STATE OF MICHIGAN

COURT OF APPEALS

CANDIE LEE FARRAR, Personal Representative of the ESTATE OF NICOLE RAE KENWORTHY,

Plaintiff-Appellant,

v

JODY MISCH,

Defendant-Appellee.

UNPUBLISHED
April 25, 2024

No. 364360
Muskegon Circuit Court
LC No. 2021-004152-NO

Before: SWARTZLE, P.J., and SERVITTO and GARRETT, JJ.

PER CURIAM.

Nicole Kenworthy drowned in a swamp that surrounded defendant's camper. The trial court granted defendant summary disposition on plaintiff's claims for wrongful death under ordinary negligence and premises liability. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Defendant parked his camper on property that he later stated he owned with his father, and he invited the decedent to his camper one night to "talk" or "hangout." The decedent's roommate drove her to defendant's camper and then left. After spending some time together, defendant told the decedent that she had to leave because his children were also with him in the camper. Defendant was deposed during the case, and he asserted his Fifth Amendment right not to provide testimony during that deposition. Defendant offered, however, a video of his interview with the police concerning the incident. According to defendant during his interview with the police, the decedent became erratic after defendant told her that she had to leave, and defendant noticed that the decedent was standing in water when he instructed her not to walk further into the woods because there was a swamp nearby. Defendant also stated that he told the decedent that he did not know who else was on the property before he closed the door to his camper and slept for the night.

The next morning, defendant contacted the police and reported that the decedent was missing. Defendant consented to the police searching the property, and the decedent's body was found submerged in a swamp on the property. An autopsy revealed that the cause of decedent's

death was "[d]rowning associated with Combined Toxic Effects of Fentanyl and Methamphetamine."

Plaintiff filed a wrongful-death action against defendant under the theories of ordinary negligence and premises liability. Defendant moved for summary disposition under MCR 2.116(C)(10) because, according to defendant, he did not owe the decedent a duty to aid or protect her under a theory of ordinary negligence since they did not share a "special relationship," and he was not in possession and control of the premises for the purposes of premises liability.

The trial court held that there were no facts that demonstrated that the decedent needed assistance, and plaintiff had not offered any facts to show that the decedent entrusted herself to defendant's protection for the purposes of a special relationship. Further, the trial court found that plaintiff had not offered any facts to show that defendant actually exercised control of the property. Thus, the trial court granted defendant summary disposition and dismissed plaintiff's claims under ordinary negligence and premises liability.

Plaintiff now appeals.

"We review de novo a trial court's decision to grant or deny a motion for summary disposition." *Sherman v City of St Joseph*, 332 Mich App 626, 632; 957 NW2d 838 (2020) (citations omitted). This Court reviews a motion brought under MCR 2.116(C)(10) "by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Sherman*, 332 Mich App at 632.

Plaintiff first argues that the trial court erred by granting summary disposition on the ordinary-negligence claim. Notwithstanding plaintiff's argument that the trial court erred because the decedent and defendant did actually share a special relationship that gave rise to defendant's duty for heightened care, plaintiff ignores that "Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land." *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 625; 971 NW2d 716 (2021). "Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff." *Id*. "When it is alleged that the plaintiff's injuries arose from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence." *Id*. To allege a viable ordinary negligence claim, the plaintiff must allege negligent conduct distinct from the condition of the land. See *Laier v Kitchen*, 266 Mich App 482, 493-494; 702 NW2d 199 (2005). An ordinary negligence claim cannot be maintained when the "allegations relate to the creation of a dangerous condition on the premises caused by defendants' failure to act." *Nathan v David Leader Mgt, Inc*, 342 Mich App 507, 513; 995 NW2d 567 (2022) (cleaned up).

In this case, it is undisputed that the decedent drowned in a swamp and a swamp is a condition of the land. Thus, plaintiff's claim sounds in premises liability, not ordinary negligence, and the trial court did not err in granting summary disposition to defendant on this claim even

though it did so for a different reason. "A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Transp*, 256 Mich App, 1, 3; 662 NW2d 822 (2003).

Next, plaintiff argues that the trial court erred in granting defendant summary disposition on plaintiff's claim for premises liability. "Premises liability is conditioned upon the presence of both possession and control over the land." *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). The Supreme Court has held that "possession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998). In accordance with this principle, the Supreme Court has defined "possessor" as:

> (a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b). [*Merritt*, 407 Mich at 552 (cleaned up).]

This Court has defined "possession" as " '[t]he right under which one may exercise control over something to the *exclusion of all others*.' " *Derbabian v S&C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), quoting *Black's Law Dictionary* (7th ed). Additionally, this Court has defined "control" as the power to " 'manage, direct, or oversee.' " *Derbabian*, 249 Mich App at 703, quoting *Black's Law Dictionary* (7th ed). Notably, "[o]wnership alone is not dispositive," as possession and control, while incidents of title ownership, can be loaned to another. *Merritt*, 407 Mich at 552-553.

As a preliminary matter, defendant chose not to testify at his deposition and, instead, offered an interview that he had with the police concerning the decedent's death. This Court recognizes defendant's Fifth Amendment right not to testify or provide a statement, but defendant cannot then offer self-serving statements that are not subject to cross-examination unless those statements are otherwise admissible under the Michigan Rules of Evidence. See *People v Taylor*, 98 Mich App 685, 690; 296 NW2d 631 (1980). At first blush, it is not clear how *defendant* could offer *his own interview statements* for purposes of establishing *his defense* against plaintiff, as the interview statements offered by defendant were not made by a party opponent, MRE 801(d)(2), do not appear to fall within any of the traditional hearsay exceptions, MRE 803, and do not appear to be statements against interest, at least as presented to this Court on appeal, MRE 804(b); *People v Hill*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2003 (Docket No. 233208), slip op at 2-3. (This is not to say that *plaintiff* might not be able to use one or more of defendant's statements in establishing *her claim*. MRE 801(d)(2)(A).) But, because neither side has briefed this matter, we will consider the statements for purposes of this appeal.

It is undisputed that defendant placed his camper on the property, told the police that the property was owned by both him and his father, and consented to a police search of the property.

Further, defendant argues that he told the decedent that there was a swamp on the property and that he was unsure of who else was on the property on the night that decedent died. This evidence indicates that defendant exercised at least some control over the property because he had the authority to grant the police access to the property and parked his camper on the property.

Reasonable minds could differ about whether defendant had possession and control over the property when considering that evidence. Thus, there remains a genuine issue of material fact concerning plaintiff's claim of premises liability, and the trial court erred in granting defendant summary disposition on this issue.

This Court acknowledges that the trial court continued on with other analysis concerning the viability of plaintiff's premises-liability claim, but our Supreme Court has since revisited the two-decades long precedent concerning premises liability in *Kandil-Elsayed v F&E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023). Further, this Court has held that "the rule of law announced in *Kandil-Elsayed* should operate retroactively and applies to all cases currently pending on direct appeal." *Gabrielson v The Woods Condo Ass'n, Inc*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket Nos. 364809, 364813), slip op at 2, 8. Consequently, the law governing plaintiff's premises-liability claim in this case, at the time the trial court decided the motion for summary disposition, has changed. The trial court could not have resolved these issues under this new standard, and we decline to resolve them for the first time on appeal. *Jawad A Shah, M.D., PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 149 (2018).

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Deborah A. Servitto
/s/ Kristina Robinson Garrett