STATE OF MICHIGAN

COURT OF APPEALS

CARL GARLAND and ROSE GARLAND,

Plaintiffs-Appellants/
Cross-Appellee,

v

CENTENNIAL FARMS, INC.,

Defendant-Appellee/
Cross-Appellant,

and

DIETRICH BAILEY AND ASSOCIATES, a Michigan Corporation, and CENTAUR CONTRACTORS, INC., a Michigan Corporation, Jointly and Severally,

Defendants.

UNPUBLISHED
July 5, 1996

No. 173848
LC No. 92-012391-NI

Before: Griffin, P.J., and Smolenski and L.P. Borrello,* JJ.

PER CURIAM.

In this premises liability case, plaintiffs Carl and Rose Garland[1] appeal as of right a March 1994 order granting defendant Centennial Farms' second motion for summary disposition. Defendant cross-appeals an October 1993 order that denied its motion for the rehearing of a July 1993 opinion. This opinion denied defendant's first motion for summary disposition. We reverse the March 1994 order granting defendant's second motion for summary disposition. We affirm the October 1993 order denying defendant's motion for rehearing.

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* Circuit judge, sitting on the Court of Appeals by assignment.

This case arises out of an incident in which plaintiffs were injured when the vehicle in which they were traveling on a road located in a subdivision or condominium complex owned by defendant failed to negotiate a "T" intersection and went into a ditch.

We first consider the issues raised in plaintiffs' appeal as of right. Although the trial court granted defendant's second motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), we treat the motion as granted pursuant to MCR 2.116(C)(10) and review accordingly where it is clear from the record that the court and the parties considered matters outside the pleadings. See MCR 2.116(G).

Plaintiffs argue that the trial court erred in allowing defendant to assert that the danger posed by the "T" intersection was open and obvious. Specifically, plaintiffs contend that the defense of open and obvious danger is an affirmative defense and that defendant waived this defense by failing to plead it in either its original responsive pleading or an amendment thereto as required by MCR 2.111(F)(3)(b). We disagree. It is true that defenses that go beyond rebutting a plaintiff's prima facie case are affirmative defenses that must be pleaded in the first responsive pleading or an amendment thereto, or they are waived. *Hofmann v Auto Club Ins Ass'n*, 211 Mich. App 55, 90; 535 NW2d 529 (1995); *Stanke v State Farm Mutual Automobile Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993); MCR 2.11(F). However, "the 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 95-96; 485 NW2d 676 (1992). Accordingly, the trial court did not err in considering defendant's defense that the "T" intersection was an open and obvious danger where this defense is not an affirmative defense.

Next, plaintiffs argue that the trial court erred in ruling as a matter of law that the danger posed by the "T" intersection was open and obvious. We agree. Although evidence was presented that plaintiffs had driven this route through defendant's complex several times previously, evidence was also presented that at the time of the incident it was dark and foggy. Evidence was further presented that the route had changed over time, including the addition of a row of houses and, more significantly, the moving of a dumpster that had been located near the "T" intersection. Viewing this evidence in favor of plaintiffs, we conclude that a question of fact existed concerning whether the danger posed by the "T" intersection was noticeable to the ordinary user upon casual inspection. *Riddle*, *supra* at 96; *White v Badalamenti*, 200 Mich App 434, 437; 505 NW2d 8 (1993). Accordingly, the trial court erred in determining as a matter of law that the danger posed by the "T" intersection was open and obvious.

Finally, plaintiffs contend that the court erred in ruling as a matter of law that plaintiffs were licensees. We agree. Evidence was presented that before the incident plaintiffs had visited plaintiff Rose Garland's sister, who was a resident of defendant's complex. However, evidence was also presented that the road upon which plaintiffs were leaving defendant's complex, although open to the public, was a private road on defendant's property. Viewing this evidence in favor of plaintiffs, we conclude that a question of fact existed concerning whether plaintiffs were licensees or invitees while

traveling on this road. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995); *Stanley v Town Square Cooperative*, 203 Mich App 143, 146-148; 512 NW2d 51 (1993). Accordingly, the trial court erred in determining as a matter of law that plaintiffs were licensees.

In light of our resolution of the issues raised by plaintiff on appeal, we reverse the trial court's grant of defendant's second motion for summary disposition.

We now turn to the issue raised by defendant on cross-appeal. Defendant argues that the trial court erred in denying its first motion for summary disposition. The trial court denied defendant's first motion for summary disposition pursuant to MCR 2.116(C)(10) and we review accordingly. Specifically, defendant argues that plaintiffs theory of proximate cause was based only on guess, conjecture and speculation. We disagree. After reviewing the record, we agree with the trial court's July 1993 opinion that sufficient circumstantial evidence was presented to create a question of material fact concerning the issue of proximate cause. *Libralter Plastics, Inc v Chubb Group of Ins Co's*, 199 Mich App 482, 484-486; 502 NW2d 742 (1993). The court did not err in denying defendant's first motion for summary disposition. Accordingly, we affirm the trial court's denial of defendant's motion for rehearing.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Michael R. Smolenski
/s/ Leopold P. Borrello

[1] This Court's docket sheet indicates that plaintiff Carl Garland passed away on May 23, 1995.