STATE OF MICHIGAN

COURT OF APPEALS

MELISSA KISCHNICK-WOOD, Next Friend of KYLE J. WOOD, JR.,

Plaintiff/Appellee/Cross-Appellant,

and

KYLE WOOD,

Plaintiff-Appellee,

UNPUBLISHED
December 10, 2013

v

EDWARD KISCHNICK, JR.,

Defendant/Cross-Appellee,

and

BRANDON DEWYSE,

Defendant-Appellant.

No. 311082
Bay Circuit Court
LC No. 10-003302-NO

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant Brandon DeWyse appeals by delayed leave granted the order denying his motion for summary disposition that was brought pursuant to MCR 2.116(C)(8) and (10). Plaintiff cross-appeals the order granting defendant Edward Kischnick, Jr.'s, motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. BACKGROUND FACTS

On July 18, 2008, nine-year-old Kyle Wood, Jr. and his younger brother, Devon, visited their grandfather, defendant Kischnick, and his stepson, defendant DeWyse, at Kischnick's home. After playing outside for a good part of the day, Kyle Jr., Devon, and DeWyse entered Kischnick's detached garage about the time it started to rain. Kischnick and a neighbor were in the garage. According to deposition testimony, Kyle Jr. eventually became restless and wanted to play in the rain. After some discussion, DeWyse and Kyle Jr. agreed to race from the garage

to the concrete edge of the driveway and back to the garage.[1] Shortly after DeWyse reentered the garage, he heard a noise behind him. DeWyse turned around and realized that Kyle Jr. had fallen on the garage floor. Kischnick and the neighbor heard the noise as well, but neither actually witnessed Kyle Jr.'s fall. While Kyle Jr. initially appeared to have avoided significant injury, the following day it became apparent that he had suffered a head injury as a result of the fall.

Kyle Jr., through his next friend, sued Kischnick for maintaining a dangerously slippery garage floor and failing to warn him of this danger. Specifically, Kyle Jr. alleged that he slipped and fell on a discolored patch of cement that was significantly smoother than the remainder of the garage floor. It was also alleged that DeWyse negligently encouraged Kyle Jr. to race in the rain. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Kischnick argued that there was no genuine issue of material fact with regard to whether the garage floor was defective or otherwise presented a dangerous condition. DeWyse argued that he owed no duty to Kyle Jr. to prevent him from racing, or, in the alternative, that the proper standard of care was recklessness, not negligence. The trial court granted summary disposition with respect to Kischnick but denied summary disposition with respect to DeWyse.

II. DUTY

DeWyse argues that the trial court erred in concluding that he owed Kyle Jr. a general duty of care. "This Court reviews de novo the grant or denial of a motion for summary disposition filed under MCR 2.116(C)(10)." *Calhoun Co v Blue Cross & Blue Shield of Michigan*, 297 Mich App 1, 11; 824 NW2d 202 (2012). The existence of a duty is also a question of law subject to de novo review. *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 95; 485 NW2d 676 (1992).

Johnson v Pastoriza, 491 Mich 417, 434-435; 818 NW2d 279 (2012) provides as follows:

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. [Internal quotation marks and citations omitted.]

In *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), the Court stated:

> 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. A genuine issue of material fact exists when the

[1] In his deposition, DeWyse alternatively indicated that the idea to race was either his idea or Kyle Jr.'s idea. However, DeWyse consistently indicated that he set forth the parameters of the race.

record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.

To bring a negligence claim, a plaintiff must establish four elements: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 281; 807 NW2d 407 (2011). "'Duty' is a legally recognized obligation to conform to a particular standard of conduct toward another so as to avoid unreasonable risk of harm." *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). "A legal duty or obligation may arise by contract, statute, constitution, or common law." *West American Ins Co v Gutekunst*, 230 Mich App 305, 310; 583 NW2d 548 (1998). With respect to the general duty of care imposed by common law, "every person engaged in the prosecution of any undertaking [has] an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261, 150 NW2d 755 (1967). In other words, "every person is under the general duty to so act, or to use that which he controls, as not to injure another." *Id.*

Generally, a person does not have an affirmative legal duty to aid or protect another person. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). However, a duty to aid or protect may be imposed where there exists a "special relationship" between parties. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8-9; 492 NW2d 472 (1992). "Some generally recognized 'special relationships' include common carrier-passenger, innkeeper-guest, employer-employee, landlord[-]tenant, and invitor-invitee." *Id.* at 8. The underlying rationale for a special relationship is the element of control. *Id.* at 8-9. "Thus, the determination whether a duty-imposed special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself." *Id.* at 9.

Simply put, "[t]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Hill*, 492 Mich at 661 (brackets, internal quotation marks, and citation omitted). "Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Id.* (internal quotation marks and citation omitted). When the parties do not have a relationship or the harm is not foreseeable, no duty may be imposed. *Id.* When the parties only have a "limited relationship," only a "limited duty" may be imposed, and it is unnecessary to consider the remaining factors. *Id.* at 662.

In this case, the trial court concluded that DeWyse and Kyle Jr. had an "adult-child" special relationship that imposed a duty on DeWyse to not race Kyle Jr. in the rain. However, the special-relationship doctrine is inapplicable to this case because Kyle Jr. does not argue that DeWyse had an affirmative duty to act for his benefit. In other words, the issue here is not whether DeWyse owed a duty to Kyle Jr. to affirmatively prevent him from racing. Rather, the issue here is whether DeWyse owed Kyle Jr. a duty to not facilitate the race. These issues are different. The former issue would implicate the special-relationship doctrine because Kyle Jr. would seek to impose a duty on DeWyse to affirmatively act for his benefit. The latter issue does not implicate the special-relationship doctrine because DeWyse owed Kyle Jr. the general duty to not unreasonably risk injury. And there is at least a question of fact for the jury with

respect to whether DeWyse owed Kyle Jr., a nine-year-old child, a duty of care to not facilitate the race. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617; 537 NW2d 185 (1995) ("If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty as well as breach become questions for the jury to decide.").

To the extent that it is alleged that DeWyse also owed Kyle Jr. a duty to warn about the dangers of slipping on the garage floor, a person has a duty to warn of a known danger when he or she creates or increases that danger. See *Hill*, 492 Mich at 671-672. Here, DeWyse arguably created or increased the danger of slipping on the garage floor by suggesting that he and Kyle Jr. would run in the rain and back into the garage. Accordingly, there is a question of fact with respect to whether DeWyse had a duty to warn Kyle Jr. about the dangers of slipping on the garage floor.

DeWyse argues that even if the trial court did not err in concluding that he owed a duty of care to Kyle Jr., the trial court erred in concluding that the proper standard of care was negligence, not recklessness. "[C]oparticipants in a recreational activity owe each other a duty not to act recklessly." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 95; 597 NW2d 517 (1999). Thus, the applicable standard of care for a participant in a recreational activity is recklessness. *Id*. at 76. The recklessness standard does not apply to all actions in relation to recreational activities, however. Rather, the recklessness standard only applies to actions by participants in the course of the recreational activity itself. See *Sherry v East Suburban Football League*, 292 Mich App 23, 27-28; 807 NW2d 859 (2011).

Here, the trial court correctly concluded that the standard of care was negligence because the alleged negligent action by DeWyse, encouraging Kyle Jr. to race, occurred before the race itself. The recklessness standard only applies when the recreational activity is ongoing and only when the alleged wrongful conduct was perpetrated by a participant. See *Sherry*, 292 Mich App at 27-28. But in this case, not only did the alleged negligent action occur before the race, DeWyse had actually finished the race when Kyle Jr. fell.

We therefore affirm the trial court's denial of summary disposition with respect to DeWyse and its conclusion that the proper standard of care was negligence.

III. CROSS-APPEAL

Plaintiff argues that the trial court erred in concluding that there was no genuine issue of material fact with respect to whether the garage floor was defective. The trial court did not specify the subrule for its grant of summary disposition, but it is apparent that the trial court relied on the deposition testimony in doing so. When a trial court reviews evidence outside the pleadings in granting summary disposition, this Court reviews the grant of summary disposition under the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

Ordinary negligence and premises liability are two separate theories. See *Wheeler v Central Michigan Inns, Inc*, 292 Mich App 300, 304-305; 807 NW2d 909 (2011). "When an injury develops from a condition of the land, rather than emanating from an activity or conduct that created the condition on the property, the action sounds in premises liability." *Woodman v*

Kera, LLC, 280 Mich App 125, 153; 760 NW2d 641 (2008). When a party brings an ordinary negligence action, premises-liability concepts such as the open and obvious doctrine are inapplicable. See *Wheeler*, 292 Mich App at 304-305.

A plaintiff may bring a premises-liability claim based on failure to warn of a dangerous condition. See *Laier v Kitchen*, 266 Mich App 482, 489; 702 NW2d 199 (2005); *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 496-497; 595 NW2d 152 (1999). "In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006).

The first issue in a premises-liability claim is whether a dangerous condition exists. *Prebenda v Tartaglia*, 245 Mich App 168, 170; 627 NW2d 610 (2001). We conclude that there is a question of fact with respect to whether the discolored patch of cement on the garage floor was a dangerous condition. Plaintiff presented the deposition testimony of a retired MIOSHA inspector who opined that the discolored patch was unusually slippery when he investigated it in December 2008, and there is no indication that its texture was significantly different when Kyle Jr.'s injury occurred in July 2008. The retired inspector opined that the smoothness of the discolored patch contributed to Kyle Jr.'s fall.

Thus, because there is at least a question of fact with respect to whether the discolored patch was a dangerous condition, the next issue is whether the discolored patch was open and obvious or whether plaintiff otherwise failed to establish a factual basis for a premises-liability claim. See *Prebenda*, 245 Mich App at 170. "A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596. Under the open and obvious doctrine, a possessor of land owes no duty to warn of or protect against dangers when "an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007) (brackets, internal quotation marks, and citation, omitted). In *Bragan v Symanzik*, 263 Mich App 324, 335; 687 NW2d 881 (2004), this Court explained that with respect to child invitees, "we must consider whether a dangerous condition would be open and obvious to a reasonably careful minor; that is, whether the minor would discover the danger and appreciate the risk of harm." A possessor of land is required to protect against a danger notwithstanding the open and obvious doctrine when the danger has a "special aspect." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A special aspect exists when the danger is either unavoidable or presents a likelihood of severe harm. *Id*. at 517-518.

Here, Kyle Jr. was a licensee because he was a social guest of Kischnick. See *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). "[A] possessor of land has no obligation to take any steps to safeguard licensees from conditions that are open and obvious." *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). Moreover, a possessor of land does not owe a licensee a duty to affirmatively prepare the premises for the licensee's presence. See *Bradford v Feeback*, 149 Mich App 67, 71; 385 NW2d 729 (1986).

In granting summary disposition in favor of Kischnick, the trial court reasoned that the garage floor was not defective because it is not uncommon for garage floors to be exposed to water and slippery when wet. For the reasons noted above, there is at least a question of fact with respect to whether the discolored patch was a dangerous condition. Accordingly, there is also a question of fact with respect to whether Kischnick owed a duty to warn Kyle Jr. of a dangerous condition. See *Benton*, 270 Mich App at 440.

However, we conclude that on the record before us, there is no genuine issue of material fact with respect to whether Kischnick satisfied any duty to warn.[2] The undisputed deposition testimony showed that Kischnick regularly warned Kyle Jr. and his younger brother to slow down while playing. These warnings were given during previous visits and during the visit at issue. Repeated warnings to slow down sufficed to warn Kyle Jr. about the danger of running and slipping on the discolored patch. While Kischnick may have not specifically identified the slipperiness of the discolored patch to Kyle Jr., he did warn him about the dangers of playing too fast. As the trial court noted, Kischnick could have placed a sign that read "Slippery When Wet" near the discolored patch, but such an obligation would seem to be unrealistic and impractical. For these reasons, we conclude that there is no question of fact with respect to whether defendant Kischnick breached his duty to warn. See *Benton*, 270 Mich App at 440.

Plaintiff suggests that in addition to the duty to warn, Kischnick also had the duty to maintain a safer garage floor and the duty to prevent Kyle Jr. from racing. Kischnick did not owe Kyle Jr. the duty to maintain a safer garage floor because a possessor of land does not owe a licensee a duty to prepare the premises. See *Bradford*, 149 Mich App at 71. Kischnick did not owe Kyle Jr. the duty to prevent him from racing because Kischnick was unaware that he was racing, and a defendant cannot be liable in a premises-liability action when he or she had no knowledge that a child subjected himself or herself to a dangerous condition. See *Murday v Bales Trucking, Inc*, 165 Mich App 747, 753; 419 NW2d 451 (1988). The trial court did not err by granting summary disposition in favor of Kischnick.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

[2] This Court will not reverse a correct result reached for the wrong reason. *Dybata v Wayne Co*, 287 Mich App 635, 647; 791 NW2d 499 (2010).