STATE OF MICHIGAN

COURT OF APPEALS

GLORIA GIBSON,

Plaintiff-Appellant,

v

MARY ANDERSON,

Defendant-Appellee.

UNPUBLISHED
December 14, 2010

No. 293830
Wayne Circuit Court
LC No. 08-124322-NO

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this premises liability action. We affirm.

Plaintiff sustained injuries when she slipped on the icy road adjoining defendant's property and fell onto a metal pipe stuck into the ground in defendant's yard. Defendant used metal pipes connected with rope to create an enclosure – a makeshift fence – to prevent children from crossing over her lawn. On appeal, plaintiff argues that the trial court improperly granted summary disposition for defendant because genuine issues of material fact exist regarding (1) whether defendant breached her duty to maintain her premises in reasonable repair and (2) whether the dangerous condition on defendant's land was open and obvious and, if it was, if the applicability of the open and obvious doctrine relieved defendant from liability for the injury suffered by plaintiff. We disagree.

We review decisions on motions for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). In reviewing the trial court's decision, "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.*

We first address plaintiff's argument that she alleged both a premises liability claim and an ordinary negligence claim to which the open and obvious defense is inapplicable. "[T]he applicability of the open and obvious danger doctrine depends on the theory underlying the negligence action." *Hiner v Mojica*, 271 Mich App 604, 615; 722 NW2d 914 (2006). "The doctrine applies to an action based on premises liability, but not ordinary negligence." *Id.*

Plaintiff's complaint very clearly alleged that defendant was negligent with respect to a condition on defendant's land. In particular, plaintiff alleged that defendant owned the property, and that plaintiff was walking adjacent to the property when she slipped and fell, causing her to land on defendant's property. Plaintiff further alleged that when she fell, she struck a metal pipe protruding from the ground on defendant's property, that defendant was in control of the premises, that defendant failed to maintain her property in a reasonably safe condition, and that the pipe created a dangerous condition that subjected others to an unreasonable risk of harm. Thus, plaintiff alleged that she was injured by a condition of the land. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). She therefore pled only a premises liability claim and not an ordinary negligence claim. Plaintiff's argument to the contrary lacks merit.

Plaintiff also contends that the open and obvious doctrine does not apply because the dangerous condition on defendant's land did not cause her fall. She argues that the icy road caused her fall and that the metal pipe caused her *injury*. Plaintiff fails to provide any authority to support her contention and we fail to see how the distinction she draws makes any difference in applying the open and obvious doctrine. A possessor of land is subject to liability for physical harm to an invitee *caused by a condition on the land*. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Because plaintiff alleged that the metal pipe on defendant's property caused her injuries, defendant is subject to liability for such harm and the open and obvious defense is applicable.

The duty that a landowner owes to a visitor depends on the visitor's status as a trespasser, licensee, or invitee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A trespasser is one who enters another's land without consent. *Id*. A licensee is a person who enters another's land with consent. *Id.* An invitee enters the land of another by invitation, "which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Id.* at 596-597 (quotation marks and citation omitted) (brackets in original).

Although plaintiff refers to the duty that landowners owe to invitees, plaintiff provides no facts to establish that she was an invitee. No evidence exists to even suggest that defendant consented to plaintiff's presence in her yard. Rather, plaintiff slipped on the icy road causing her to inadvertently intrude onto defendant's property, which defendant had enclosed with a makeshift fence, constructed from metal pipes and rope, specifically to prevent trespassers from entering. The fact that plaintiff intruded on to defendant's property inadvertently is irrelevant to any duty owed to her by defendant because, as regards the degree of care owed by the landowner, "'the status of an accidental trespasser is still that of a trespasser.'" *Gladon v Greater Cleveland Regional Transit Auth*, 75 Ohio St 3d 312, 316; 662 NE2d 287 (1996), quoting 2 Restatement of the Law 2d, Torts (1965) 172, § 329, Comment *c*. Thus, there exists no genuine issue of material fact regarding plaintiff's status as a trespasser.

A landowner owes no duty to keep his premises safe for trespassers except to refrain from wanton and willful misconduct. *Stitt*, 462 Mich at 596. "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). Here, defendant fashioned a fence out of metal pipes and rope around her yard to prevent children from walking on her grass. The fencing of a yard is a common occurrence; it does not show an intent to harm or an indifference

regarding whether harm would occur. Therefore, no genuine issue of material fact exists that defendant did not breach a duty owed to plaintiff.

Further, even assuming that plaintiff was an invitee as she asserts, the trial court properly granted summary disposition in defendant's favor under the open and obvious doctrine. Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on its land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Under the open and obvious doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

Plaintiff does not contest that the metal pipe upon which she fell was open and obvious in and of itself. Instead, she argues that, despite its open and obvious nature, special aspects existed that rendered the open and obvious defense inapplicable. Where "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517. To constitute a special aspect sufficient to remove a condition from the open and obvious danger doctrine, the condition must pose a particularly severe risk of harm or be effectively unavoidable. *Id*. at 517-519.

Plaintiff argues that special aspects existed because the metal pipe threatened passersby with a risk of severe harm or even death and because it was effectively unavoidable once plaintiff slipped on the ice and lost control. These arguments are without merit. The Michigan Supreme Court in *Lugo*, 464 Mich at 518, provided an example of a special aspect that poses an unreasonably high risk of severe harm. The Court stated that an unguarded 30-foot-deep pit in the middle of a parking lot would present a special aspect despite its open and obvious nature because of the substantial risk of death or severe injury to a person who falls in the pit. *Id.* The metal pipes on defendant's property cannot be compared to an unguarded 30-foot-deep pit and presented no such risk of death or severe injury as to render the condition unreasonably dangerous.

Further, the metal pipe was not effectively unavoidable. Plaintiff could have easily avoided the pipe by avoiding the patch of ice, which was the condition that set into motion her eventual contact with the pipe. She could have taken a different route while crossing the street or waited until the condition of the street improved. Because the presence of defendant's makeshift fence was open and obvious and without special aspects that made it unreasonably dangerous, defendant owed no duty to plaintiff regarding the pipe upon which plaintiff fell. The trial court properly granted summary disposition in defendant's favor.

Next, plaintiff argues that defendant cannot rely on the open and obvious doctrine because defendant does not own the land on which the pipes are located, as the pipes were placed within the public right of way. A public highway is presumed to create a public right of way spanning sixty-six feet. *Eyde Bros Dev Co v Eaton County Drain Comm'r*, 427 Mich 271, 297-

298; 398 NW2d 297 (1986). Property owners of land abutting a public right of way retain title to the property in fee simple to the center of the street; the property is merely subject to the public right of way. *Id*. at 282. It is the easement owner, however, and not the landowner, who owes the duty to maintain the easement in a safe condition and protect third parties from injury. *Morrow v Boldt*, 203 Mich App 324, 329-330; 512 NW2d 83 (1994). Thus, plaintiff's argument in this regard would completely absolve defendant of any underlying duty.

Plaintiff also contends that defendant is nevertheless liable for her injuries because defendant created a dangerous condition by placing the pipes on the right of way. A landowner who physically intrudes onto adjacent property or an abutting public right of way and affirmatively creates or increases a hazard may be liable for any resulting injuries. See *Rodriguez v Detroit Sportsmen's Congress*, 159 Mich App 265, 271-272; 406 NW2d 207 (1987). Defendant did not create a hazardous condition by merely fashioning a commonplace fence using the metal pipes and rope to prevent children from walking across her lawn.

Finally, plaintiff argues that dismissal of her public nuisance claim was erroneous because defendant's motion for summary disposition failed to address the claim. We note that plaintiff waived appellate review of this issue by failing to include it in her statement of questions presented. MCR 7.212(C)(5); *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004). In any event, plaintiff's argument lacks merit.

A public nuisance is "an 'unreasonable interference with a common right enjoyed by the general public.'" *Capitol Props Group, LLC v 1247 Center Street, LLC*, 283 Mich App 422, 427; 770 NW2d 105 (2009), quoting *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). "The term 'unreasonable interference' includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights." *Id.* The metal pipes in defendant's yard did not unreasonably interfere with a common right enjoyed by the general public. Accordingly, no genuine issue of material fact exists that the metal pipes did not constitute a public nuisance.

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray