STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH MOSS,

Plaintiff-Appellant,

v

JOE YOUNG EXCAVATING,

Defendant-Appellee.

UNPUBLISHED
October 22, 2020

No. 350948
St. Clair Circuit Court
LC No. 18-001938-NO

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

PER CURIAM.

Plaintiff, Deborah Moss, appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defendant, Joe Young Excavating. The trial court ruled that plaintiff's claim was barred because the condition of the land on which she was injured was open and obvious. We affirm because the trial court reached the correct result, albeit for the wrong reason.

I. BACKGROUND

On August 9, 2016, plaintiff visited a mobile-home park to attend a birthday party. Plaintiff admitted that she visited the mobile-home park frequently because her daughter lived there. On the day in question, plaintiff parked her vehicle on a newly poured concrete driveway. When plaintiff got out of her parked vehicle, she stepped on the ground next to the driveway. According to plaintiff, the spot where she stepped was a "sand covered hole" that gave way, causing her to fall and suffer injury. Plaintiff testified that she did not see the hole before she stepped into it because it was covered and not readily observable, appearing upon causal inspection to be normal ground. Plaintiff further testified that, after her injury, she looked around and discovered other holes around the edges of the driveway, which appeared to her to be "covered up."

Joseph Young, Sr., a co-owner of defendant, testified that his company replaced the driveway in question. After completing the project, defendant's employees drove stakes at each side of the driveway and erected caution tape around the drying concrete. Young personally spoke with plaintiff's daughter, who lived at the mobile-home site where the new driveway was located. He informed her that the concrete needed to cure and that no one should use the concrete for at

least seven days. Having "no reason to go back" to the job site, neither Young nor anyone employed by defendant returned to the premises before plaintiff's injury occurred. After plaintiff's injury, Young learned that the mobile-home park's sewer line was leaking. Given the proximity of the leak to the driveway, he concluded that the underground leak had caused the hole in which plaintiff fell.

Plaintiff admitted that she saw defendant's employees installing the new driveway on the subject premises, and she saw that the driveway was "roped off" after defendant poured the new concrete. When she visited the premises on the day of her injury, she parked on the newly poured concrete driveway, which was no longer "roped off" (though it is undisputed that seven days had not yet passed from when the project was finished). After plaintiff's injury, Young visited the premises, and observed that the stakes and caution tape placed on the premises by his employees were lying to the side of the driveway, having been removed by some unknown third person.

Instead of suing the property owner for her injuries, plaintiff sued defendant. Plaintiff alleged that defendant had failed to repave the driveway properly, creating gaps and holes along its sides. Plaintiff further alleged that defendant had failed to warn her of the potentially dangerous conditions around the driveway and failed to repair defective and dangerous conditions on the land. Plaintiff's three-page complaint asserted only one count, which she captioned as a claim for ordinary negligence.

After discovery, defendant filed a motion for summary disposition under MCR 2.116(C)(10). As relevant here, defendant argued that because plaintiff's claim regarded injuries she suffered as a result of a condition on the land, the claim was one for premises liability, rather than ordinary negligence. Defendant further argued that because it did not exercise any possession or control over the premises on the date of plaintiff's accident, it owed plaintiff no duty to warn or to protect her from the condition of the premises. In the alternative, defendant argued that, even if it qualified as a premises possessor who could be held liable under a premises-liability theory, plaintiff's claim necessarily failed because, among other things, the hole that allegedly caused her injuries was an open and obvious condition, as demonstrated by plaintiff's admission that she looked around after her injury and observed other holes around the edges of the driveway.

After oral argument on the motion, the trial court granted summary disposition in defendant's favor under MCR 2.116(C)(10), reasoning as follows:

> If the circumstances were such that somehow a hole can be covered with dirt and no longer be a hole, it still is an open and obvious condition and this is why. [Plaintiff] knew that this construction project took place. She knew that the ground in the area of the driveway and that immediately adjacent to the driveway is naturally going to be disturbed in the course of that construction project. It takes time for ground to settle or return to its final resting place after a construction project of this sort. That is something that an average person with reasonable intelligence would be able to discern and take appropriate precautions to avoid a potential risk of harm by walking on what might be unstable ground.

This appeal followed.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred by holding that the alleged defect that caused her fall was open and obvious. We conclude that a genuine issue of material fact exists on this question and that the trial court erred in ruling that the condition was open and obvious, as a matter of law. Nonetheless, we conclude that defendant was entitled to summary disposition of plaintiff's claim because it owed no duty to plaintiff.

We review de novo a trial court's ruling on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Summary disposition is appropriate under MCR 2.116(C)(10) "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (cleaned up).

A. THE NATURE OF PLAINTIFF'S CLAIM

On appeal, the parties dispute whether plaintiff's claim sounds in ordinary negligence, premises liability, or both. We conclude that plaintiff's claim sounds in premises liability.

"Courts are not bound by the labels that parties attach to their claims. Indeed, it is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012) (cleaned up). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. at 692 (citation omitted). "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*.

In this case, plaintiff alleges that she suffered injury as the result of a hole in the ground. Hence, plaintiff alleges that she suffered injury because of a dangerous condition on the land, and her claim sounds in premises liability, not ordinary negligence.

B. OPEN AND OBVIOUS DANGER

It is clear that the trial court treated plaintiff's claim as one sounding in premises liability because it applied the open-and-obvious doctrine to her claim. In general, although a premises possessor owes a duty of care to invitees, the duty does not encompass removal of open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461.

After reviewing the record, it is clear that plaintiff presented sufficient evidence to create a genuine issue of material fact on whether the risk was open and obvious. Young himself testified that a *subterranean* sewer pipe was leaking approximately four feet beneath the ground, six feet

away from the location of the disputed hole. Indeed, Young opined that the leakage from the sewer pipe had formed a weak spot underneath the ground where plaintiff fell. On this record, there is nothing to suggest that this weak spot in the underlying terrain would have been apparent to an average person of ordinary intelligence upon casual inspection. On the contrary, Young admitted that he and his sons—who surveyed the site over the course of two days while pouring the new driveway at the premises—were unaware of the sewer leak. Moreover, plaintiff testified that immediately before stepping on the ground, she glanced down, wary because she had recently undergone surgery on her right leg, and she did not observe any hole in the ground. Viewing such evidence in the light most favorable to plaintiff as the nonmoving party, a rational trier of fact might reasonably conclude that no visibly dangerous condition existed before plaintiff stepped on the exposed dirt; rather, a dangerous hole was created when plaintiff stepped there, with the surface ground giving way because the underlying soil had been saturated or washed away by a subterranean sewer leak.

C. DUTY OF CARE

Reversal is not warranted, however, because an alternative ground for affirmance exists. "This Court will not reverse a trial court's order of summary disposition when the right result was reached for the wrong reason." *Forest Hills Coop v Ann Arbor*, 305 Mich App 572, 615; 854 NW2d 172 (2014).

It is hornbook law that a party cannot breach a duty where no duty existed. It is undisputed that defendant did not own the premises on which plaintiff suffered injury. Nonetheless, plaintiff argues that defendant owed her a duty, relying on *Finazzo v Fire Equip Co*, 323 Mich App 620; 918 NW2d 200 (2018). In that case, the defendants were contractors who were performing work on the premises, and the plaintiff was injured after stumbling on an electrical cable that the contractors had left on the floor. *Id*. at 622. Although the defendants did not own the premises on which the plaintiff was injured, the Court held that, under the right circumstances, the defendants could be held liable for the plaintiff's injuries under a premises-liability theory. *Id*. at 627-629. The Court recognized the general rule that, "for a party to be subject to premises liability in favor of persons coming on the land, the party must possess *and* control the property at issue but not necessarily be its owner," because "a party in possession is in a position of control, and normally best able to prevent any harm to others." *Id*. at 627 (cleaned up). "[L]iability for an injury due to defective premises ordinarily depends upon power to prevent the injury and therefore rests primarily upon him who has control and possession." *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 662; 575 NW2d 745 (1998) (cleaned up). "Liability for negligence does not depend upon title; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner thereof." *Id*. (cleaned up).

Plaintiff's reliance on *Finazzo* is misplaced. The contractors in that case were still actively engaged in work on the premises when the plaintiff was injured. In contrast, it is undisputed in this case that defendant had completed its work at the premises approximately six days before plaintiff was injured. Plaintiff presented no evidence indicating that defendant had express or implied permission from the mobile-home park to retain any possession or control over the area where plaintiff was injured. On the contrary, Young testified that neither he nor his sons returned to the premises after completing the driveway project—until they were notified that plaintiff had

been injured—because they had "no reason to go back." Unlike the *Finazzo* defendants, defendant here was not situated to prevent harm to invitees or others on the premises arising from any conditions on the land. Indeed, the record is devoid of evidence indicating that defendant had either notice of the condition at issue or authority to inspect the premises such that defendant reasonably should have had notice. On this record, we cannot hold that defendant—rather than the actual owner and possessor of the subject premises—owed a duty to plaintiff that would support her premises-liability claim. Consequently, the trial court reached the correct result by granting summary disposition to defendant under MCR 2.116(C)(10).

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Brock A. Swartzle
/s/ Kathleen Jansen
/s/ Stephen L. Borrello