STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF JOSEPH A. CLOCK, by JEANETTE A. CLOCK, Personal Representative, Plaintiff-Appellant, v NEAL KEMP and SUSAN KEMP, Defendants-Appellees.	UNPUBLISHED July 19, 2011 No. 296596 Kalamazoo Circuit Court LC No. 2009-000141-NO

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm.

This case arises from an accident that occurred on June 15, 2008 when a large tree branch from defendant's property fell on Joseph Clock when he was walking on a nearby roadway. The branch fell from an old choke cherry tree on the edge of defendants' property as a result of a weak attachment between the branch and main trunk. The accident tragically resulted in Joseph Clock's death.

On appeal, plaintiff argues that the trial court erred in granting summary disposition because the evidence established a question of fact concerning whether defendants should have known about the dangerous condition of the tree and the need to have the tree inspected by a professional. We disagree.

We review the grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id*. at 120. Parties opposing a motion for summary disposition must present more than mere conjecture and speculation. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

In *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000), our Supreme Court stated:

> To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.

In *Oppenheim v Pitcairn*, 293 Mich 475, 477-478; 292 NW 374 (1940), our Supreme Court stated:

> Where the charge of negligence is the failure to maintain the premises in a reasonably safe condition, we have always insisted upon proof that the unsafe condition was known to the one on whom the duty rested, or that the character of the danger or the passage of time was such that knowledge of the menace should have come to the reasonably prudent incumbent.

Thus, defendants had to know, either actually or constructively, of the danger.

Neither the branch that fell in a storm in 2002 nor the alleged visible signs of decay on the tree created a genuine issue of material fact regarding whether defendants had constructive notice of the dangerous condition of the tree or the duty to have the tree inspected by an arborist.

During a storm in 2002, a large branch fell off the tree, similar to the one that struck Clock. Plaintiff contends that the falling branch should have served as a warning to defendants that they needed to have the tree inspected. However, plaintiff's argument is based on certain testimony by plaintiff's expert from his deposition. The deposition pages, which include the expert's opinions, were not included in the lower court record, and we will not consider this evidence. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) (finding that parties cannot expand the record on appeal). Based on defendants' expert's testimony that was presented, it was not necessary for defendants to contact an arborist after the branch fell. Thus, the evidence of the falling branch in 2002 did not raise a question of fact concerning whether defendants had a duty to contact an arborist to inspect the tree after the branch fell in 2002.

Plaintiff also alleges defendants should have known they needed an inspection because of visible decay, including poor attachment of the main tree stems, improper leafing, decay on the north side of the main stem from the branch that fell in 2002, three four-to-six-inch dead limbs on the top of the tree, and evidence many large branches had fallen off in the past. The evidence presented regarding the alleged visible decay is based on conjecture, speculation, and a misinterpretation of facts. Therefore, evidence of the alleged visible decay fails to raise a genuine issue of material fact concerning whether defendants had a duty to have the tree inspected.

Additionally, it is not clear that even if defendants had an arborist inspect the tree, the arborist would have found the weak attachment problem and the branch would have been removed. Consequently, we find the trial court did not err in granting defendants' motion for summary disposition because plaintiff failed to raise a genuine issue of material fact.

Finally, plaintiff provides no authority and makes no separate argument regarding her nuisance claim. It is unclear whether she is actually challenging the grant of summary disposition as to that claim. And, we conclude that any challenge to the grant of summary

disposition of the nuisance claim is waived by plaintiff's failure to properly present it in the statement of questions presented in the party's brief on appeal. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). The issue is also abandoned by plaintiff's failure to brief the issue. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002).

Affirmed.

/s/ Peter D. O'Connell
/s/ Donald S. Owens