

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL J. WILLIAMS and JANEEN
WILLIAMS,

UNPUBLISHED
January 12, 2006

Plaintiffs-Appellants,

v

No. 257566
Saginaw Circuit Court
LC No. 03-049120-NO

HAROLD JOHNSON, WILLIAM
HOLLERBACK and H & W FARMS,

Defendants-Appellees,

and

BIRCH RUN INVESTMENT COMPANY,

Defendant.

Before: Bandstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants Harold Johnson, William Hollerback, and H & W Farms in this premises liability action. We affirm.

Plaintiff Michael Williams (hereinafter plaintiff¹) was employed by Birch Machinery. Defendant Johnson and his wife are the sole shareholders of Dixie Machinery, d/b/a Birch Machinery. Johnson is also president and an employee of Birch Machinery. Birch Machinery operated as a welding, machine repair, and machine manufacture shop. Across the parking lot from the Birch Machinery shop is another building. The Birch Run Investment Company, a partnership whose sole partners are Johnson and his wife, owns both buildings.

¹ Plaintiff Janeen Williams sought damages for loss of consortium. Given the derivative nature of this claim, we will hereafter refer to Michael Williams as plaintiff.

According to plaintiff, while working for Birch Machinery Johnson asked plaintiff to empty the contents of a planter machine into a bin located directly outside the door of the Birch Machinery shop. Plaintiff vacuumed the contents of the planter into a bin, which he then moved with a forklift into the building next to the Birch Machinery shop. The building was used by defendant H & W Farms for storage of machinery and was jointly owned by Johnson and his son-in-law, defendant William Hollerback. While inside the building plaintiff climbed on top of the load to secure it. At that point he brushed against a live electrical conduit hanging from the ceiling and received an electric shock. Plaintiff fell to the ground, lost consciousness, and sustained serious injury.

Plaintiff filed a premises liability suit against defendants Johnson, Hollerback, and H & W Farms. The trial court granted summary disposition in favor of Johnson, Hollerback, and H & W Farms, finding that H & W Farms was not a legal entity and that neither Hollerback nor Johnson was a proper party of interest in the premises liability action because neither was an owner or possessor of the premises on which defendant was injured.

Plaintiff first argues that the trial court erred in granting summary disposition in favor of Johnson. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must support its position with affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Once the moving party has met this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). When the burden of proof at trial would rest on the opposing party, the opposing party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts to show that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

To prevail against Johnson under a premises liability theory, plaintiff must show that Johnson was in possession and control of the premises where plaintiff was injured. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702, 705; 644 NW2d 779 (2002). "Ownership alone is not dispositive." *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 566; 563 NW2d 241 (1997). "Possession and control are certainly incidents of title ownership, but these possessory rights can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Id.* A possessor of land is: "'(a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).'" *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980), quoting 2 Restatement Torts, 2d, § 328 E, p 170. This Court has defined possession as "[t]he right under which one may exercise control over something to the *exclusion of all others*." *Derbabian, supra* at 703, quoting Black's Law Dictionary (7th ed.) (emphasis in *Derbabian*).

Here, evidence was presented that Johnson did not individually own the premises where plaintiff was injured and that the Birch Run Investment Company owned the premises. The Birch Run Investment Company was dismissed as a party in the present action because the statute of limitations had run as to it. Plaintiff failed to offer any evidence suggesting that Johnson individually possessed or controlled the premises where plaintiff was injured. Plaintiff's entire factual basis for Johnson's alleged possession and control over the building where he was injured is founded on plaintiff's affidavit, which averred in relevant part that:

[H & W Farms] owns farming equipment and stores fertilizer in the building in which I was hurt, which is located next to the Birch Machinery building where I worked. Along with other employees, I did light repairs on that farming equipment at various times during my employment . . . I believe that Harold Johnson is the H in H & W Farms and that William Hollerback is the W in H & W Farms.

Regardless of whether H & W Farms was storing equipment in the building, plaintiff's affidavit fails to establish that Johnson as an individual possessed the building or exercised exclusive control over it. In addition, contrary to plaintiff's assertion on appeal, this statement does not establish that Johnson regularly instructed Birch Machinery employees to enter the building where he was injured. Moreover, plaintiff's allegation that Johnson directed him to enter the building where he was injured is not supported in the record by affidavit, deposition testimony, or an allegation contained in the complaint. The record merely indicates that Johnson instructed plaintiff to empty the planter that was located directly outside of the Birch Machinery shop. Because plaintiff failed to offer any evidence that Johnson individually possessed or controlled the building where the injury occurred, the trial court properly concluded that Johnson was not a proper party to the action.

Plaintiff also argues that that the trial court erred in finding that H & W Farms was not a legal entity and thus not a proper party to the action. Plaintiff has abandoned this issue on appeal by failing to cite or apply law in reference to this issue. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald