STATE OF MICHIGAN

COURT OF APPEALS

LISA FEDEWA, Personal Representative of the Estate of NICHOLAS RYAN FEDEWA,

Plaintiff-Appellant,

v

ROBERT CLANCY CONTRACTING, INC.,

Defendant/Cross-Defendant-Appellee,

and

BAY-RAMA, INC.,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
February 26, 2008

No. 274088
Macomb Circuit Court
LC No. 2005-002126-NO

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendants on plaintiff's wrongful death claim. We reverse and remand.

This action arises out of the death of plaintiff's nine-year-old son, Nicholas, who was suffocated when the sand pile on which he was playing collapsed on him. On May 31, 2003, Nicholas was playing on property owned by defendant Bay-Rama located directly behind the Fedewa house. Bay-Rama is a non-profit organization that holds an annual festival in the New Baltimore area to raise funds that Bay-Rama then expends on various charitable endeavors in the community. One such endeavor is the building of Festival Park, the property involved in this case. The park has been under development for a number of years, with Bay-Rama engaging in various aspects of the project as funds and volunteers are available. In the spring of 2003, work was being done on the storm sewer phase of the project. Defendant Clancy was the contractor employed to work on this portion of the project and had placed a large sand pile on the park grounds behind the Fedewa house for use in the project. The sand pile had been placed there in March and apparently had been reduced in size as work progressed throughout the spring.

On the day of the tragic event, Nicholas was playing on the sand pile, apparently digging a hole or tunnel and was in the hole when the sand collapsed around him. He was discovered by

his older brother, with only his feet visible outside the sand pile. The brother called 911 and went to a neighbor for help. They extricated Nicholas as the emergency personnel arrived. Although Nicholas was initially resuscitated, he died the next day in the hospital.

Thereafter, plaintiff filed the instant action, alleging willful and wanton misconduct, attractive nuisance, premises liability, and ordinary negligence. The ordinary negligence claim was raised against defendant Clancy only. Defendants moved for summary disposition, which the trial court granted.

Defendant first argues that the trial court erred in dismissing the premises liability claim on the basis that Nicholas was a trespasser rather than a licensee. The trial court did conclude that there was no genuine issue of material fact that Nicholas was a trespasser and, therefore, defendants owed no duty to Nicholas other than to refrain from injuring him by willful and wanton misconduct. The court further found that there was no genuine issue of material fact that defendants had not engaged in willful and wanton misconduct.

The standards for reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) was summarized by this Court in *Bragan v Symanzik*, 263 Mich App 324, 327-328; 687 NW2d 881 (2004):

> We review a trial court's determination regarding a motion for summary disposition de novo. A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." [*Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).] Summary disposition is appropriate only if there are no genuine issues of material fact, and "the moving party is entitled to judgment as a matter of law." [*MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).]

While the trial court in this case correctly observed that ordinarily the only duty owed by a landowner to a trespasser is to refrain from willful and wanton misconduct, the trial court failed to recognize that the duty is different with respect to child trespassers. In *Bragan, supra* at 328, we made the following observation:

> Likewise, reasonable care requires a person to "exercise greater vigilance" when he knows or should know that children are nearby as "children act upon childish instincts and impulses."
>
> Landowners owe a heightened duty of care to known child trespassers. Normally, the only duty owed to a trespasser is to refrain from wanton and willful misconduct. Pursuant to the attractive nuisance doctrine, however, the landowner is liable for harm caused by a dangerous artificial condition located where children are known to trespass if children would not likely realize the danger and the owner fails to use reasonable care to eliminate a danger whose burden outweighs its benefit. In *Taylor v Mathews*, [40 Mich App 74; 198 NW2d 843 (1972)] this Court determined that "there is no fixed age at which a child does and

> can be expected to realize any particular risk, as a matter of law." Accordingly, it was a question for the jury whether the child trespasser could realize the risk of diving into the defendant's gravel pit.

Accordingly, if the attractive nuisance doctrine applies, the trial court improperly dismissed the claim even if Nicholas was a trespasser.

This brings us to plaintiff's second assignment of error, that the trial court erred in concluding that there was no genuine issue of material fact that the sand pile did not constitute an attractive nuisance. There are five elements that must be met to establish an attractive nuisance. *Pippin v Atallah*, 245 Mich App 136, 146-147 n 4; 626 NW2d 911 (2001). The trial court specifically concluded that plaintiff could not establish the second element, which is:

> 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 . . . [*Id.*]

The first portion of this requirement, that defendants knew or should have known of the condition, is easily established: defendants caused the sand pile to be placed on the property in the first place. It is the second requirement, that defendants realized, or should have realized, that the condition involved an unreasonable risk of death or serious bodily harm to the children, that is involved here. The trial court concluded that no evidence was presented by plaintiff to establish this requirement. We disagree. In fact, Bay-Rama's project manager for Festival Park, Larry Gingas, testified at his deposition that he understood that the sand pile represented a danger to children being injured if the children dug or tunneled in the pile and the pile collapsed on them.

Furthermore, the requirement is not just that defendants realized the danger presented, but the requirement is met if the jury concludes that defendants should realize the danger presented. The deposition testimony of Gingas and Robert Clancy, owner of Clancy Contracting, explored their knowledge of excavating, the propensity of sand to collapse, and related topics. The jury could make the assessment whether defendants should have realized the danger the sand pile presented to the children in the area.

The trial court's opinion on this subject focused a great deal on whether the adult residents of the area realized the danger presented by the sand pile and essentially concluded that all of the available evidence merely established that the parents in the neighborhood did not realize the danger until after the accident. But this hardly answers the question present. It might be marginally relevant to the question whether a sand pile is so inherently and obviously dangerous that anyone, including defendants' agents, should have realized the danger; but it does not answer either the question whether defendants' agents did realize the danger themselves or whether, due to their specific training and experience, should have realized the danger present even if others did not. And it is those latter questions that are most relevant to this case.

Moreover, defendants' reliance on *Murday v Bales Trucking, Inc*, 165 Mich App 747; 419 NW2d 451 (1988), is misplaced. *Murday* involved children digging in the side of a hill. As this Court explained in *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 179-180; 475

NW2d 854 (1991), *Murday* does apply where the defendant creates an artificial condition on the property.

In sum, we believe that sufficient evidence was presented to merit submitting the question to jury. The jury could properly determine whether defendants realized or should have realized the danger presented. Accordingly, the trial court should have allowed plaintiff's negligence and premises liability claims to proceed as supported by the attractive nuisance doctrine.

We next turn to plaintiff's argument that, even if plaintiff must establish willful and wanton misconduct, the trial court erred in concluding that there was no genuine issue of material fact that defendants did not engage in willful and wanton misconduct. The trial court stated three reasons for its conclusion: (1) there was no evidence to support an inference that defendants placed the sand pile so as to entice children to it for the purpose of injuring the children, (2) no "ordinary mind" would reasonably conclude that a sand pile could prove disastrous to another, and (3) there is no dispute that Nicholas was a trespasser.

The trial court's third point is easily dismissed because, as discussed above, a landowner is liable to a trespasser for willful and wanton misconduct. *Bragan*, *supra* at 328. Thus, this does not establish the absence of willful and wanton misconduct, but only the potential need to establish the existence of willful and wanton misconduct. As for the trial court's first point, that is simply not an element of willful and wanton misconduct which plaintiff has to establish, though perhaps if plaintiff did it could easily be concluded that the conduct was willful, if not intentional.

Rather, absent intentional wrongdoing, what must be established to constitute willful and wanton misconduct is the following:

> (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997).]

The trial court's second point does address this last fact, but the trial court merely reached the conclusion that the danger is not apparent to the ordinary mind. In our view, this was improper fact finding by the trial court. Moreover, its conclusion is suspect at best under the circumstances. Obviously a sand pile can prove dangerous to another—it caused Nicholas' death—and an "ordinary mind" would certainly conclude, in light of the events in this case, that it is dangerous. This, of course, does not answer the question whether the danger was apparent to the ordinary mind *before* the accident. But that is a determination best left to the jury to decide at trial, not the trial court on summary disposition.

The final question raised by plaintiff that needs to be addressed is whether the trial court erred in classifying Nicholas as a trespasser rather than as a licensee. That issue need not be resolved at this point because, even if Nicholas should be classified as a trespasser, as discussed above defendants would remain liable if plaintiff can establish willful and wanton misconduct or

if the sand pile constituted an attractive nuisance. But we should point out that this issue might become relevant at trial if the jury concludes that the sand pile was not an attractive nuisance and that defendants did not engage in willful and wanton misconduct. In which case, the differing duty owed to a licensee may permit a recovery where none would be had if Nicholas is determined to be a trespasser.

In any event, we are satisfied that there exists a genuine issue of material fact regarding whether Nicholas was a trespasser or a licensee. As the trial court points out in its opinion, there is evidence that the property was posted with one or more "No Trespassing" signs and that the children were run off when found on the property. But at the same time, there was also evidence that, before the accident, there was only one "No Trespassing" sign on the entire perimeter of the property and that sign was in such dilapidated condition that it was virtually illegible. Moreover, there was evidence that the children were run off only when work was being performed out of concern that the children would be injured by the equipment. Furthermore, there was a significant amount of evidence that children frequently played on the property and that defendants must have known of their continuing presence. This is particularly relevant because permission to be on property may be implied:

> "A 'licensee' is a person who is privileged to enter the land of another by virtue of the possessor's consent." [*Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000).] Such consent may be either express or implied. Permission may be implied where the owner, or person in control of the property, "acquiesces in the known, customary use of property by the public." *Alvin v Simpson*, 195 Mich App 418, 420; 491 NW2d 604 (1992). [*Pippin, supra* at 142.]

Accordingly, plaintiff established a genuine issue of material fact that Nicholas was a licensee rather than a trespasser.

In sum, we conclude that there exists a genuine issue of material fact regarding (1) whether Nicholas was a trespasser or a licensee, (2) whether defendants engaged in willful and wanton misconduct, and (3) whether the sand pile constituted an attractive nuisance. Accordingly, the trial court erred in granting summary disposition to defendants.

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

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood