STATE OF MICHIGAN

COURT OF APPEALS

HARMAIL SIDHU,

Plaintiff-Appellant,

v

ERIN MELISSA HANSEN, TRACY WINTERMEYER, and 830 SOUTH MAIN STREET, L.L.C.,

Defendants,

and

LORI WINTERMEYER and WILSON WHITE COMPANY, INC.,

Defendants-Appellees.

UNPUBLISHED
November 5, 2009

No. 276930
Washtenaw Circuit Court
LC No. 04-001206-NI

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Plaintiff Harmail Sidhu appeals as of right the trial court's order granting summary disposition in favor of defendants Lori Wintermeyer, 830 South Main Street, L.L.C. ("830 South Main"), and Wilson White Company, Inc. ("Wilson White").[1] We affirm.

[1] While the caption identifies Lori Wintermeyer as a defendant-appellee, the parties entered into a stipulated order on July 6, 2006 permitting plaintiff to amend his complaint to add 830 South Main as the real party in interest and dismiss Lori Wintermeyer without prejudice. Despite the filing of an amended complaint accomplishing this substitution, the parties continue to name Lori Wintermeyer as a defendant-appellee rather than 830 South Main. This error in nomenclature is nonsubstantive, however, as the trial court granted summary disposition to both 830 South Main and Lori Wintermeyer and our findings apply equally to both. To avoid confusion, we will refer only to Lori Wintermeyer, and not 830 South Main, throughout the remainder of this opinion.

In July 2004, plaintiff was riding his bicycle on the sidewalk along South Main Street in Ann Arbor, Michigan in front of a home owned by Wintermeyer and approaching a driveway for apartments owned by Wilson White. Plaintiff alleges that a solid wall of vegetation located on the property line adjoining defendants'[2] properties obstructed his view of vehicles exiting the apartments and obstructed exiting drivers' views of individuals on the sidewalk on the other side of the vegetation. Plaintiff concedes that he had traveled the route many times, and was aware of the vegetation and driveway behind it. As plaintiff entered the intersection of the sidewalk and the driveway, he swerved to avoid being struck by a vehicle driven by defendant Erin Melissa Hansen, who was exiting the apartments. Plaintiff lost control of his bicycle, fell to the cement, and sustained several injuries, including fractures of both his arms.

Plaintiff subsequently filed negligence claims against Hansen, Wintermeyer, and Wilson White. Only the claims against Wintermeyer and Wilson White are at issue on appeal. Plaintiff alleged that Wintermeyer and Wilson White were negligent in failing to maintain their premises in a manner that did not violate Ann Arbor City Ordinances, including §§ 3:14 and 3:16, with respect to vegetation growth on their property. The trial court, treating plaintiff's claims against defendants as premises liability claims and relying on plaintiff's deposition testimony in which he admitted he was aware that the vegetation obstructed the driveway, determined that defendants owed no duty to plaintiff and granted defendants' motions for summary disposition.

This Court reviews a trial court's decision on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants moved for summary disposition under both MCR 2.116(C)(8) and (10). Although the trial court did not state under which subrule it granted defendants' motions, it is apparent that it granted the motions under MCR 2.116(C)(10) because it relied on evidence outside of the pleadings. See *id.* at 338 and n 9. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, *supra*.

In a premises liability action, the plaintiff must establish that: (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 duty that a landowner owes a plaintiff depends on the plaintiff's status on the land. *Id.* The trial court found, and the parties do not directly dispute, that plaintiff was a licensee.[3] See *Campbell v Kovich*, 273 Mich App 227, 235-236; 731

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[2] Wintermeyer and Wilson White will be referred to collectively as defendants.

[3] Although Wintermeyer does not directly dispute that plaintiff was a licensee, and asserts in her brief on appeal that "she did not owe Plaintiff, as a licensee, a duty to warn," she maintains that plaintiff was on a public right-of-way, not defendants' private property, when he was injured. Wilson White makes a similar argument in its brief on appeal. Plaintiff maintained in the trial court that while ownership of the sidewalk is irrelevant to his claims, two surveys verify that the

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NW2d 112 (2006) (stating that a person walking on a sidewalk is "on" the adjacent landowner's property, i.e., the servient estate under the sidewalk, by using the public right-of-way over the sidewalk and, absent a commercial purpose, is a licensee in relation to the landowner). A landowner only "owes a licensee a duty to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the hidden danger involves an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk involved." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004). Thus, a landowner has no obligation to take any steps to safeguard a licensee from a condition that is open and obvious, even if special aspects of the condition make it unreasonably dangerous. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001).

As the trial court found, plaintiff admitted in his deposition that he was familiar with the area and knew that there was a driveway on the other side of the vegetation. Plaintiff now claims that although he was aware of the vegetation and driveway, the vehicle that struck him was a hidden danger of which he had no knowledge. But, pedestrians and cyclists using the sidewalk should expect that vehicles might exit the apartments on the driveway. In fact, plaintiff admitted in his deposition that when he rode his bicycle on sidewalks, he generally approached driveways, including the driveway at issue, slowly and cautiously to look for vehicles. Plaintiff had reason to know of the danger presented. Thus, assuming plaintiff was a licensee, the trial court correctly determined that defendants owed no duty to plaintiff on the basis of premises liability. *Kosmalski*, *supra*; *Pippin*, *supra*.

Next, plaintiff argues that defendants cannot avoid liability because they have a statutory duty under MCL 554.139(1) to keep their premises in reasonable repair. Plaintiff failed to raise this argument before the trial court; therefore, it is not properly before this Court and we need not address it on appeal. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 117; 662 NW2d 387 (2003). Even if plaintiff had preserved this issue, however, his argument would fail. The duty created by MCL 554.139(1) and articulated in *O'Donnell v Garasic*, 259 Mich App 569, 580; 676 NW2d 213 (2003) extends only to contracting parties to a lease or license of residential property, *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007), and it is undisputed that plaintiff does not qualify as such a party. Thus, defendants owed no duty to Sidhu under MCL 554.139(1).

Plaintiff further argues that defendants owed him a duty under Ann Arbor Ordinances, §§ 3:14 and 3:16 to maintain the vegetation on their properties to allow for adequate lines of sight. At the time of the accident, sections 3:14 and 3:16 provided:

> 3:14 Trimming and Corner Clearance. Trees and other vegetation on private property shall be maintained so that no part thereof intrudes upon the public right-of-way in the space of eight (8) feet above the surface of the right-of-

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sidewalk is "completely" on defendants' private property and not in the public right-of-way. Had plaintiff sued for negligence due to a condition existing on defendants' premises that posed a danger outside the premises, our analysis would be governed by the principles set forth in *Johnson v Bobbie's Party Store*, 189 Mich App 652; 473 NW2d 796 (1991) and *Langen v Rushton*, 138 Mich App 672; 360 NW2d 270 (1984).

> way. Vegetation on private property within 25 feet of the intersection of right-of-way lines shall not be permitted to grow above the height of 36 inches above the adjacent right-of-way surface. Trees may be maintained within 25 feet of the intersection but must have all branches trimmed to provide clear vision for a vertical height of eight (8) feet above the roadway surface.
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> 3:16 Grass and Weeds. On private property no noxious weeds, grass or other rank vegetation shall be permitted at a height greater than 16 inches. However, the Superintendent may designate natural areas where vegetation may be permitted to grow in excess of 16 inches. Annually, a notice shall be published in a local newspaper in March indicating that if weeds are not cleared by June 1, they may be removed by the City and the costs charged against the property.

Specifically, plaintiff asserts that defendants violated section 3:14 by allowing vegetation on their properties located "within 25 feet of the intersection of right-of-way lines . . . to grow above the height of 36 inches above the adjacent right-of-way surface," and violated section 3:16 by allowing "rank vegetation" on their properties to grow above the height of 16 inches, so that plaintiff was unable to see the vehicle exiting the apartments, and the vehicle's driver was unable to see him on the sidewalk. It is undisputed that in September 2004, approximately three weeks after the accident, the city of Ann Arbor served Wintermeyer with a "notice of code violation." The notice indicated that she was in violation of section 3:14. It further stated: "Vegetation next to wall on property needs to be trimmed up and back. Sight hazard for driveway of 826 S Main [the driveway for the apartments owned by Wilson White.]"

We are not persuaded by plaintiff's argument. "Violation of an ordinance is not negligence per se, but only evidence of negligence." *Stevens v Drekich*, 178 Mich App 273, 278; 443 NW2d 401 (1989), citing *Mills v A B Dick Co*, 26 Mich App 164, 168; 182 NW2d 79 (1970); see also *Hodgdon v Barr*, 334 Mich 60, 71; 53 NW2d 844 (1952). "If no duty is owed by the defendant to the plaintiff, an ordinance violation committed by the defendant is not actionable as negligence." *Stevens*, *supra*, citing *Johnson v Davis*, 156 Mich App 550, 555-556; 402 NW2d 486 (1986). In other words, "violation of an ordinance, without more, will not serve as the basis for imposing a legal duty cognizable in negligence theory." *Ward v Franks Nursery & Crafts, Inc*, 186 Mich App 120, 135; 463 NW2d 442 (1990).[4] Even if we were to assume that defendants violated the ordinances at issue[5] and that the ordinances were intended to prevent the type of injury and harm suffered in this case,[6] see *Johnson*, *supra* at 661 (stating that "before the

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[4] This Court in *Ward*, *supra* at 135, stated that "depending upon the relationship of the parties," it could "conceive of instances where an ordinance may impose a duty on an actor . . . ." Plaintiff has failed to establish that this case presents such an instance.

[5] It is undisputed that the city of Ann Arbor served Wintermeyer with a notice indicating that she had violated section 3:14. The notice did not indicate, however, that she had violated section 3:16. Nor is there any record evidence that the city served Wilson White with a "notice of code violation" for violating either section.

[6] Although we agree with the trial court that at least one purpose of section 3:14 is to provide adequate lines of sight for the users of right-of-ways, it is questionable whether the provision

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violation of an ordinance, rule, or regulation may be considered as bearing on the question of negligence, the court must determine that the purpose of the ordinance was to prevent the type of injury and harm suffered"), such violations, without more, do not establish that defendants owed a legal duty to plaintiff or serve as a basis for a private cause of action. The trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

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prohibiting vegetation located "within 25 feet of the intersection of right-of-way lines" from growing more than "36 inches above the adjacent right-of-way surface," applies to the facts of this case. Plaintiff has not established that the intersection of the sidewalk and the driveway constitutes an "intersection of right-of-way lines" within the meaning intended by the provision. It is also questionable whether the provision in section 3:16 prohibiting "rank vegetation" from growing more than 16 inches, applies here. Plaintiff has not established that the vegetation in this case constitutes "rank vegetation" within the meaning intended by the provision or that the purpose of the provision is to provide adequate lines of sight.