STATE OF MICHIGAN

COURT OF APPEALS

DELBERT GENE CONLEY,

Plaintiff-Appellant,

v

MICHAEL TERRY and DEBRA TERRY,

Defendants-Appellees.

UNPUBLISHED
May 22, 2007

No. 274929
Wayne Circuit Court
LC No. 06-605169-NO

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition in this premises liability case. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants hired plaintiff, a carpenter and independent contractor, to replace the gutters and paint the trim on their home, and to paint the exterior of their detached garage. Plaintiff inspected the property to formulate an estimate for the job, and did not notice any beehives on the house or the garage. On August 6 or 7, 2005, plaintiff removed the old gutters from the house. He noticed a few bees in the area while working, but did not see any beehives or swarms. On August 7, 2005, plaintiff was lying on the roof of the house painting trim. He put his foot against the joint formed by the chimney and the roof. Just after he did so, numerous bees swarmed around him. Plaintiff attempted to escape by climbing down his ladder, but slipped and fell to the cement pavement below, sustaining serious injuries.

Plaintiff filed suit alleging that defendants breached their duty to warn him of the existence of beehives in the area in which he would be working, in spite of defendants' actual knowledge of the existence of such hives, and to remove the hives prior to his starting work on the premises. Plaintiff alleged that defendants' breach of duty directly and proximately caused his injuries, including a closed head injury and a fractured elbow.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendants asserted that plaintiff had no knowledge of the existence of a beehive on the roof, and thus could not prove proximate causation; that the cause of plaintiff's injuries was an extraordinary or unanticipated occurrence for which they could not be held liable; that they had no knowledge of the condition that was alleged to have caused plaintiff's injuries, and thus could not be held liable for those injuries; that the condition about which plaintiff complained was

open and obvious, and lacked any special aspects that made it unreasonably dangerous in spite of its open and obvious nature; and that they as property owners were not liable for plaintiff's injuries because plaintiff was an employee of an independent contractor.

In response, plaintiff asserted that defendants failed to warn him of the existence of beehives on or around the home, although Debra Terry had discovered a nest in the trim of the home the day before his fall occurred. Plaintiff asserted that it could be inferred that his act of rubbing his foot on the joint disturbed a hidden nest and caused the bees to approach him.

The trial court granted defendants' motion for summary disposition, finding that the undisputed evidence showed that plaintiff, who was an independent contractor, knew that bees were in the area, and that the risk of bees was open and obvious.

We review the trial court's decision on a motion for summary disposition de novo. In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we must review the record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party, and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).[1]

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

The issue of duty is a question of law for the court. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). The concept of duty encompasses whether the defendant owes the plaintiff an obligation to avoid negligent conduct. In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. If no duty exists, there can be no actionable negligence. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A landowner is liable for physical harm caused to an invitee by a condition on the land if the owner knew or by the exercise of reasonable care

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[1] The trial court did not specify the court rule under which it granted defendants' motion for summary disposition. However, the motion was supported by deposition testimony and affidavits, and the trial court referred to that evidence when ruling on the motion. We assume that the trial court granted summary disposition pursuant to MCR 2.116(C)(10). See *Detroit News, Inc v Policemen & Firemen Retirement Sys*, 252 Mich App 59, 66; 651 NW2d 127 (2002).

would have known of the condition; i.e., by making an inspection, should have expected that the invitee would not discover the condition, and failed to take reasonable care to protect the invitee against the condition. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Bertrand, supra* at 612. 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 the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). If special aspects make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

As a general rule, a premises owner is not liable to an employee of an independent contractor for the contractor's negligence. See *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 9; 574 NW2d 691 (1997); *Portelli v I R Constr Products Co, Inc*, 218 Mich App 591, 596; 554 NW2d 591 (1996). Nevertheless, a premises owner's duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition on the land extends to employees of independent contractors. *Hughes, supra* at 9-10.

In this case, defendants were not immune from liability simply because plaintiff was an independent contractor. Plaintiff was an invitee; thus, defendants had a duty to protect plaintiff from a dangerous condition on the land, unless the condition was open and obvious. *Bertrand, supra* at 612. A premises owner is not an absolute insurer of the safety of an invitee. *Id*. at 614. The trial court did not err in concluding that the condition was open and obvious. Plaintiff readily acknowledged that he had observed bees around defendants' home and garage, and that bees could present problems in areas around gutters and trim. Plaintiff's assertion that defendants had a duty to warn him that because he had observed bees in the area, more bees likely were present is without merit. The trial court did not err in concluding as a matter of law that the condition was open and obvious. *Novotney, supra*.

Furthermore, plaintiff did not present evidence to establish why the accident occurred as it did. Such evidence must be presented to make out a prima facie case of negligence. *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977). To establish causation, a plaintiff must prove that it is more likely than not that but for the defendant's breach of duty, the injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994). Plaintiff acknowledged that he did not know from where the bees that swarmed around him came. No evidence showed that bees had nested around the joint where the chimney met the roof, and that defendants failed to warn plaintiff of that fact. The possibility that a breach of duty

by defendants caused plaintiff to sustain injuries is not sufficient to sustain causation. *Ritter*, *supra*. The trial court properly decided the issue as one of law and granted summary disposition for defendants. *Reeves v K-Mart Corp*, 229 Mich App 466, 480; 582 NW2d 841 (1998).

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff