aboveground swimming pool at defendants' home. At his deposition, plaintiff testified that he began the fateful dive by quickly traveling across a two-tiered deck located immediately adjacent to the pool, then diving head-first into the water. Plaintiff, who had been drinking that night, apparently misjudged the diameter of the pool when making the dive and, as a result, struck his head at the far end of the pool. Plaintiff thereafter floated to the surface of the water, face-down and unable to move his legs.

Nearly three years later, plaintiff filed the instant suit alleging that defendants were liable for his injuries as a result of their failure to warn or otherwise protect him from the dangers associated with the pool. Specifically, plaintiff alleged that given the shallow depth of the pool, defendants breached their duty of care as premises owners by providing a deck from which a person could dive into the pool. Plaintiff further alleged that defendants were negligent in failing

to provide adequate lighting in the pool area, and in permitting "night swimming to be done without warning of depth and/or diving dangers."

Following discovery, defendants moved for summary disposition of plaintiff's suit, arguing that plaintiff was aware of the dangers associated with the pool, which were open and obvious, and that therefore defendants were not liable for the injuries suffered by plaintiff. The trial court agreed and granted summary disposition in defendants' favor under MCR 2.116(C)(10). Plaintiff now appeals, arguing that the trial court erred in granting summary disposition to defendants based on the open and obvious doctrine. We disagree.

We review de novo a trial court's grant of summary disposition. *Ruff v Isaac*, 226 Mich App 1, 4; 573 NW2d 55 (1997). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id*. In reviewing such a motion, a trial court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The trial court may grant a motion for summary disposition under MCR 2.116(C)(10) where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

In premises liability actions, a property owner must exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, unless the risk of harm is unavoidable or remains unreasonable despite the obvious nature of the condition, this duty of care does not extend to dangerous conditions that are open and obvious, i.e., that are known to the invitee or are so obvious that the invitee might reasonably be expected to discover the danger and risk presented upon casual inspection.[1] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516-517, 519; 629 NW2d 384 (2001); see also *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

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[1] We reject plaintiff's claim that the open and obvious danger doctrine was effectively abrogated by Michigan's adoption of comparative negligence. As emphasized by our Supreme Court in *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992), the open and obvious danger rule does not run contrary to the doctrine of comparative negligence:

> The adoption of comparative negligence in Michigan does not abrogate the necessity of an initial finding that the premises owner owed a duty to invitees. Moreover, we find that the duty element and the comparative negligence standard are fundamentally exclusive . . . doctrines to be utilized at different junctures in the determination of liability in a negligence cause of action.

In other words, "[a]lthough the adoption of comparative negligence may have limited a defendant's defenses, the defendant's initial duty has not been altered." *Id*. at 98.

The record evidence here shows that the dangers associated with diving head-first into defendants' pool were well known to plaintiff. *Riddle, supra*. Plaintiff acknowledged during his deposition that although the pool area may have been dimly lit, he could nonetheless see the outline of the pool while standing on the deck. Plaintiff also testified that he could see that the pool was round and estimated the pool to be between fifteen and twenty feet in diameter, with a depth of "five feet or so." Thus, plaintiff testified, it was not necessary to warn him of the depth or diameter of the pool because he could see these for himself. Plaintiff also acknowledged that he knew before entering the pool that a person could get hurt diving into a pool with these dimensions, and even admitted adjusting his dive to account for the shallowness of the water.[2] Plaintiff further acknowledged that he was aware before the dive that if he traveled across the deck quickly enough before diving, he could be propelled all the way across the pool and strike the opposite side. Given plaintiff's testimony in this regard, the trial court did not err in granting summary disposition in favor of defendants. The evidence submitted below indicates that the dangers associated with the pool were clearly known to plaintiff, who at no point during his deposition attributed his injuries to a failure of defendants' to provide adequate lighting in the pool area or to warn him of the dangers of diving into the pool.

Additionally, we note that our Supreme Court has held in the context of a product liability case that the open and obvious danger doctrine precludes recovery for dangers associated with the use of an aboveground swimming pool. See *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 400-401; 491 NW2d 208 (1992). In so holding, the Court reasoned that the condition creating the associated danger, "i.e., shallow water, is a fact that is readily apparent or discoverable upon casual inspection." *Id*. at 400. The Court also reasoned that the potential for injury associated with diving into such "observably shallow water" is a common and generally recognized danger. *Id.* We find this reasoning equally applicable in premises liability cases such as this, see *Stopczynski v Woodcox*, 258 Mich App 226, 234; 671 NW2d 119 (2003), and see no reason to distinguish this matter on the ground that plaintiff was injured as a result of striking the side of the pool, as opposed to its bottom. As noted by the Court in *Glittenberg*, the dangers associated with diving into aboveground swimming pools, which are generally more diminutive in both depth and diameter than their underground counterparts, are generally well known.

We affirm.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra

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[2] See *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 401; 491 NW2d 208 (1992) ("fact that . . . plaintiffs acknowledged the necessity to perform a shallow dive simply underscores the conclusion that the risk of diving in shallow water is open and obvious").