

STATE OF MICHIGAN
COURT OF APPEALS

FLORIS WERTZ, Personal Representative of the
ESTATE OF ROBERT DALE WERTZ,

UNPUBLISHED
January 27, 2009

Plaintiff-Appellant,

v

No. 282721
Gratiot Circuit Court
LC No. 06-010106-NO

LEASLY FITZGERALD SCHAPER,

Defendant,

and

BEBOW DAIRY FARM, INC.,

Defendant-Appellee.

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order dismissing plaintiff's claim for the wrongful death of plaintiff's decedent. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On November 3, 2005, Robert Wertz (Wertz) drove a tractor-trailer loaded with bales of straw from defendant Schaper's farm to defendant Bebow Dairy Farm. According to plaintiff, Schaper's employees loaded the straw bales onto the trailer, which was owned by Schaper, and secured them with straps. Wertz then drove the truck to Bebow's farm. Once at the farm, an employee of Bebow, Ricardo Castillo, helped Wertz unload the bales. In his deposition, Castillo stated that when Wertz arrived, Castillo noticed that the bales of straw were leaning badly enough that Castillo thought that the trailer was going to tip over. He tried to tell Wertz to be careful, but was not sure whether Wertz understood him. Wertz began untying the straps from the bales. When he untied the "last rope in the back" three bales fell from the truck. The bales fell on top of one of the straps. Wertz told Castillo that he needed the strap. Castillo, who was running a tractor, told Wertz that he would have to change the bucket attachment for a forklift attachment. Castillo went behind the building and changed attachments. When he returned, he moved the bales off of the strap and stacked the bales with the tractor. When Castillo noticed that Wertz was rolling up the straps, he drove the three bales into the barn. As he backed out of

the barn after dropping off the bales, he looked up, and saw that additional bales had fallen off the trailer. When he got closer, he saw that a bale of straw had fallen on Wertz, crushing him.

Plaintiff filed suit, alleging negligence on the part of Schaper and Bebow's employees. Bebow moved for summary disposition pursuant to MCR 2.116(C)(10). In response, plaintiff maintained that discovery was not yet complete and that plaintiff had requested to depose additional Bebow employees. Following a hearing in which plaintiff also averred that she had contacted a possible expert witness concerning the accident, the trial court granted Bebow's motion for summary disposition due to lack of evidence to create a question of fact concerning Bebow's liability. Plaintiff moved for reconsideration, and provided an affidavit by plaintiff's counsel in support of her motion. The trial court denied reconsideration.

Plaintiff moved for leave to appeal. This Court denied leave on the ground that plaintiff failed to persuade of the need for immediate review. This appeal follows the later dismissal of plaintiff's claim against defendant Schaper.

We review de novo a trial court's decision on a motion for summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. *Id.* After reviewing the pleadings, affidavits, depositions, admissions, and any other evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998).

On appeal, plaintiff maintains that the trial court's grant of summary disposition was premature because plaintiff had not completed discovery. In *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), this Court noted:

As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. [Quotations and internal citations omitted.]

We review a trial court's decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

Plaintiff first maintains that depositions of a number of Bebow's employees who were present on Bebow's premises that day might reveal evidence in support of her claim. While plaintiff does not maintain that any of these other individuals actually witnessed the accident, she contends that Castillo may have provided them with a different account of the accident than the one he provided in his deposition. Plaintiff also argues that she should have been allowed to have her expert witness complete his analysis and render an opinion as to what caused the accident.

"[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." *Michigan Nat'l Bank v*

Metro Institutional Food Service, Inc, 198 Mich App 236, 241; 497 NW2d 225 (1993). See also *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994) (“If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.”). Michigan’s discovery rules are broadly construed, *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003), but the support of open and extensive discovery is not intended to promote “fishing expeditions,” *In re Hammond Estate*, 215 Mich App 379, 386-387; 547 NW2d 36 (1996). The mere promise or assertion that facts will be established is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Plaintiff has presented nothing on the record thus far to support her theory as to how Castillo’s negligence was a proximate cause of Wertz’s death. Nor can plaintiff avoid summary disposition by resting on a claim of *res ipsa loquitur*, because the accident was not caused by an instrumentality that was exclusively in Bebow’s control. See *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987). Plaintiff maintains that further discovery could reasonably lead to the uncovering of factual support for her position that Castillo actually had a hand in causing the accident. We disagree.

Plaintiff has failed to show that she might be able to discover inaccuracies in Castillo’s deposition testimony were she provided the opportunity to depose additional witnesses. We note that two other witnesses, Castillo’s brother and Bebow’s foreman, were deposed. Plaintiff has not pointed to anything in those depositions to support her assertion that Castillo did not testify truthfully. Plaintiff has apparently also received statements from additional employees, which have not provided anything to support plaintiff’s claims. Plaintiff is merely speculating that additional depositions would help her discover potentially useful evidence, which amounts to an improper fishing expedition.

Plaintiff also argues that the trial court should have found that discovery was incomplete because her proposed expert witness had not completed his testing, which could have led to a finding that Castillo was not telling the truth about how the bales fell. This is a closer question and one that we would find more compelling had plaintiff provided any evidence in support of her claim. However, plaintiff has not provided evidence on the record to show that she has a fair chance of uncovering factual support for her position were discovery allowed to continue. Plaintiff has not provided any information concerning Dr. Hughes’s background, expertise, or whether he could be properly qualified as an expert. Plaintiff has provided nothing to suggest that Dr. Hughes’s possible testing or methodology, whatever it might be, could provide an alternate theory of the cause of the accident that would have been more than mere speculation or that could assist the trier of fact. Plaintiff has not provided even an affidavit from Dr. Hughes stating that he has a fair chance of shedding any light on what happened. Even considering the difficulty of finding a possible expert witness here, counsel did have ample time to present some of this underlying information to the trial court. Given that plaintiff has to directly tie Castillo’s actions to the death, not just to prove that there were discrepancies in Castillo’s testimony, we conclude that plaintiff has not shown that the trial court abused its discretion in finding that further discovery did not stand a fair chance of uncovering factual support for her position.

Affirmed.

/s/ Joel P. Hoekstra

/s/ E. Thomas Fitzgerald

/s/ Brian K. Zahra