STATE OF MICHIGAN

COURT OF APPEALS

CATHIE PULLEY, Plaintiff-Appellant,	UNPUBLISHED November 17, 2016
v	No. 328202 Genesee Circuit Court
CONSUMERS ENERGY COMPANY, Defendant-Appellee.	LC No. 14-102857-NO

Before: STEPHENS, P.J., and SAAD and METER, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals the trial court's order that granted defendant's motion for summary disposition. For the reasons provided below, we affirm.

I. BASIC FACTS

Plaintiff resides in Clio, Michigan, and defendant supplies electric power in that area.

On July 19, 2013, a severe weather system moved into the Flint/Clio area. According to defendant's report, "[t]he system brought thunderstorms, high winds, with gusts reaching 55+ mph, and heavy lightning and rains." Plaintiff was one of the 83,283 customers who had their electric service affected by the storms. Indeed, on July 19, she observed that the power was surging and going on and off in her house, and she called defendant at 11:03 a.m. to report the abnormality. Shortly thereafter, plaintiff lost power. Later that day, a crew authorized by defendant came out to the area near plaintiff's home and performed repairs on a downed power line, which resulted in power being restored to all the affected homes in the immediate area.

Three days later, on July 22, the day that events occurred that gave rise to plaintiff's claim, plaintiff again noticed surging power inside her house and called defendant to report it. Plaintiff then saw several people gathered outside looking up at the power lines. When she went out to investigate, she noticed that it was sunny and that some power lines located a house or two away were "smoking." After recording a video, plaintiff went back inside her home and took a shower. Plaintiff states that when she was done and touched the handle with her left hand to turn the water off, she felt a shock run up through her left arm.

Plaintiff's fiancé, John Pulley, called defendant to report that plaintiff had been physically shocked and injured. Bryan Morawski, an Electric Field Leader with defendant, was

dispatched to plaintiff's home. When Morawski arrived at the location, he saw that one of the 120-volt power lines located west of plaintiff's house "had been knocked down by a broken tree limb/branch." Morawski noted that this downed line was at a different location than the downed power line that was repaired three days earlier on July 19. Morawski further stated in an affidavit that the 120-volt power line that was struck by the limb/branch fell onto a nearby "neutral" (i.e., unenergized) line running parallel to the 120-volt line. This neutral line runs to plaintiff's home as well as other homes in the area. As a built-in precaution, when the neutral line becomes energized, it causes a nearby transformer fuse to "trip," which cuts power to the immediate area, including plaintiff's home. Morawski noticed that the fuse indeed had tripped and power was not being supplied to plaintiff's home when he arrived.[1] Defendant's crews made repairs and restored power to the area.

Plaintiff thereafter complained of neck and back pain and numbness in her left arm. She filed suit against defendant and alleged that defendant's negligence caused her injuries.

Defendant moved for summary disposition under MCR 2.116(C)(10) and made four arguments why plaintiff's claim was barred. First, defendant argued that its Tariff (also called an electric rate book) barred plaintiff's claim. The Tariff acts as a contract between defendant and its customers and states that defendant is not responsible for interruptions or variations in service that are caused by conditions outside defendant's control, such as "action of the elements" and "storm[s]." Second, defendant asserted that it was entitled to summary disposition because there was no evidence that it acted unreasonably in not trimming tree branches near the power lines in question. Third, defendant claimed that any power surges could not have caused plaintiff's injuries. Defendant relied on the affidavit of Professional Engineer, James Heyl, who stated that after conducting an inspection of plaintiff's home, there was no electrical connection to the water piping, which made it impossible for any electricity to flow into the piping. Accordingly, Heyl opined that plaintiff "could not have sustained an electrical shock while using her shower on July 22, 2013." Fourth and lastly, defendant claimed that, in any event, plaintiff cannot offer any evidence that defendant was negligent because she does not have an expert who can offer such testimony.

Plaintiff responded and asserted that the Tariff did not bar her claim because the underlying allegation does not involve "service interruption" but instead "negligence that led to an electrical shock." Plaintiff also stated that she can establish a prima facie case of negligence because this case is not necessarily about tree trimming. For the first time, plaintiff referenced the doctrine of res ipsa loquitur and claimed that this doctrine allowed her to meet the causation element in a negligence action. Plaintiff further claimed that, contrary to Heyl's affidavit, the power surge indeed caused her injuries. Plaintiff summarized, "it does not take an expert to determine that electricity arching between power lines and melting wires into the home is evidence of negligence." Plaintiff further asserted that the facts as presented "do[] not require an

[1] Plaintiff testified that she was not sure whether the power was still surging when she took her shower and did not recall the power going out at all on July 22.

expert's interpretation to know that this is not normal electrical behavior for a well-maintained system."

The trial court granted defendant's motion. The court found that plaintiff had an evidentiary "gap" with respect to causation and explained:

> [T]he Court can believe plaintiff's claims that she received some kind of shock when she touched the shower handle. The Court can believe plaintiff's claims that she saw smoking power lines outside of the house. There's a gap between what happened with the smoking power line on the outside of the house and what happened inside the house where the shower was. And for this claim to proceed[,] plaintiff would have to have someone who could show how that electricity moved from the smoking line to the shower handle and there's a gap. There's no showing of that, and . . . defendant's got an expert saying that there was no path for the electricity to have entered the shower. Plaintiff does not have an expert showing that there is a path.

The trial court also found that plaintiff's reliance on res ipsa loquitur was misplaced because she needed, but failed, to provide an expert who could address the causation element. Further, the trial court ruled that the Tariff precluded any claims that arose from a storm and that plaintiff never provided any evidence to contradict defendant's witness who testified that the damage on July 22 was caused by a downed tree limb as a result of a storm.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Alcona Co v Wolverine Envtl Prod, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* The motion is properly granted when the proffered evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). "The nonmoving party may not rest of the allegations in the pleadings, but must set forth, through documentary evidence, specific facts demonstrating a genuine issue for trial." *Id.*

III. ANALYSIS

Defendant moved for summary disposition, and the trial court granted the motion on two different grounds. We will address each one in turn.

A. TARIFF

At trial, defendant sought summary disposition on the theory that the Tariff precluded plaintiff's suit and the trial court agreed. The Tariff provides, in pertinent part, the following:

> The Company shall not be liable for interruptions in the service, phase failure or reversal, or variations in the service characteristics, or for any loss or damage of any kind or character occasioned thereby, due to causes or conditions beyond the Company's reasonable control, and such causes or conditions shall be deemed to specifically include, but not be limited to, the following: acts or omissions of customers or third parties; operation of safety devices except when such operation is caused by the negligence of the Company; absence of an alternate supply of service; failure, malfunction, breakage, necessary repairs or inspection of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry; act of God; war; action of the elements; storm or flood; fire; riot; labor dispute or disturbances; or the exercise of authority or regulation by governmental or military authorities.

Plaintiff does not dispute that the Tariff is valid and governs. Plaintiff instead claims that it simply is not applicable because defendant's proffered explanation for the power surges that took place on July 22, 2013, do not comport with the evidence. Plaintiff points out that Morawski's claim that a storm caused a tree branch to fall on July 22 is belied by the record because the only record of the weather that day shows that it was "sunny," i.e., there was no storm that day to have caused any branch to fall to cause any disruption to the electric service. But this presumes that a storm can only disrupt electric service on the day it occurs. Clearly, storm damage could cause branches to weaken and fall at a later time, well after the storm has passed through. And assuming arguendo that a storm, per se, did not cause the branch to fall three days after the storm occurred, this is not dispositive, as the Tariff clearly contemplates any and all instances that are "beyond the Company's reasonable control." The Tariff provides a list of examples of such things that are beyond defendant's control, but it stresses that the list is *not* exclusive. Therefore, the fact that it did not "storm" on July 22 does not determine whether the Tariff applies. The question is whether the cause of the disruption on July 22 was outside the reasonable control of defendant.

Here, Morawski stated that on July 22, a power line was knocked down by a "broken tree limb/branch." Morawski further averred that "[t]he July 22 broken tree limb incident was caused by a severe storm." It was incumbent on plaintiff to offer evidence to contradict Morawski's assertion that a broken tree limb caused the energized line to touch the nonenergized "neutral" line on July 22. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Yet, plaintiff offered no such evidence. Thus, there is no question of fact as to how the power line came down on July 22. Plaintiff also has offered nothing to show that this breaking and falling of the tree limb was not "beyond the control" of defendant.

Plaintiff insinuates, as she did at the trial court, that the damage caused on July 22 was caused by the faulty repair work that defendant performed on July 19. And, while if true, this might circumvent the Tariff, plaintiff has failed to offer any *evidence* to support such a theory. Indeed, the only evidence on this subject demonstrates just the opposite—that the July 19 repair had nothing to do with the incident on July 22. Morawski explained that the location of the July 22 downed power line (and repair) was different from where the July 19 downed line (and repair) occurred. He further stated that the damage caused by the tree limb on July 22 was unrelated to the incident on July 19 and that any power surge on July 22 would have been unrelated to the

July 19 event. Plaintiff's mere allegations to the contrary cannot refute defendant's evidence. See *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002) ("In opposition to the motion [under MCR 2.116(C)(10)], the nonmoving party may not rest upon mere allegations or denials, but must proffer evidence of specific facts showing that there is a genuine issue for trial.").

In light of plaintiff's failure to produce any evidence to rebut defendant's evidence that showed that the branch falling on July 22 was beyond defendant's control, the Tariff precludes plaintiff's claim for damages. We also note that plaintiff's claim that the Tariff only represents a limitation on economic damages and does not apply to personal injury damages is not supported in the plain language of the Tariff. To the contrary, the Tariff's broad language of "any loss or damage of any kind or character" clearly contemplates *all* types of damages or losses, which includes personal injury.

Accordingly, defendant's motion for summary disposition was properly granted for this reason alone.

B. CAUSATION

The trial court also held that plaintiff's failure to produce any evidence of causation was fatal to her claim. "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." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (footnote omitted).

In its motion for summary disposition, defendant argued that there was no evidence of causation. In support of its motion, defendant offered the affidavit of Heyl, who stated that defendant's electricity had no path to enter plaintiff's shower. Indeed, Heyl stated that "[i]t was impossible for a complete circuit to have existed that would allow electrical current to enter the shower whereby a person would receive an electrical shock." Plaintiff presented no expert testimony to refute Heyl's contention. As the trial court ruled, the failure to produce any evidence on this essential element warrants that defendant's motion for summary disposition be granted. See *Quinto*, 451 Mich at 362. The mere fact that plaintiff alleges that she received a shock when she touched the shower handle is insufficient to show that how any negligent act on defendant's part *caused* that shock to occur.[2]

In opposing defendant's motion for summary disposition, plaintiff relied on the doctrine of res ipsa loquitur, whose purpose "is to create an inference of negligence when the plaintiff is

[2] Based on the evidence presented and viewing it in a light most favorable to plaintiff, a court necessarily is left with the conclusion that, although there was a power surge, it was scientifically impossible for it to affect the shower handle. In other words, the evidence suggests that whatever sensation plaintiff experienced in the shower could not have been related to any external power surge. In order to create a material question of fact, plaintiff needed an expert who could explain how the power surge could have propagated to the shower.

unable to prove the actual occurrence of a negligent act." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). Our Supreme Court in *Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005), explained that in order to invoke the doctrine, a plaintiff must satisfy the following conditions:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
>
> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [Quotation marks, citations, and brackets omitted.]

The Supreme Court noted that for the first component, "the fact that the injury complained of does not ordinarily occur in the absence of negligence must either be supported by expert testimony or must be within the common understanding of the jury." *Id.* at 7 (quotation marks and citation omitted). Here, plaintiff offered no expert testimony to show that the event does not ordinarily occur in the absence of someone's negligence. And, we cannot conclude that such a determination is within the common understanding of a lay jury. Electrical surges and the like can occur for a variety of reasons, not all of which are because of someone's negligence. Indeed, common sense and experience dictates that storms, high winds, snow, sleet, and falling branches/trees can cause power disruptions. All of these instances can impact electrical service without anyone's negligence. Therefore, because plaintiff cannot satisfy the first requirement to invoke res ipsa loquitur, plaintiff was not entitled to any inference of negligence.

Nor did plaintiff satisfy the second requirement to invoke the doctrine. At the trial court, plaintiff asserted that the "power lines leading to [plaintiff's house] are in [defendant's] exclusive control." While this fact may be true, what is unspoken is also true: the electrical circuitry *inside* plaintiff's home is not under defendant's control. Obviously, with plaintiff's allegation that she received an electric shock in the shower, the home's internal electrical system is extremely relevant to any determination regarding causation. Thus, this second requirement for res ipsa loquitur is not met as well.

With res ipsa loquitur unavailable to plaintiff, she is not entitled to an inference that defendant was negligent. Accordingly, she had to produce some evidence of defendant's negligence, and she failed to do so. As a result, defendant was entitled to summary disposition.

Affirmed. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Cynthia D. Stephens
/s/ Henry William Saad
/s/ Patrick M. Meter