STATE OF MICHIGAN

COURT OF APPEALS

MICHELA MANGA, a Minor, by her Next Friend, BEPIN MANGA,

Plaintiff-Appellant,

v

GREAT LAKES CROSSING OF AUBURN HILLS,

Defendant-Appellee.

UNPUBLISHED
December 2, 2003

No. 241624
Oakland Circuit Court
LC No. 99-019779-NO

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

PER CURIAM.

Plaintiff appeals by delayed leave granted from a trial court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The minor plaintiff was injured while playing on a giant toy cupcake in a designated play area in the food court of defendant's mall. The trial court ruled that there was no disputed issue of material fact as to how the incident occurred, which was while plaintiff was jumping off the cupcake, and determined that the evidence did not establish a breach of duty.

Plaintiff first contends that the trial court erred in finding that the child jumped off the cupcake because her father testified otherwise.

The law is clear that in deciding a motion for summary disposition, the court may not make findings of fact or weigh credibility of witnesses. *Nesbitt v American Community Mut Ins Co,* 236 Mich App 215, 225; 600 NW2d 427 (1999). Rather, it is to view all the evidence in the light most favorable to the nonmoving party and determine whether a genuine issue of material fact exists. *Smith v Globe Life Ins Co,* 460 Mich 446, 455; 597 NW2d 28 (1999).

The trial court did not make a finding of fact that plaintiff jumped. Rather, it determined whether her father's testimony established a genuine issue of material fact as to how the incident occurred. Plaintiff's father is the only person who witnessed the accident. In his deposition testimony, given through an interpreter, he stated alternately that plaintiff fell, slid off, or jumped off the cupcake. When counsel pointed out that those words all had different meanings in

English and he needed to be precise, plaintiff's father ultimately stated that plaintiff jumped off the cupcake and then lost her balance and fell. That being the last word on the subject and the only evidence available, the court did not err in finding that there was no genuine issue of fact as to how the accident occurred.

Plaintiff next contends that the trial court erred in granting defendant's motion. The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith, supra*.

The evidence established that an accident occurred. The minor plaintiff jumped off a play structure and broke her arm. An accident is not, in and of itself, evidence of negligence. *Skinner v Sqare D Co,* 445 Mich 153, 164; 516 NW2d 475 (1994). The plaintiff must present some facts that either directly or circumstantially establish negligence. *Id*., *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3, 9; 279 NW2d 318 (1979). To prove negligence, a plaintiff must establish a breach of duty owed by the defendant which is a proximate cause of the plaintiff's injuries. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

There is no dispute that defendant owed the minor plaintiff a duty; she was an invitee on defendant's premises which were held open for a commercial purpose. *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 604; 614 NW2d 88 (2000). To establish a breach of that duty, the plaintiff must show that there is a dangerous condition on the land and that defendant (a) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (b) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc,* 214 Mich App 431, 432-433; 542 NW2d 612 (1995).

Plaintiff has the burden of producing evidence to show that a genuine issue of material fact exists on each element of her case. *Hazle v Ford Motor Co*, 464 Mich 456, 465 n 10; 628 NW2d 515 (2001); *Smith, supra*. This burden includes establishing a casual link between defendant's alleged negligence and the accident. *Pete v Iron Co,* 192 Mich App 687, 689; 481 NW2d 731 (1992). Here, plaintiff has not presented any evidence, apart from the accident itself, to show that the play area was unreasonably dangerous. There is no evidence that the play equipment was defective or violated known safety standards. Plaintiff alleged in her complaint that the play equipment was unreasonably dangerous because it was made of hard plastic and lacked padding, but she presented no evidence to show the composition of equipment. Nor has she shown what caused her injury contact with hard plastic or to some other hard surface of unusual stress caused by the position in which she fell. While plaintiff's theory is plausible, that is not enough. If the "evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." *Skinner, supra* at 166-

167, quoting 57A Am Jur 2d, Negligence, § 461, p 442. Because plaintiff failed to establish a causal link between the accident and any negligence on the part of the defendant, the trial court did not err in granting defendant's motion. *Pete, supra*.

Finally, plaintiff contends that she had a valid claim under the doctrine of attractive nuisance. Because plaintiff did not preserve her attractive nuisance claim nor did she adequately brief the merits of her claim, it is deemed abandoned. *Prince v MacDonald,* 237 Mich App 186, 197; 602 NW2d 834 (1999).

We affirm.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter