STATE OF MICHIGAN

COURT OF APPEALS

LENA NICAJ and VASEL NICAJ, Plaintiffs-Appellants, v EAST-LIND HEAT TREAT, INC, Defendant-Appellee.	UNPUBLISHED December 21, 2006 No. 270428 Oakland Circuit Court LC No. 2005-063609-NO

Before: Wilder, P.J., and Kelly and Borrello, JJ.

PER CURIAM.

Plaintiffs Lena and Vasel Nicaj[1] appeal as of right the trial court's order granting summary disposition in favor defendant East-Lind Heat Treat, Inc. We reverse and remand.

I. Facts

At the time of the accident giving rise to this action, plaintiff, who was an employee of her husband Vasel Nicaj's business, was making a pick up from defendant. She parked her van outside defendant's south door. When she parked, the large overhead rolling door for vehicles was open. Plaintiff exited her vehicle and entered on foot through this door although there was an open pedestrian door directly adjacent. Plaintiff testified that after she completed her transaction at the pick-up counter, defendant's employee Dave Pastorisa came around to help carry her box. According to plaintiff, when she turned to walk toward the overhead rolling door, it was not in motion. However, when she attempted to walk under it, it was coming down and struck her in the head. Pastorisa testified that he used the pedestrian door because he heard the overhead door coming down. He also testified that he exited before plaintiff and held the door open for her.

Plaintiff filed a first amended complaint, in which she alleged, in what was labeled a premises liability claim, that defendant was negligent in:

[1] Because Vasel Nicaj's claim is derivative of that of his wife Lena Nicaj, we employ the singular term plaintiff throughout this opinion to refer to Lena Nicaj.

A. Not properly advising invitees of the existence of the overhead door;

B. Not advising invitees of specific areas where they should not stand or walk in order to avoid dangerous contact with the overhead doors;

C. Not providing the overhead door with sensors and/or other safety devices which would prevent its closing when individuals were underneath said door or within a certain distance of said door;

D. Failing to provide horns, sirens, whistles, bells, lights or any other type of warning devices when said overhead door was being closed;

E. Failing to equip the overhead door with a pressure switch or bump switch to prevent the overhead door from closing if an individual is underneath said door;

F. Failing to provide Plaintiff, Lena Nicaj, with a safe walkway;

G. Failing to hire and retain adequate and competent personnel to design, construct, inspect, supervise, maintain and operate the subject overhead door and its adjacent area and premises;

H. Failing to timely remove, eliminate or prevent the hazardous, dangerous and unsafe condition and/or timely warn Plaintiff, Lena Nicaj, of the same so she could avoid dangerous contact with the overhead door; and

I. Failing to adequately instruct its employees of the proper and safe operation of the overhead door and proper and safe procedures regarding the overhead door so as not to injure the public and in particular, Plaintiff, Lena Nicaj.

Defendant filed a motion for summary disposition, in which it asserted that plaintiff's claim was based solely on premises liability and that the overhead door was open and obvious without any special aspects. Photographic exhibits attached to the motion demonstrated that near one end of the parts pick-up counter were the overhead rolling door for vehicle entry and a pedestrian doorway. Outside the building and to the right of the overhead rolling door was a sign. The sign, which was approximately eye level to a standing adult and nearly equal to one fourth the size of an ordinary door, stated: "CAUTION: DO NOT PULL INSIDE THIS DOOR. IT MAY CLOSE WITHOUT WARNING."

On the trial court's leave to file an amended complaint to add an ordinary negligence claim, plaintiff filed a second amended complaint. In an ordinary negligence count, plaintiff alleged that defendant, by its employee Joseph Adam and others, breached its duties to plaintiff by:

A. Negligently lowering the overhead door by depressing a manual switch, without ascertaining if people were nearby;

B. Negligently walking away from the manual switch area after depressing it and thereby leaving this dangerous instrumentality unattended while descending;

C. Failing to manually stop the garage door from descending prior to hitting the Plaintiff;

D. Failing to position the manual switch in a location which would allow the operator to see persons in the area and thereby permit the operator to avoid lowering the door to cause injury;

E. Other negligent acts and/or omissions, not yet known but which maybe shown by the proofs[.]

Defendant filed another motion for summary disposition reiterating its previous argument with respect to plaintiff's premises liability claim. With respect to plaintiff's ordinary negligence claim, defendant argued that the open and obvious defense remains applicable because the condition of the land could not be eliminated from consideration and, therefore, plaintiff's ordinary negligence claim actually sounded in premises liability.

Plaintiff filed a response to defendant's motion citing evidence that, after picking up her parts at the counter, she walked toward the overhead rolling door and was unaware that it was moving down until it hit her. Plaintiff argued that because defendant failed to keep the door raised until clear of pedestrian traffic, ordinary negligence was applicable. Plaintiff also argued that while the closed door may have been open and obvious, that defendant would close the door when she was walking toward and under it was not.

In reply, defendant argued that plaintiff's ordinary negligence claim failed because defendant's conduct was not independent of the condition of the premises. Defendant also asserted that plaintiff's premises claim failed because the condition was not unavoidable when a pedestrian door was adjacent to the rolling overhead door and, in fact, was being held open by Pastorisa. Further, plaintiff admitted that she had been to the pick-up counter hundreds of times. Defendant asserted that she must, therefore, have known about the door and seen the warning sign. Defendant further asserted that an overhead rolling door is an "utterly common condition."

At the motion hearing, the trial court ruled:

> All right. This is Defendant's motion for summary disposition pursuit [sic] to MCR 2.116C8 and C10. Counsel, even you say, it's heavy and huge. The Defendant's motion is granted as the hazard was open and obvious. While Plaintiff contends there was special aspects which would defeat the summary disposition, there weren't any special aspects of the nature anticipated in Lugo. Specifically, the hazard was not unavoidable, nor was there a significant risk of serious injury.
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> Plaintiff has also filed a claim for ordinary negligence, Plaintiff alleges Defendant's employee set the door in motion which was negligence on his part. Plaintiff relies on Layer versus Kitchen, 2266 Mich ap 482 [sic], which permitted a negligence claim to proceed as well as a promises [sic] liability claim. In Layer [sic], the Plaintiff and Defendant were using a front-end loader when the Plaintiff was crushed by the heavy piece of equipment. The Court of appeals allowed the negligence claim to proceed as the claim involved an instrumentality that was not

> affixed to the premises. In this case, the instrumentality was affixed to the premises. Further, this case is more similar to several unpublished cases from the Court of Appeals where the negligence claims were dismissed. Thus the negligence claim is also subject to the open and obvious defense and it is also dismissed. So, summary disposition is granted as to both claims.

The trial court entered an order granting defendant's motion for summary disposition as to all of plaintiff's claims.

II. Analysis

Plaintiff contends that the trial court erred in dismissing her premises liability claim and ordinary negligence claim on the basis that the condition that caused her injury was open and obvious. We agree that the trial court erred, but for a different reason. Plaintiff's claims sound only in ordinary negligence, not premises liability and, therefore, the open and obvious doctrine is inapplicable.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002).

It is well established that "the gravamen of an action is determined by reading the claim as a whole," *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), and looking "beyond the procedural labels to determine the exact nature of the claim," *MacDonald v Barbarotto*, 161 Mich App 542, 547; 411 NW2d 747 (1987).

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous *condition* on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Where an injury arises out of a *condition* on the land, rather than out of the *activity or conduct* that created that condition, the action lies in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

In this case, the analysis in the lower court centered around *Laier v Kitchen*, 266 Mich App 482, 484; 702 NW2d 199 (2005), in which the decedent was killed in an accident on the defendant's property while assisting the defendant with repairs on a front-end loader. During the repairs, the bucket loader dropped, killing the decedent. *Id.* In addition to alleging premises liability, the plaintiff also alleged that the defendant "owed a duty to [the plaintiff] to use due care and caution in operation and control of the tractor and bucket." *Id.* at 493. This Court held that this claim was one of ordinary negligence because the defendant's conduct was the alleged basis of liability independent of premises liability. *Id.* The Court further held that the open and

obvious danger doctrine does not apply to actions for ordinary negligence. *Id.* at 500 (Neff, J), 502 (Hoekstra, J).

Similarly in this case, plaintiff was struck in the head with an overhead rolling door that was activated by defendant's employee pressing a button. Nonetheless, plaintiff attempts to characterize various individual aspects of the door as a dangerous condition. For example, plaintiff names the absence of audible warning devices, the absence of motion sensors, and the position of the activation button. However, none of the alleged aspects of the door caused the door to come down without warning. Even without the named aspects, the door would not have come down unless and until a person pressed the button activating the door. As such, defendant's conduct was the basis for the alleged liability. Thus, although plaintiff's injury occurred on defendant's premises, plaintiff has not pleaded a premises liability claim. Her claim, despite being labeled premises liability and ordinary negligence, sounds only in ordinary negligence.

Plaintiff also asks us to determine whether comparative negligence is a basis for granting summary disposition. An issue is not properly preserved for appellate review if it is not raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom,* 265 Mich App 88, 95; 693 NW2d 170 (2005). Plaintiff concedes that the trial court never addressed this issue, but asserts that defendant raised it at the motion hearing stating that plaintiff "has been in and out of that door three to four days a week for 18 years; so it's not an unknown quantity" and that plaintiff "chose not to use the pedestrian door; she chose to walk through a fourteen by fourteen foot space with a closing overhead door in front of her." However, these assertions were not couched in terms of a comparative negligence argument. Rather, they were part of defendant's argument that the open and obvious doctrine should be applied. Because comparative negligence was neither raised nor addressed, the this issue is unpreserved for our review.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello