

STATE OF MICHIGAN
COURT OF APPEALS

WESLEY N. SCHMIDT,

Plaintiff-Appellant,

v

WESLEY L. SCHMIDT and PATRICIA N.
SCHMIDT,

Defendants-Appellees.

UNPUBLISHED

November 25, 2003

No. 241790

Calhoun Circuit Court

LC No. 01-002970-NO

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arises out of injuries plaintiff sustained while helping his father, defendant Wesley L. Schmidt, trim trees at his parent's home. Plaintiff fell out of a bucket that was attached to a tractor. Defendant Wesley L. Schmidt was operating the tractor. Plaintiff filed suit alleging that the accident occurred because defendant Wesley L. Schmidt operated the tractor in a negligent manner. He also alleged that as a business invitee, defendants owed him a duty to use reasonable care to protect him from a dangerous condition on the land.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that no genuine issue of fact existed as to whether defendant Wesley L. Schmidt acted in a negligent manner. Specifically, defendants contended that plaintiff's assertion in his deposition testimony that the bucket "had to have" jumped was based on inadmissible speculation. In granting defendants' motion for summary disposition, the trial court held that no basis existed for a premises liability claim because plaintiff failed to allege that he was injured due to the existence of a dangerous condition on the land. The trial court further found that the evidence did not create a genuine issue of fact as to whether defendant Wesley L. Schmidt acted in a negligent manner by causing the tractor or bucket to jump.

On appeal, plaintiff argues that a question of fact remained regarding whether defendant Wesley L. Schmidt caused the tractor to jump. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo.¹

"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."² Legitimate inferences can establish a negligence claim provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture."³

Causation requires proof that the defendant's breach of duty more likely than not caused the injury.⁴ Here, plaintiff stated in his deposition that the tractor or bucket must have jumped, but that he could not be certain that was what happened. In a subsequent affidavit, however, plaintiff alleged that the tractor and bucket jumped. A party cannot create an issue of fact by submitting an affidavit that contradicts prior testimony.⁵ The possibility that a breach of duty by defendant Wesley L. Schmidt caused plaintiff to sustain injuries is insufficient to establish causation.⁶ Accordingly, plaintiff failed to make out a prima facie case of negligence.

The trial court also properly held that this case did not present a premises liability claim because plaintiff failed to assert that his injuries occurred due to the presence of a dangerous condition on the land. A premises liability claim requires proof of an injury due to the existence of a dangerous condition on the land, and not due to an activity conducted on the land.⁷

Affirmed.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter

¹ *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

² *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

³ *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

⁴ *Skinner v Square D Co*, 445 Mich 153, 165-166; 516 NW2d 475 (1994).

⁵ *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993).

⁶ *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977).

⁷ See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).