S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ELSIE FOSTER-SMITH, Personal Representative of the Estate of THERESA FOSTER,

Plaintiff-Appellee/Cross Appellant,

v

KENYA N SPRATT,

Defendant,

and

FAST PETE'S HAULING & DEMOLITION CO,

Defendant-Appellant/Cross-Appellee,

and

FIRM BUILT CONSTRUCTION, INC, and DALE HATT,

Defendants.

UNPUBLISHED
March 2, 2006

No. 262483
Wayne Circuit Court
LC No. 03-326873-NO

Before: O'Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

In this premises liability action, defendant-appellant/cross-appellee Fast-Pete's Hauling and Demolition Company appeals by leave granted the denial of its motion for summary disposition on plaintiff-appellee/cross-appellant's attractive nuisance and willful and wanton

misconduct claims.[1] Plaintiff cross-appeals the grant of summary disposition on her active negligence claim. We affirm in part, reverse in part and remand.

In October of 2001, Kenya Spratt purchased a vacant lot on LaSalle Boulevard in Detroit. In June of 2002, Spratt hired defendant to excavate a basement for the home Spratt was having built on the lot. According to the contract between Spratt and defendant, defendant would excavate the basement, remove excess material from the site and return to the worksite after the construction of the basement to backfill the excavation and grade the lot. After completing the excavation, defendant removed some of the soil from the site, but left the remainder piled next to the basement for use as backfill. Spratt hired Firm Built Construction, Inc. (Firm Built) to pour the footings for the foundation and the basement itself. The footings were poured sometime between June 15, 2002 and July 2, 2002.

On the night of July 2, 2002, Theresa, who was sixteen-years-old, her young nephew, and three friends, Bernard Childress, Christopher Williams and DeCarla Davis, went to see the construction site. While at the site, Theresa, her nephew and Davis ascended the hill created by defendant while Childress and Williams descended into the basement. At some point, Davis ran down the hill and Theresa soon followed. While running down the hill, Theresa fell and suffered a fatal injury.[2]

On August 12, 2003, plaintiff filed a complaint against defendant and Kenya Spratt. Plaintiff claimed that defendant and Spratt were liable for Theresa's death because the hill created by the excavation of the basement constituted an attractive nuisance and the failure to barricade, fence or post signs constituted willful and wanton misconduct. On April 5, 2004, plaintiff amended the complaint to include a count based on active negligence.[3]

On August 5, 2004, defendant filed a motion for summary disposition. In its motion, defendant contended that the property did not contain a dangerous condition from which reasonable minds could infer that defendant intended to harm or was so deliberately indifferent to the potential for harm that it was the equivalent of willingness that harm should occur. Hence, defendant concluded, summary disposition on plaintiff's willful and wanton misconduct claim was appropriate. Defendant further contended that it did not know or have reason to know that children were likely to trespass on the constructions site, did not know nor should it have known

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[1] Defendant shall be used to refer to defendant Fast-Pete's Hauling and Demolition Company.

[2] The Deputy Medical Examiner for Wayne County determined that Theresa died from blunt force trauma to the chest that broke her sternum, caused a rupture of the left ventricle and resulted in hemopericardium. He found the manner of death to be accidental.

[3] In April 2004, Spratt filed a notice of non-party at fault under MCR 2.112(K). In the notice, Spratt stated that Firm Built and others may have proximately caused plaintiff's damages. On May 27, 2004, plaintiff filed its second amended complaint, which added Firm Built as a defendant. In October 2004, Firm Built filed a notice of non-party fault in which it claimed that one of its subcontractors, Dale Hatt, may be responsible for plaintiff's damages. On October 29, 2004, plaintiff filed its third amended complaint wherein it added Hatt as a defendant.

that the hill would pose a danger, that Theresa was old enough to realize the danger presented, and that defendant took steps to warn of any danger posed by the construction site. Therefore, defendant argued, plaintiff failed to establish one or more elements of her attractive nuisance claim. Finally, defendant argued that the duty to refrain from active negligence only arises after the premises owner becomes aware or should be aware of the trespasser's presence and, consequently, does not apply to acts done before the trespasser's arrival. On November 29, 2004, defendant submitted a supplemental brief, in which it argued that it did not have possession or control of the premises and, as a result, could not be liable under a premises liability theory.

In December 2004, a default was entered against Hatt for failing to respond to plaintiff's complaint. In February 2005, plaintiff settled with Spratt and Firm Built. The trial court approved the settlement in March 2005.

On February 18, 2005, the trial court held a hearing to hear arguments on defendant's summary disposition motion. On February 25, 2005, the trial court announced its opinion on defendant's motion for summary disposition. The trial court stated that there were fact questions on plaintiff's attractive nuisance and willful and wanton misconduct claims, but that, under controlling precedent, plaintiffs have not presented a case for active negligence. On April 18, 2005, the trial court entered an order granting defendant's motion for summary disposition as to plaintiff's active negligence claim, but denying it in all other respects. On May 6, 2005, defendant applied for leave to appeal to this Court, which was granted.[4]

Defendant first argues that the trial court should have granted its motion because the attractive nuisance doctrine is outdated and out of step with recent developments in premises liability law that require courts to examine the condition of the land rather than the "individual idiosyncrasies of the particular plaintiff." However, because this argument was not properly preserved for appellate review, we decline to address it. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).[5]

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[4] See *Foster-Smith v Spratt*, unpublished order of the Court of Appeals, entered July 26, 2005 (Docket No. 262483).

[5] Even if it were preserved, we would find this argument to be without merit. Michigan law has long recognized that premises possessors owe a heightened duty of care to children. See *Powers v Harlow*, 53 Mich 507; 19 NW 257 (1884); *Lyshak v Detroit*, 351 Mich 230, 242-243; 88 NW2d 596 (1958); *Swanson v Marquette*, 357 Mich 424, 425-426; 98 NW2d 574 (1959); *Gilbert v Sabin*, 76 Mich App 137, 142 n 1; 256 NW2d 54 (1977). Furthermore, the development of the open and obvious doctrine, as it applies to reasonably prudent adults, see *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) and *Mann v Shusteric Enterprises, Inc*, 470 Mich 320; 683 NW2d 573 (2004), does not alter the fact that landowners may still be liable for conditions on their land, which "children because of their youth do not discover . . . or realize the risk involved in intermeddling with it." 2 Restatement Torts, 2d, § 339(c), p 197. See *Kosmalski v St. John's Lutheran Church*, 261 Mich App 56, 67; 680 NW2d 50 (2004) ("As explained by the Restatement, a landowner is required to take into consideration that a child's ability to 'appreciate the full extent of the risk' is different from that of an adult."); *Bragan v*

(continued…)

Defendant next argues that the trial court should have granted summary disposition in its favor on plaintiff's attractive nuisance claim under MCR 2.116(C)(10) because plaintiff failed to establish the existence of material fact issues on each of the elements for that claim. Specifically, defendant argues that (1) it did not have possession and control of the premises, (2) it did not know or have reason to know that children were likely to trespass at the site, (3) it did not know or have reason to know that the condition of the land would involve an unreasonable risk of death or serious bodily injury to children, (4) and that plaintiff was of an age, intelligence, and experience that she realized or should have realized the risk involved in intermeddling with or coming into the area made dangerous by the condition. We agree that plaintiff was of an age, intelligence, and experience that she realized or should have realized the risk involved in intermeddling with or coming into the area made dangerous by the condition.

This Court reviews de novo the trial court's decision whether to grant summary disposition. *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

Under Michigan's attractive nuisance doctrine,[6]

> "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
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> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
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> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
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> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

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(…continued)

Symanzik, 263 Mich App 324, 335; 687 NW2d 881 (2004) (noting that the Restatement recognizes that "child invitees are entitled to greater protection because of their 'inability to understand or appreciate the danger, or to protect [themselves] against it.'").

[6] While it is still often referred to as the "attractive nuisance doctrine," the doctrine does not actually require that the condition attract the presence of the children. See *Pippin v Atallah*, 245 Mich App 136, 146 n 3; 626 NW2d 911 (2001); 2 Restatement Torts, 2d, § 339, comment e, p 200.

> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
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> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children." [*Taylor v Mathews*, 40 Mich App 74, 81; 198 NW2d 843 (1972), quoting 2 Restatement Torts, 2d, § 339, p 197.]

A party may not be liable under the attractive nuisance doctrine unless the injured party establishes each of the five elements of § 339.[7] See *Rand v Knapp Shoe Stores*, 178 Mich App 735, 741; 444 NW2d 156 (1989); *Murday v Bales Trucking, Inc*, 165 Mich App 747, 752; 419 NW2d 451 (1988).

Under Restatement, 2d, § 339(c), a premises possessor will not be liable for injuries caused by an artificial condition upon the land to trespassing children unless, "the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it." A premises possessor is not required "to keep his land free from conditions which even young children are likely to observe and the full extent of the risk involved in which they are likely to realize." *Id.*, comment m, p 204.

> The purpose of the duty is to protect children from dangers which they do not appreciate and not to protect them against harm resulting from their own immature recklessness in the case of a known and appreciated danger. Therefore, even though the condition is one which the possessor should realize to be such that young children are unlikely to realize the full extent of the danger of meddling with it or encountering it, the possessor is not subject to liability to a child who in fact discovers the condition and appreciates the full risk involved, but none the less chooses to encounter it out of recklessness or bravado. [*Id.*]

Section 339(c) looks to the child in question to determine whether he or she actually realized or should have realized the danger posed by the artificial condition. Further, there is no "fixed age at which a child does and can be expected to realize any particular risk, as a matter of law." *Taylor*, *supra* at 92. Instead, each case must be judged on its own merits. *Id.* Finally, "unless the judge can say from the undisputed evidentiary facts that all reasonable men would agree that the [child] . . . did or could have been expected to realize the risk involved, . . . the issue must be submitted to a jury." *Id.* at 92 n3.

In the present case, defendant presented considerable evidence that plaintiff was of an age and experience that she either realized or should have realized the danger posed by trespassing on the hills. At the time of the accident, Theresa was sixteen-years-old. Theresa's mother testified that Theresa was a good student and on the honor roll from grade school through to the

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[7] Because we have concluded that summary disposition for defendant is appropriate under § 339(c), we need not address defendant's arguments concerning the other elements of attractive nuisance.

time of her death and that she was in accelerated classes and had been accepted into a special program for students who want to be engineers. Theresa also tutored and participated in extracurricular activities and was very well disciplined. Further, her friends Childress and Williams stated that they thought Theresa was intelligent and mature for her years. In addition, there was evidence that Theresa actually appreciated the danger involved with being on the site.[8] Given this unrebutted testimony, one cannot but conclude that Theresa was of an age, maturity and intelligence that she either actually realized or should have realized the danger posed in running down a debris-strewn hill. *Id.* Therefore, the trial court should have granted summary disposition in favor of defendant on this basis.

Defendant next argues that its conduct did not, as a matter of law, amount to willful and wanton misconduct. Consequently, the trial court should have granted its motion for summary disposition on this claim as well. We agree.

A premises possessor owes no duty to a trespasser except to refrain from injuring him by willful and wanton misconduct. *Stitt v Holland Abundant Life*, 462 Mich 591, 596; 614 NW2d 88 (2000). The elements of willful and wanton misconduct are

> "(1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." [*Taylor v Laban*, 241 Mich App 449, 457; 616 NW2d 229 (2000), quoting *Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997).]

Willful and wanton conduct is far more than a greater degree of ordinary negligence, it "is quasi-criminal and manifests an intentional disregard for another's safety." *Ellsworth v Highland Lakes Development Assoc*, 198 Mich App 55, 61; 498 NW2d 5 (1993).

In the present case, plaintiff contends that defendant's failure to erect a barricade around the construction site or otherwise safeguard it, constituted conduct amounting to willful and wanton misconduct. Yet there is no evidence that defendant intended to cause harm or acted with "such indifference to whether harm will result as to be the equivalent of a willingness that it does." *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). Indeed, this Court has been reluctant to characterize omissions to act as willful and wanton misconduct, *Ellsworth*, *supra* at 61-62, and has even held that the failure to fence or take other similar measures does not

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[8] In response to this evidence, plaintiff noted that Davis and Childress both stated that they did not recognize that someone could get seriously injured or die while playing at the construction site. However, Davis, who was fifteen-years-old at the time of the accident, testified that she was aware of the danger of tripping and falling down the hill, but just didn't think it would happen. She also stated that she knew it would not be wise to run down the hill because a person would pick up speed as he or she ran and the hill was strewn with debris such as bricks and cement.

amount to willful and wanton misconduct, *Wilson v Thomas L McNamara, Inc*, 173 Mich App 372, 379; 433 NW2d 851 (1988). Hence, while the failure to properly safeguard a construction site might constitute ordinary negligence, it does not rise to the level of willful and wanton misconduct. Therefore, the trial court should have granted defendant's motion for summary disposition on this claim.

Finally, plaintiff argues that the trial court erroneously granted summary disposition in favor of defendant on plaintiff's active negligence claim. Plaintiff contends that, under an active negligence theory, one who creates a hazard on the land is obligated to eliminate or minimize the hazard and warn others of the hazard under an ordinary negligence theory. This duty, plaintiff argues, remains even if the one creating the hazard is not the premises possessor.

We note that plaintiff appears to be confusing two doctrines involving ordinary negligence principles. The doctrine referred to generally as the active negligence doctrine addresses the duty of care imposed on a premises possessor once he or she becomes aware of the presence of a trespasser, or if in the exercise of ordinary care he or she should know of the trespasser's presence. See *Pippin v Atallah*, 245 Mich App 136, 145; 626 NW2d 911 (2001). Under this doctrine, the premises possessor must exercise ordinary care to prevent injury to the trespasser. *Id.* "Because the duty to refrain from active negligence only arises after the premises owner becomes aware, or should be aware, of the trespasser's presence, it follows that it does not encompass conduct that occurred before the trespasser arrived." *Id.*

Plaintiff confuses this doctrine with the ordinary negligence principles applicable to a contractor whose negligent workmanship creates a hazardous condition on land. See 2 Restatement Torts, 2d, § 385, p 293. In the latter case, the contractor who created the hazardous condition through negligent performance of a completed contract might be held liable to a third-party who is injured by that hazardous condition, despite the fact that the contractor is not the premises possessor. See *Kapalczynski v Globe Construction Co*, 19 Mich App 396, 403 n 10; 172 NW2d 852 (1969) (citing 2 Restatement Torts, 2d, § 385, p 293); *Feaster v Hous*, 137 Mich App 783, 789; 359 NW2d 219 (1984). Hence, "a servant or contractor who turns over the land to his employer in a condition made dangerous by his failure to exercise reasonable care, is liable for harm caused by it, after his employer has accepted the work, not only to the employer but to all persons whom he should expect to be upon the land with the consent of his employer or to be in its vicinity." 2 Restatement Torts, 2d, § 385, comment c, p 294. Under the Restatement approach, the contractor's liability is determined under the same rules as one who negligently manufactures chattel goods. 2 Restatement Torts, 2d, § 385, p 293. Because plaintiff's active negligence claim was not based on negligent performance of a completed contract (i.e. negligent workmanship), this doctrine is inapplicable. Therefore, because all of defendant's allegedly negligent conduct occurred before plaintiff entered the construction site, see *Pippin*, *supra* at 145, the trial court properly granted summary disposition in favor of defendant on this claim.

Because plaintiff failed to establish the existence of a fact-issue regarding whether Theresa, because of her youth, did not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, the trial court should have granted summary disposition in favor of defendant on this claim. Further, defendant's failure to barricade or fence the construction site did not, as a matter of law, constitute willful and wanton misconduct, therefore, the trial court should have granted defendant's motion for

summary disposition of that claim as well. Finally, the trial court properly granted defendant's motion for summary disposition on plaintiff's active negligence claim.

Affirmed in part, reversed in part and remanded for entry of summary disposition in favor of defendant on plaintiff's attractive nuisance and willful and wanton misconduct claims. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot