STATE OF MICHIGAN

COURT OF APPEALS

DAVID SCHISLER and LILLIAN SCHISLER,

Plaintiff-Appellees,

v

ARGENBRIGHT, INC., d/b/a ARCHWAY MARKETING SERVICES, and GAGE MARKETING SUPPORT,

Defendant-Appellants.

UNPUBLISHED
June 20, 2006

No. 259728
Wayne Circuit Court
LC No. 03-312932-NI

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

PER CURIAM.

Defendants appeal by delayed application for leave the order denying their motion for summary disposition in this premises liability action involving injuries received during an attack by a Canadian goose. We reverse.

Plaintiff was a substitute driver for USF Holland, delivering a package to defendants, tenants in the business complex outside of which the incident occurred. Plaintiff parked his delivery truck, a tractor-trailer, on the service road and approached the building on foot, on the paved driveway, intending to inquire about access for his truck to complete the delivery. Plaintiff had walked about 20 feet toward the building when he noticed the goose about 30 feet away on the lawn. Plaintiff stated that the goose was not moving or making any threatening noises, so he continued walking on the pavement toward the building. According to the plaintiff, the goose moved away, and then suddenly flew directly at him. Plaintiff stopped walking, and the goose began pecking his head. Plaintiff attempted to defend himself by swatting at the goose with his hat, at which point plaintiff's foot brushed against a landscaping berm, and he lost his balance and fell, resulting in a fractured wrist. Plaintiff then returned to his truck.

Defendants contend that the trial court erred in denying summary disposition based on the lack of evidence presented by plaintiff that the prior behaviors exhibited by the goose were sufficient to place them on notice of its aggressive tendencies and the attendant risk of harm, or that their failure to find a means to evict the goose from the property constituted harboring of the

animal. Plaintiff counters that defendants had knowledge, for more than a year, that geese were nesting on the property and that one of the geese would harass employees and visitors by hissing and chasing them.[1] Plaintiff's claim to impose liability on defendants is based on his alleged status as a business invitee and the duties that arise from this relationship.

This Court reviews de novo the denial of a motion for summary disposition. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003). Defendant's motion was brought under both MCR 2.116(C)(8) and MCR 2.116(C)(10). MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone, while MCR 2.116(C)(10) tests the factual sufficiency of a claim and is to be supported by documentary evidence. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) will be granted if no factual development could justify the plaintiff's claim for relief, while a motion under MCR 2.116(C)(10) will be granted if no material issues of fact remain. Because the trial court considered documentary evidence and decided questions of fact remained, it appears the motion was decided under MCR 2.116(C)(10). We find, however, that under MCR 2.116(C)(8), plaintiff's claim fails as a matter of law.

It has long been recognized that both occupiers and owners of land may owe a duty of care to invitees, but that duty is not the same for tenant as it is for landlord:

> The possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land. Consequently, a landlord may be held liable for an unreasonable risk of harm caused by a dangerous condition in the areas of common use retained in his control such as lobbies, hallways, stairways, and elevators. Likewise, a business invitor or merchant may be held liable for injuries resulting from negligent maintenance of the premises or defects in the physical structure of the building.
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> The duty a possessor of land owes his invitees is not absolute, however. It does not extend to conditions from which an unreasonable risk cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself. Furthermore, the occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection.

Krass v Tri-County Security, Inc, 233 Mich App 661, 671; 593 NW2d 578 (1999) (citation omitted). The trial court focused on the duty to warn of known dangers in denying defendant's motion for summary disposition, finding a question of fact as to whether defendant had notice of the risk posed by the goose. We find dispositive the difference between the duty owed by a landlord and that owed by a tenant.

Defendants assert that they lacked notice of the dangerous propensities of the goose because it had not been previously known to attack. The trial court found that plaintiff provided

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[1] There is no evidence that the goose that attacked plaintiff is the same goose that had hissed at or chased others in the past.

sufficient evidence to the contrary to create a genuine issue of material fact. We find that while there may be a question as to whether defendants had notice,[2] defendants are nonetheless entitled to summary disposition of this matter because as tenants, their duty did not encompass the "common areas" on the property, including the landscaping outside the building, where this incident occurred. According to the deposition testimony of Ms. Hedges, a representative of Ashley Romulus, the owner of the premises, Ashley retained the contractual responsibility to maintain the common areas, including the landscaping at issue. And it is the landlord who "may be held liable for an unreasonable risk of harm caused by a dangerous condition in the areas of common use retained in his control." *Krass, supra,* at 671.

Defendants, as tenants in the building outside of which this incident occurred, lacked the duty to maintain the common area, and indeed in this situation did not have options for an "exercise of reasonable care" which might realistically have prevented this attack. Exercising reasonable care here might properly include posting a warning sign or removing the animal, neither of which was within defendants' power or control to do. Had a warning sign been necessary in the common area, the duty to put one up would have fallen to the landlord, not the tenant. Removal of the animal was also outside defendants' control. Geese are protected animals, and defendants were told by a representative of the Michigan Department of Natural Resources ("DNR") that a nesting goose cannot be removed. During the hearing on the motion for summary disposition, defendant described the lengthy process by which one might apply to the DNR to conduct the removal of a nesting goose, and we are convinced that defendants' failure to pursue this process was not unreasonable, particularly as there is no guarantee that the DNR will remove an animal that has not already posed an overt threat to human safety.

To summarize, we hold that the duty to maintain the common area where this incident occurred fell to the landlord, not the tenant, here defendant, and defendants were not negligent because they were simply not positioned to take reasonable precautionary steps that might reasonably have prevented plaintiff's injury, even if they did have notice that the goose might pose a threat to safety. To hold defendants liable for plaintiff's injuries in this matter would be to declare defendants insurers of plaintiff's safety, which goes beyond the reasonable care that is required. *Krass, supra,* at 671. Because we therefore find defendants are entitled to summary disposition as a matter of law, we need not address defendants' remaining arguments.

Reversed.

/s/ Jessica R. Cooper
/s/ Janet T. Neff
/s/ Stephen L. Borrello

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[2] We note without drawing a conclusion as to the question of fact that even if other geese had exhibited protective behaviors toward their nests in the past, that does not equate to notice to defendants that this particular goose posed any threat to human safety. We further note that a history of hissing or chasing, generally warning passersby away from their nests, also does not equate to notice that a goose would attack.