

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF PATRICIA PEABODY, by PAMELA
HARRIS, Personal Representative,

UNPUBLISHED
June 20, 2024

Plaintiff-Appellant,

v

No. 366895
Eaton Circuit Court
LC No. 2022-000464-NO

POSITIVE FAMILY DENTAL PLLC,

Defendant-Appellee.

Before: O'BRIEN, P.J., and M. J. KELLY and FEENEY, JJ.

PER CURIAM.

Plaintiff, the estate of Patricia Peabody, appeals as of right the trial court's order granting defendant, Positive Family Dental PLLC, summary disposition under MCR 2.116(C)(10). Because the trial court did not err by granting summary disposition, we affirm.

I. BASIC FACTS

On September 14, 2021, Wendell Peabody drove himself to Positive Family Dental's office for an appointment. He exited his car and made his way up a handicap ramp using his walker. When he was approximately three-quarters of the way up the ramp, he heard a “holler or scream” from his wife, Patricia Peabody. He looked back and saw that she was falling. She landed facedown on the ramp with her feet extending off the bottom of the ramp. Patricia told him to get help. Two employees from the dental office met him at the door. They had heard Patricia fall and were on their way to aid her. The employees called 9-1-1, and Patricia was taken to a hospital. She died four days later. Her medical records reflect that as a result of the fall she had fractured her arm and her neck.

In May 2022, Patricia's estate filed a wrongful death claim against Positive Family Dental, alleging a combined count of premises liability and general negligence. Patricia's estate asserted that the handicap ramp on Positive Family Dental's property was dangerous and defective because there was a height differential at the bottom of the ramp, there was not a handrail on both sides of the ramp, and that the existing handrail was not adequate. The estate contended that Patricia tripped and ultimately died as a result of the handicap ramp's defective condition.

Following discovery, Positive Family Dental moved for summary disposition. It asserted that summary disposition was warranted because (1) there was no evidence of how the fall occurred so Patricia's estate could not prove causation; (2) the condition of the ramp and the handrail were open and obvious; and (3) there is no evidence of breach because the conditions were not unreasonably dangerous and Positive Family Dental lacked notice of the conditions. Positive Family Dental also asserted that the estate's general negligence claim should be dismissed because the complaint only sounded in premises liability.

In response, Patricia's estate argued that its claim sounded in general negligence because Positive Family Dental created the dangerous condition or allowed it to persist. The estate asserted that the ramp was a hazard because it had a raised lip at the bottom and because the handrail was too low and did not extend past the end of the ramp. In support, the estate referred to photographs of the ramp and to Wendell's testimony that there was a handrail on the right side of the ramp and describing that the bottom of the ramp was yellow and had a lip that was a couple of inches high. Patricia's estate further contended that the handrail was not compliant with "the applicable building codes." Although the estate attached photographic evidence showing the condition of the ramp and the handrail, it did not identify the building codes that the handrail was allegedly violating. Moreover, although it referenced the opinion of a safety expert, no documentary evidence was submitted detailing the expert's proposed opinion.

Patricia's estate argued that the open and obvious doctrine did not apply because the hazard posed by the ramp and handrail were effectively unavoidable and that the danger posed was unreasonably dangerous. Further, the estate maintained that the open and obvious doctrine could not shield Positive Family Dental from liability because it had a duty to ensure that the handrails on the ramp were in compliance with building codes. Again, Patricia's estate failed to identify the pertinent building codes and, although it referenced that its safety expert would opine that the handrails did not comply with the building codes, it did not submit any evidence in support of that proposition. On the matter of causation, Patricia's estate suggested that the defective handrails played a role. In support, the estate directed the court to testimony from Wendell indicating that Patricia always used the handrail at her home in Michigan and her home in Florida. Patricia's estate, however, did not respond to Positive Family Dental's evidence indicating that no one saw how Patricia had fallen. Nor did it point to any evidence supporting its claim that the lack of a handrail contributed to Patricia's fall.

At oral argument on the motion for summary disposition, the lawyer for Patricia's estate attempted to argue that the defect was the lack of an adequate handrail, not the ramp itself. The estate's lawyer explained that the handrail was "not up to code." He informed the court that the estate would have an expert "come in and testify" that the handrail was too low and did not extend far enough from the ramp. The estate's lawyer posited that it did not matter why Patricia started to fall because the absence of adequate handrailing was enough for the matter to be submitted to a jury as "the lack of an adequate handrail prevented her from being able to [] re-engage or rebalance herself." Positive Family Dental responded by pointing out that it had supported its motion for summary disposition with documentary evidence. It asserted that the estate had responded by referencing building codes that were not in the record and by promising expert testimony at trial without even submitting an affidavit from its expert. It also contended that the estate had provided nothing but speculation as to the cause of Patricia's fall.

The court determined that it was not appropriate for Patricia’s estate to present evidence orally at the motion hearing after it had failed to provide evidence in its response to summary disposition. The court asked the estate’s lawyer if he agreed that there was “nothing in your answer—there’s no affidavit or any type of document that—any type of documents that indicates how [Patricia] fell, correct?” The estate’s lawyer responded that he did not know “exactly why she began to lose her balance,” but that he could “speculate that her toe caught that slight elevation at the bottom of the ramp.” He conceded that her fall could have been caused by “any number of reasons.” He maintained that “once she started to lose her balance and it’s our contention, Judge, at that point, she did not have an adequate handrail and that’s at least a proximate cause of her falling.” He did not direct the court to any evidence supporting that proposition. Rather, he asked the court if he could provide a supplemental brief addressing the building codes, but the court did not permit him to do so.¹

The court granted summary disposition for multiple reasons. First, the court held that the estate’s claim sounded only in premises liability and that the condition of the ramp was open and obvious. Additionally, the court determined that summary disposition was warranted because the estate did not meet its burden to refute Positive Family Dental’s evidence indicating that it could not prove the elements of its premises liability claim, including causation. Accordingly, the court entered an order granting summary disposition to Positive Family Dental.

Patricia’s estate moved for reconsideration. In support of the motion, it attached copies of the building codes that it alleged were violated by the handicap ramp in this case. The estate also referenced that its expert would provide testimony in the future, but it once again did not attach an affidavit from that expert. The court denied reconsideration, reasoning:

[The estate] did not meet [its] burden to defeat [Positive Family Dental’s] Motion for Summary Disposition by providing substantively admissible evidence that established a dispute of material fact. [The estate] claims that [it] has an expert that will opine on the condition of the handrailing, but did not provide any affidavit to support this claim. Likewise, [the estate] did not plead a violation of the Grand Ledge Building Code until her oral argument at the May 30, 2023, hearing and then inappropriately attached a copy of the code to the Motion for Reconsideration. [The estate] did not meet [its] burden; thus[,] summary disposition was properly granted in favor of [Positive Family Dental].

This appeal follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Patricia’s estate argues that the trial court erred by granting Positive Family Dental’s motion for summary disposition. We review *de novo* a trial court’s decision on a motion for

¹ Patricia’s estate does not argue that the trial court abused its discretion by denying its request to supplement its response to the motion for summary disposition.

summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

1. GENERAL NEGLIGENCE CLAIM

Patricia's estate first argues that the trial court erred by summarily dismissing its general negligence claim. "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Serv*, 296 Mich App 685, 691, 692; 822 NW2d 254 (2012), overruled in part on other grounds by *Kandil-Elsayed v F & E Oil, Inc*, 512 Mich 95; 1 NW3d 44 (2023). In a premises liability case, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id.* "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id.*

Here, the estate alleges that Patricia tripped as a result of a defect in the handicap ramp and that she was unable to prevent her fall because of a defect in the handrail. The ramp and the handrail are both conditions on the land. Consequently, the estate's theory of liability arose solely from Positive Family Dental's duty as an owner, possessor, or occupier of land. The fact that the estate alleges that Positive Family Dental either created or allowed the dangerous condition to persist is immaterial given that it was neither Positive Family Dental's action nor conduct that caused the injury. The trial court, therefore, did not err by concluding that the action sounds solely in premises liability.

2. PREMISES LIABILITY

"All negligence actions, including those based on premises liability, require a plaintiff to prove four essential elements: duty, breach, causation, and harm." *Kandil-Elsayed, Inc*, 512 Mich at 110. In this case, the trial court held that summary disposition was warranted based upon the estate's failure to establish each element of its premises liability case. On appeal, the estate challenges the trial court's determination that summary disposition was warranted as to the elements of duty and breach. It does not challenge the court's determination as to causation.

A party moving for summary disposition under MCR 2.116(C)(10) must support the motion with enough detail that the opposing party is on notice of the need to respond. *Barnard Mfg*, 285 Mich App at 369; see also MCR 2.116(G)(4) (stating that the moving party "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact."). The motion must be supported "with affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted." *Barnard Mfg*, 285 Mich App at 369; MCR 2.116(G)(3).

In its reply brief on appeal, the estate contends that the issue of "negligence" was raised for the first time at oral argument on the motion for summary disposition. The record belies that assertion. The motion for summary disposition specifically alleged that there was "no evidence of how the fall occurred and thus no factual basis to determine whether any alleged defective

condition of the ramp or handrail caused or contributed to [Patricia's] fall." Further, in its brief in support of its motion, Positive Family Dental alleged that the estate could not prove "causation because no one witnessed the fall and the single piece of evidence on which [the estate] relies—a statement Wendell claims that [Patricia] made while in the hospital two days after the fall—is not substantively admissible and thus cannot overcome [Positive Family Dental's] right to summary disposition." In support, Positive Family Dental directed the trial court to Wendell's testimony that he did not see Patricia start to fall and that he had no personal knowledge as to the reason for her fall. It also noted that no other witness had seen the fall or had any information as to why Patricia fell. Positive Family Dental noted that the medical records likewise did not indicate how or why Patricia fell; rather, the records only detailed that she had, in fact, fallen. Further, subsections I-D and III-D of the brief in support of the motion for summary disposition contained Positive Family Dental's argument that the estate was only speculating as to how and why Patricia fell. Thus, not only did Positive Family Dental argue that the estate could not prove the element of causation, it also submitted documentary evidence in the form of medical records and deposition testimony from Wendell to support its argument.

A properly supported motion for summary disposition shifts the burden to the opposing party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In doing so, the nonmoving party cannot rely on mere allegations or denials, but must instead, "by affidavits or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." *Barnard Mfg*, 285 Mich App at 374 (quotation marks and citations omitted). Indeed, MCR 2.116(G)(4) provides:

When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

In this case, the estate did not provide any affidavits or other evidence showing that there was a genuine issue for trial. Rather, it asserted that there were building codes that were violated. It did not submit as evidence the buildings codes that were allegedly violated. It also asserted that it had an expert witness who would opine that the ramp's handrail did not comply with the unidentified building codes. No affidavit was provided, however. Further, the estate did not direct the court to any testimony supporting an inference that Patricia's fall was caused as a result of a defect in the ramp or with the ramp's handrail. Instead, it directed the trial court to Wendell's testimony that Patricia's habit was to use the handrails at her houses in Michigan and Florida. From there, he speculated that the allegedly inadequate handrail prevented her from catching herself once she began to fall. Absent from the record, however, is any evidence that she was not using the handrail prior to falling, that she had reached for and was unable to catch herself on the railing because of its allegedly defective condition, or that the handrail contributed in any way to her fall. The trial court ruled that summary disposition was warranted based upon the estate's failure to establish a genuine issue of material fact by reference to something more than mere allegations or denials. That determination was not erroneous given the complete absence of evidence regarding causation.

The estate argues that the trial court erred by granting summary disposition based upon the application of the open and obvious doctrine. Although the Supreme Court's decision in *Kandil-Elsayed*, 512 Mich 95, altered the framework for analyzing a claim that a defect is open and obvious, the matter is not dispositive in this case given that summary disposition was properly granted on the basis of the estate's failure to establish a genuine issue of material disputed fact. Consequently, we need not address whether summary disposition was warranted under the open and obvious doctrine.

Finally, on appeal, Positive Family Dental contends that summary disposition was appropriate because it lacked notice of the allegedly dangerous condition of the ramp and the handrail. Summary disposition was not granted, however, based upon the alleged lack of notice. Moreover, given that the estate alleged that the dangerous condition was created by Positive Family Dental's negligence in failing to comply with the applicable building codes, notice of the dangerous condition was not required. See *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991) (stating that when a plaintiff alleges that the defendant created the dangerous condition there is no need for proof of notice).

Affirmed. Positive Family Dental may tax costs as the prevailing party. MCR 7.219(A).

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ Kathleen A. Feeney