STATE OF MICHIGAN

COURT OF APPEALS

KWALA AMIN, Personal Representative of the Estate of SUFIAN AMIN,

Plaintiff-Appellee,

v

MARINO S. PAPALAS TRUST, MARINO S. PAPALAS as Trustee and Individually, MARY M. PAPALAS as Trustee and Individually, ALEXANDER PAPALAS as Trustee, and LOUISA M. CONCESSI PAPALAS,[1]

Defendants-Appellants.

UNPUBLISHED
September 29, 2009

No. 286502
Wayne Circuit Court
LC No. 07-707273-NO

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendants appeal on leave granted from the trial court's order denying their motion for summary disposition. We reverse and remand for entry of judgment in favor of defendants. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The basic facts of this case are not in dispute. In the late afternoon or evening of July 31, 2006, 16-year-old Sufin ("Shawn") Amin was walking on a sidewalk adjacent to defendants' property. A large box elder tree on defendants' property suddenly cracked at its base and fell on Amin, resulting in his death. The tree apparently broke due to the extensive rotting of the tree's interior.

Plaintiff filed suit, alleging that the tree had been dead and in a hazardous condition for an extended period of time. Plaintiff contended that defendants failed to have the tree removed, despite knowing of its dead condition. Plaintiff alleged negligence and nuisance. Both counts were premised on defendants being aware of the dangerous condition of the tree.

[1] Marino Papalas and Louisa Concessi Papalas have been dismissed from this action.

Defendants moved for summary disposition, arguing that they did not know or have reason to know that the tree, which was alive and appeared healthy, would break near its base and fall on a passerby. Plaintiff, in part, relied on the deposition testimony of three neighbors, who stated that an excessively large number of birds regularly roosted in the tree. The neighbors assumed that the birds were eating insects that lived in the tree. As a result, the neighbors concluded that the tree was diseased and needed to be cut down. Plaintiff also maintained that defendants had a duty to have the tree inspected.[2]

The court heard oral arguments and ruled:

> So a reasonable homeowner would have known there was a problem [due to the large number of birds], not necessarily that it would fall over, but that there was a problem that deserved attention, then there would be a duty to get attention to that tree.
>
> And once that happened, then you get the experts that would come and look at that tree and say, this tree has got to come down.

The trial court denied defendants' motion for summary disposition.

In this Court, defendants argue that they had no actual notice of the tree's condition because even the experts testified that it looked green and alive at the time of the accident, and they had regular trimming service done on it. They also argue that they had no constructive notice; both parties' experts testified that the presence of a flock of birds would not indicate that there was decay inside the tree. Defendants assert that homeowners have no duty to have trees inspected by experts when there are no outwardly visible problems, and that the trial court erred in concluding that the neighbors' testimony that they saw birds of unknown species in the tree at unidentified times meant defendants had constructive notice of a potential problem requiring examination by a tree expert. In fact, the experts said that the presence of birds did not indicate a structural problem with the tree. The neighbors' speculative testimony that something must have been wrong with the tree is supported only by hindsight, not by any scientific or evidentiary basis. This is the kind of speculation that this Court rejected in *McCune v Meijer, Inc*, 156 Mich App 561; 402 NW2d 6 (1986). Finally, defendants assert that because they had no actual or constructive notice of the problem, both plaintiff's counts—negligence and nuisance—must fail.

Plaintiff responds that he successfully established a question of fact whether defendants had constructive notice. Credibility of the neighbor-witnesses is for the jury to decide. Plaintiff is not insisting on constant inspection of perfectly healthy trees, but argues that if three uninterested neighbors found the tree's condition to be of concern and something that should be

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[2] The experts agreed that had the tree been properly inspected by a professional the dangerously decayed condition of the tree's interior would have been discovered. But that is not the issue that must be addressed here for purposes of this appeal; rather, the relevant question is whether there is a genuine issue of material fact regarding whether defendants knew or should have known of the need to have the tree inspected in the first place.

addressed, a jury could find that a reasonable property owner would have noticed the birds, called an expert, and heeded advice to have the tree removed. Other jurisdictions have recognized a duty of landowners to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees near public ways. Finally, plaintiff asserts that defendants' motion did not address the nuisance claim, and so even if this Court finds his evidence insufficient to create a question of fact regarding negligence, the suit should be allowed to proceed on the nuisance count.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

"'To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to establish that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages.'" *Latham v Nat'l Car Rental Systems, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (citation omitted). Michigan Civil Jury Instruction 19.09 provides:

> A possessor of land . . . has a duty to exercise ordinary care in maintaining his . . . premises in a reasonably safe condition in order to prevent injury to persons traveling along an adjacent . . . sidewalk . . . . [Brackets and italics omitted; cited supporting authorities in commentary are *Grimes v King*, 311 Mich 399; 18 NW2d 870 (1945), and *Parsons v E I Du Pont De Nemours Powder Co*, 198 Mich 409; 164 NW 413 (1917).]

"[A]lthough a landowner is not an insurer of persons on abutting highways, persons traveling upon a public street have a right to absolute safety, while in the exercise of ordinary care, against all accidents arising from things so situated with reference to the street that if they fall they will injure the travelers." *Langen v Rushton*, 138 Mich App 672, 679; 360 NW2d 270 (1984), citing *Grimes, supra.*[3] "Where the charge of negligence is the failure to maintain the

[3] Favorably quoting 2 Restatement Torts, 2d, § 363, p 258, the *Langen* panel stated that "'[a] possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable (continued…)

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." *Oppenheim v Pitcairn*, 293 Mich 475, 477-478; 292 NW 374 (1940); see also *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (possessor of land is subject to liability only if he or she knows of the dangerous condition or by the exercise of reasonable care would have discovered the hazard). "The mere occurrence of an accident is not, in and of itself, evidence of negligence." *Clark v K-Mart Corp*, 242 Mich App 137, 140; 617 NW2d 729 (2000), rev'd on other grounds 465 Mich 416 (2001).

In this case, plaintiff has failed to submit documentary evidence sufficient to create an issue of fact regarding whether defendants had actual or constructive knowledge of the hazard such that a duty arose to have the tree cut down or to have the tree inspected and examined. Defendants hired a tree trimmer to perform routine and regular trimming of the tree. That trimmer testified that he did not see any holes or damage with respect to the tree when he trimmed it in January of 2000 and October of 2004. He also testified that, although he removed some dead limbs, he did not observe anything to suggest that the tree itself was dead or diseased. Plaintiff's own expert testified that, based on the photograph taken about a year before the accident, he would not have recommended that the tree be removed; it looked like a live tree, not a dead one. Further, plaintiff's expert agreed that every four years was not an unreasonable time for tree maintenance. Plaintiff, however, argues that the testimony from three neighbors, who stated that the tree had lots of birds in it, was sufficient to create a duty for defendants to contact an expert to inspect the tree, which would have led to removal of the tree. Both parties' tree experts, however, testified that the presence of a large number of birds would not explain why the tree fell; defendants' expert opined that the presence of birds had no relevance. More specifically, plaintiff's expert testified:

> *Q*. You agree . . . that even once you were intrigued and reading about the birds in the tree that you did not contact the city or perform any other investigation to see what kinds of birds they were or what it was that attracted them to the area?
>
> *A*. That is true.
>
> *Q*. Okay. Did you see any evidence in the sample that we have in this bag – tree trunk core samples, of any insects in that sample, dead or alive?
>
> *A*. No.
>
> * * *
>
> *Q*. [D]oes the fact that there were birds observed in the tree, in your view, help explain why the tree fell over?

(…continued)

risk of harm arising from the condition of trees on the land near the highway.'" *Langen, supra* at 680.

A. No.

Plaintiff cannot not base her claim on the speculation and conjecture of the neighbors, especially when his own expert placed no relevance on the large number of birds roosting in the tree. See *Skinner v Square D Co*, 445 Mich 153, 164-167; 516 NW2d 475 (1994). A conjecture is an explanation consistent with known facts, but not deducible from them as a reasonable inference, and a party opposing summary disposition must present more than conjecture and speculation in order to create an issue of fact. *Libralter Plastics, Inc v Chubb Group of Ins Companies*, 199 Mich App 482, 486; 502 NW2d 742 (1993). In *McCune, supra* at 563, this Court stated that, while the plaintiff's theory had a certain logical consistency, as could arguably be said about the neighbor's testimony concerning the birds, equally plausible explanations existed, and the plaintiff's

> evaporation theory was completely unsupported by any expert testimony, either by deposition or affidavit, and thus amounts to no more than sheer speculation and conjecture. Since "[m]ere conjecture does not meet the burden of the opposing party to come forward with affidavits or some other evidentiary proof to establish that there exists a genuine issue of material fact," summary disposition was appropriate. [Citations omitted.]

It would lack logic for us to conclude that a reasonable landowner had constructive knowledge of a potential danger posed by the tree on the basis of the presence of the birds, where plaintiff's own expert testified that the birds' presence provided no explanation as to why the tree fell. Moreover, testimony by laypeople (the neighbors) would not be admissible regarding whether the presence of birds meant the tree was structurally sound. See MRE 701-702.

The photographs of the tree after the accident reflect that it had a canopy of green leaves. The parties do not appear to dispute that a tree can look normal from the outside, even when the inside is damaged. There were no visible, apparent, and patent manifestations of decay and rot, which would have placed defendants on notice. Where the tree at issue appeared outwardly healthy, none of the neighbors contacted defendants or the city with concerns about the tree, and where at least one of the neighbors testified she walked under the tree regularly, we conclude that the trial court erred in ruling that the presence of a large number of birds created a fact question regarding whether defendants had a duty to contact an expert. Hindsight provides the certainty of the lay neighbors that something was wrong with the tree. Although this was a tragic event, the record does not support plaintiff's claims that defendants are liable.

Plaintiff's nuisance count also fails. Plaintiff argues that, with respect to nuisance claims, negligence is not an element and the exercise of reasonable care is not a defense; therefore, the nuisance claim must survive. We first note that, while count II of plaintiff's complaint is entitled nuisance, the allegations provided that defendants improperly maintained the premises, that "the [d]efendants were aware of the condition of the tree and failed to take reasonable action to abate the nuisance, and that the decedent suffered severe injuries culminating in death "[a]s a result of [d]efendants *negligence*." (Emphasis added.) "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007), citing *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). Plaintiff's allegations sound in negligence regardless of the nuisance moniker used by plaintiff;

therefore, the claim fails for the reasons stated above. Moreover, the facts and circumstances of this case simply do not give rise to a nuisance claim, see *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190-191; 540 NW2d 297 (1995), and plaintiff's argument is essentially an attempt to have defendants held strictly liable, which is not appropriate in the context of this action.

We reverse and remand for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering