STATE OF MICHIGAN

COURT OF APPEALS

JUDY ELDERKIN,

Plaintiff-Appellant/Cross-Appellee,

v

THOMAS VANASSCHE and KATHLEEN VANASSCHE,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
January 16, 2001

No. 215703
Wayne Circuit Court
LC No. 98-805167-NO

Before: Neff, P.J., and Talbot and J.B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. Defendants cross-appeal the trial court's denial of their motion for costs and attorney fees under MCR 2.114 and MCL 600.2591; MSA 27A.2591. We affirm.

Plaintiff brought this action seeking damages for injuries she sustained as a result of a fall from a hayride wagon during a party on defendants' premises. Plaintiff attempted to disembark from the wagon by climbing over the side of the wagon. According to plaintiff, the existence of a hole in the floor of the wagon discouraged her from going to the rear of the wagon and proceeding down the steps. Instead, plaintiff jumped from the side of the wagon and hit the sideboard, causing her to flip over. Plaintiff sustained injuries to her neck, back, shoulder, and face. Plaintiff claimed that defendants were negligent in using a defective wagon, in failing to offer assistance to people getting off the wagon, and in failing to warn of the danger of the hole in the wagon floor. Plaintiff also asserted that the area of disembarkment was insufficiently lit.

The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). This Court reviews decisions on motions for summary disposition de novo. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999), citing *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Spiek, supra*. On appeal, as below, all reasonable inferences are resolved in the nonmoving party's favor. *Hampton, supra* at 602. A party faced with a motion for summary disposition brought pursuant to subrule (C)(10) is required to present evidentiary proofs creating a genuine issue of material fact for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

In order to establish a negligence cause of action, a plaintiff must show "that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered." *Arias v Talon Development Group, Inc*, 239 Mich App 265, 266; 608 NW2d 484 (2000), quoting *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993). The nature of defendants' duty to plaintiff depends upon plaintiff's status on defendants' property. *Hampton, supra* at 603. Although the parties disputed whether plaintiff was an invitee or a licensee, the trial court did not resolve this issue, and granted summary disposition on the ground that plaintiff failed to establish a genuine issue of material fact that defendants' conduct was the proximate cause of plaintiff's injuries.

The trial court correctly concluded that defendants were entitled to summary disposition on the ground that plaintiff failed to establish that defendants' conduct was a proximate cause of her injuries. The court's conclusion was based primarily on the facts as adduced and testified to by the parties. The trial court stated that "the hole had effectively nothing to do with [plaintiff] falling." Plaintiff cites *Teodorescu v Bushnell, Gage, Reizen & Byington (On Remand)*, 201 Mich App 260, 266; 506 NW2d 275 (1993), asserting that the trial court clearly erred in granting defendants' motion for summary disposition on the basis of lack of proximate cause because the question of proximate cause is a question of fact that is generally to be decided by a jury. We disagree.

A trial court may not make findings of fact in deciding a motion for summary disposition. *Jackhill Oil Co v Power Production Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995), citing *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 88; 492 NW2d 460 (1992). Nor can the court weigh credibility in deciding a motion for summary disposition. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Although in most cases the jury is to determine whether a plaintiff has shown proximate cause, see *Helmus v Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999), if reasonable minds could not differ regarding proximate cause, the court should decide the issue as a matter of law. *Id*. See also *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998).

Proving proximate cause involves examining the foreseeability of the consequences of a defendant's conduct and a determination whether the defendant should be held legally responsible. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998), quoting *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). To find proximate cause, the nature of the connection between the wrongful conduct and the injury must be such that it is socially and economically desirable to hold the wrongdoer liable. *Helmus, supra* at 256.

In this case, a review of the record establishes that plaintiff failed to show proximate cause and that reasonable minds could not differ about this finding. Plaintiff's deposition

testimony demonstrated that she knew about the "hole" in the floor at the rear of the wagon. Furthermore, the court correctly pointed out that plaintiff's fall was caused by the way she disembarked from the wagon and not from the location of the hole. Plaintiff stated that she was aware of the hole and that she sought to avoid it by jumping over the side of the wagon. Notably, plaintiff testified that when she embarked upon the wagon from the rear steps, she "was nowhere near the hole." This testimony refutes her claim that the location of the hole necessitated her jump from the side of the wagon. Moreover, the record established that plaintiff never came into contact with the hole. Thus, even if defendants were negligent in conducting a hayride with a hole in the bottom of the wagon, plaintiff failed to establish that defendants' conduct was the proximate cause of her injuries. Accordingly, the trial court did not err in determining that defendants were entitled to judgment as a matter of law because plaintiff failed to establish a genuine issue of material fact on the element of proximate cause. Because we agree that plaintiff failed to show proximate cause, it is unnecessary for us to address the applicability of the open and obvious doctrine.

Plaintiff next asserts that she was entitled to a presumption that there was a defect in the wagon because defendants failed to produce documents concerning the wagon. Plaintiff argues the presumption thereby created was sufficient to overcome defendants' motion for summary disposition. We disagree. A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation has commenced. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). An exercise of this inherent power may be disturbed only upon a finding that there has been a clear abuse of discretion. *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 400; 586 NW2d 549 (1998). Although summary disposition is generally premature if granted before discovery on a disputed issue is complete, *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), there is no disputed issue in this case regarding the state of the wagon as it relates to proximate cause. Plaintiff's injuries did not result from the hole in the wagon. Plaintiff never came into contact with the hole. The court made its decision with the benefit of plaintiff's deposition testimony, which described the hole and its location. It does not appear from the record that additional discovery, or the requested discovery, would have provided factual support for plaintiff's position. The trial court's finding that the requested discovery would not affect the outcome of the case was not an abuse of discretion and summary disposition was therefore appropriate.

Finally, defendants argue that the trial court clearly erred in denying their motion for sanctions under MCR 2.114 and MCL 600.2951; MSA 27A.2951. Specifically, defendants argue that plaintiff's claim was frivolous because there was no basis in fact to support any theory of causation against defendants. A trial court's finding on whether a claim was frivolous for the purpose of awarding attorney fees and costs under MCL 600.2591; MSA 27A.2591 will not be overturned unless it was clearly erroneous. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). In this case, the trial court's denial of defendants' motion for attorney fees and sanctions was not clearly erroneous. Plaintiff was not making new law, as defendants

claim, but was legitimately pursuing a good-faith extension of the law. MCR 2.114(D)(2); *Triplett v St. Amour*, 444 Mich 170, 180-181; 507 NW2d 194 (1993). We find no error.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan