STATE OF MICHIGAN

COURT OF APPEALS

MICHELE COMPAU and TODD COMPAU, Plaintiffs-Appellants,	UNPUBLISHED April 16, 2015
v	No. 320615 Iosco Circuit Court
PIONEER RESOURCE COMPANY, L.L.C, WALKER A. KILBOURN, d/b/a WHITTEMORE INN, and WHITTEMORE INN RACE CLUB, Defendants-Appellees.	LC No. 12-007121-NO

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

GADOLA, J. *(dissenting).*

The majority opinion concludes that the lower court erred by relying on the open and obvious doctrine to dismiss the case because the Compaus asserted claims of ordinary negligence that went beyond premises liability. Because I believe Michele Compau's injury arose from a condition on the land, and thus sounded exclusively in premises liability, I respectfully dissent.

Michigan law distinguishes between claims premised on conditions of land and claims arising out of ordinary negligence. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Although claims sounding in ordinary negligence and premises liability are distinct, an injured person asserting a premises liability claim may maintain a separate ordinary negligence claim if the overt acts of the premises owner caused his or her injuries. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In assessing whether a claim sounds in ordinary negligence or premises liability, this Court reads "the complaint as a whole" and looks "beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 711; 742 NW2d 399 (2007). If a plaintiff's injuries arose from an allegedly dangerous condition of the land, the action sounds exclusively in premises liability rather than ordinary negligence. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). "[T]his is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id.*

"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." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not extend to open and obvious dangers. *Joyce v Rubin*, 249 Mich App 231, 238; 642

NW2d 360 (2002). A condition is open and obvious if an invitee has actual knowledge of the condition or if " 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.' " *Id.*, quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993) (alteration in original). If a claim sounds in ordinary negligence, the open and obvious doctrine does not apply. *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 304-305; 807 NW2d 909 (2011). However, to prevent plaintiffs from avoiding application of the open and obvious doctrine through creative pleading, this Court has held that "the doctrine protects against liability whenever injury would have been avoided had an 'open and obvious' danger been observed, regardless of the alleged theories of liability." *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Further, if special aspects make an open and obvious condition unreasonably dangerous, the open and obvious doctrine does not apply. *Id.* at 499.

In this case, the Compaus' complaint alleged that Michele Compau fell over a railroad tie and fractured her wrist when she stepped back after a lawnmower in the race she was watching lurched out of control. The railroad tie was clearly a condition of the premises; however, the Compaus argue that they also asserted ordinary negligence claims regarding the configuration of the racetrack and its potential hazard to spectators. The majority opinion accurately notes that paragraphs 13 through 15 of the Compaus' complaint alleged that the racetrack had flimsy fencing, that racers regularly lost control of their lawnmowers, and that the track "as configured . . . created an unreasonable risk of harm to spectators."

Regardless of the Compaus' alleged theories of liability regarding the racetrack's configuration, the simple fact is that Michele Compau would not have been injured had she observed the railroad tie. The railroad tie was an "open and obvious" danger because Michele Compau admitted that she had actual knowledge of its location and existence. See *Joyce*, 249 Mich App at 238. As this Court has affirmed, creative pleading will not evade application of the open and obvious doctrine if a plaintiff would have avoided injury by observing an open and obvious danger. *Millikin*, 234 Mich App at 497. Therefore, the open and obvious doctrine applies to the Compaus' case absent a showing that special aspects made the railroad tie unreasonably dangerous.[1] Accordingly, I would affirm the trial court.

/s/ Michael F. Gadola

[1] On this point, I agree with the majority's reasoning in Section IV of the opinion, which concludes that a special aspect did not exist in this case because the distraction of the lawnmower race did not prevent discovery of the railroad tie, and the railroad tie was not effectively unavoidable and did not pose a substantial risk of serious injury or death.