STATE OF MICHIGAN

COURT OF APPEALS

JERRY MORGAN and ARLENE MORGAN,

Plaintiffs-Appellants,

v

JOHN NICKOWSKI,

Defendant-Appellee,

and

DEREK LOWREY, also known as DEREK LOWERY,

Defendant.

UNPUBLISHED
November 28, 2017

No. 334668
Wayne Circuit Court
LC No. 15-011698-CZ

Before: JANSEN, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendant, John Nickowski, in this negligence and premises liability action involving an attack on plaintiffs' dog, Axle. We affirm.

On May 13, 2015, Arlene Morgan brought Axle with her out into her backyard to do some gardening. At around 10:00 a.m. she left Axle out and went inside to retrieve some gloves. During her brief absence, Arlene heard barking at the back fence of her yard. Arlene ran outside and saw Axle on the opposite side of her fence and two pit bulls "on top of him." Arlene observed three or four men in the other yard, one of whom had a shovel and was attempting to beat the pit bulls off of Axle. Arlene also grabbed a shovel, and cut her hand on the fence as she reached over to help. Eventually, they succeeded in stopping the attack. Arlene called Jerry Morgan, Axle's co-owner, and the two took Axle to a veterinary clinic for emergency care. Axle also required specialty care about a week after the incident. Combined, the veterinary bills amounted to around $8,000.

Later, it was discovered that the two dogs belonged to Derek Lowrey, one of several tenants living in the house behind Arlene's backyard. The house where Lowrey, his dogs, and his co-tenants reside is owned by their landlord, defendant John Nickowski.

No one claims to have seen Axle enter the yard containing the pit bulls. Plaintiffs suggest that the kinds of injuries Axle sustained to his neck and head on one side, and the markings on that same side indicate that Axle was grabbed by the pit bulls and pulled over the fence before he was mauled. Although Nickowski's property was bounded by a four-foot-tall cyclone fence, Arlene claims that a two-foot-tall pile of leaves had collected in the corner of Nickowski's yard, giving Lowrey's dogs a boost to the top.

Plaintiffs brought a three-count complaint against Nickowski, Lowrey, and "dog owners 1-10," alleging (1) strict liability under MCL 287.351 against defendant dog owners, (2) negligence as to defendant dog owners, and (3) negligence as to defendant landlord Nickowski. Nickowski subsequently moved for summary disposition of plaintiffs' negligence claim under MCR 2.116(C)(10), conceding that the facts of the incident were undisputed but arguing that he had no duty to protect plaintiffs and was therefore entitled to judgment as a matter of law. Plaintiffs objected to the motion, and argued that if Nickowski had no duty in negligence or premises liability, the trial court should allow plaintiffs to amend their complaint to include a claim against Nickowski for perpetuating a nuisance. After a hearing on both motions, the trial court granted Nickowski's motion for summary disposition and denied plaintiffs' motion to amend their complaint as futile.

On appeal, plaintiffs first argue that the trial court erred when it granted Nickowski's motion for summary disposition under MCR 2.116(C)(10) because a genuine dispute of material fact remained and the trial court improperly shifted the burden of proof to plaintiffs before granting Nickowski's motion. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a complaint." *Urbain v Beierling*, 301 Mich App 114, 122; 835 NW2d 455 (2013). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Const, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). However, documents submitted will only be considered "to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). A party opposing summary disposition under MCR 2.116(C)(10) may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.*

The existence of a legal duty is a question of law. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004). Therefore, whether the common law imposes a specific duty on a landlord is a question this Court reviews de novo. *Bailey v Schaaf*, 293 Mich App 611, 627; 810 NW2d 641 (2011).

To establish a prima facie case of negligence, a plaintiff must prove four elements: 1) duty, 2) breach of that duty, 3) causation, and 4) damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Plaintiffs argue that Nickowski, as a landlord, had a duty to (1) investigate his property, (2) maintain the property and the fence around it, (3) abate nuisances, (4) warn of dangerous conditions on the property, and (5) take reasonable measures to avoid foreseeable harm. However, plaintiffs fail to cite any authority either to support that a Michigan landlord lacking any sort of control over leased property is burdened with such responsibility or that Nickowski, in particular, owed any such duty to plaintiffs. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). "This Court is not required to search for authority to sustain or reject a position raised by a party without citation of authority." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 220; 761 NW2d 293 (2008). Because plaintiffs failed to develop their argument, we reject it as abandoned on appeal. *Id*.

In Michigan, "the only possible way that [a landowner] could be held liable [for injuries to a third party sustained by his tenant's dog] on a common law negligence theory would be if he knew of the dog's vicious nature." *Szkodzinski v Griffin*, 171 Mich App 711, 714; 431 NW2d 51 (1988). Landlord liability under a premises liability theory requires a similar finding:

> "The general rule is that, in conventional settings in which premises are rented by a tenant who acquires exclusive possession and control, the landlord is not liable for attacks by animals kept by the tenant on those premises where the landlord had no knowledge of the animal or its dangerous proclivities at the time of the initial letting of the premises. . . .
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> The principle with respect to the liability of a landlord whose tenant comes into possession of the animal after the premises have been leased [is] (that to establish liability it must be shown that the landlord had knowledge of the vicious propensities of the dog and had control of the premises or other capability to remove or confine the animal). . . ." [*Feister v Bosack*, 198 Mich App 19, 23; 497 NW2d 522 (1993) (citation omitted).]

It is undisputed that Nickowski did not have possession and control over his tenants' home or the backyard where the dogs were kept. Generally, "[a] tenant has exclusive legal possession and control of the premises against the owner for the term of his leasehold[.]" *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 443; 581 NW2d 794 (1998). Once Nickowski leased the premises to Lowrey, he no longer had possession or control over it. Responsibility in premises liability cannot be extended to Nickowski when he did not own or possess the property in question or the dogs involved in the attack. See *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980) (explaining that an action for premises liability is conditioned upon the presence of both possession and control over the land).

While a common law negligence action does not necessarily require a showing of possession or control, a landlord cannot be held liable in ordinary negligence for a dog attack unless it can be shown that the landlord had knowledge of the attacking dog's propensity for viciousness. *Szkodzinski*, 171 Mich App at 714. Plaintiffs argue that a genuine dispute exists on

the matter of Nickowski's knowledge of the dangerous animals on his property. Specifically, plaintiffs point to documentary evidence and depositional testimony establishing that (1) Nickowski's tenants had a history of criminal activity, (2) a dog previously owned by Nickowski's tenants had bitten four people and been adjudicated dangerous, (3) a woman in the neighborhood suspected that the tenants' dogs had attacked her pet, and (4) other neighborhood residents had witnessed the tenants' dogs engaging in dangerous behavior.

Plantiffs' allegations of police activity might establish that Nickowski knew that his tenants were engaging in criminal behavior, but they do not create a question of whether Nickowski had any knowledge of the presence of dogs on the tenants' property. Although plaintiffs claim that the tenants were frequently involved with the police, they produced only two police reports describing criminal activity on Nickowski's property. One contains Nickowski's name, but nothing in that report indicates that the criminal activity involved had anything to do with dogs. Additionally, the police report bearing Nickowski's name as a possible witness is dated October 21, 2015—five months *after* plaintiffs' dog was attacked. It is difficult to see how any knowledge of subsequent criminal behavior could have alerted Nickowski to the presence of vicious dogs on his property before plaintiffs' pet was attacked. The second police report does reflect a complaint involving a dog previously owned by the tenants. According to the report, the tenants' pit bull bit four people and was adjudicated dangerous. However, the report does not contain evidence that Nickowski was aware of the incident. Further, as plaintiffs concede, the prior complaint involved the tenants' *predecessor* pit bull, not the two pit bulls involved in the attack on plaintiffs' dog. The fact that the tenants' previous pet was dangerous was not evidence that the tenants' current pit bulls were dangerous, even if Nickowski had somehow been aware of the adjudication. Further, despite plaintiffs' argument to the contrary, the fact that the tenants were generally known to engage in criminal activity in their home would not constitute evidence that they would keep dangerous animals on the property.

Plaintiffs also suggest that if Nickowski ever inspected his property, he would have or should have known that his tenants were keeping vicious dogs. Plaintiffs point to a signed statement from Marcina Butcher, a resident of the same community where plaintiffs live and Nickowski rents property to Lowrey, as evidence that the dogs' vicious predispositions were obvious. Butcher claimed that she witnessed part of the attack on Axle, and explained that it reminded her of when her own dog had been found dead in Lowrey's backyard. According to Butcher, Lowrey had frequent contact with the police and with animal control. Butcher recalled that in the two years she had spent living next door to Lowrey, she had witnessed the dogs attack each other, attack another dog owned by Lowrey, and escape the backyard through the gate. Arlene also testified that she had observed the two dogs fighting with each other on occasion, and that she had "heard" that the dogs have been known to escape their yard and chase children around the neighborhood.

When opposing a motion for summary disposition, "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). The opinions of neighborhood residents and hearsay statements are not evidence creating a genuine dispute over whether Nickowski had personal knowledge of the dogs' presence or their vicious tendencies.

Even if all of plaintiffs' evidence were admissible, it would not establish that Nickowski could have known that his tenants kept pit bulls on their property or, more importantly, that the pit bulls engaged in vicious behavior. Plaintiffs both testified in their own depositions that they had no reason to believe that Nickowski had any knowledge of his tenants' pet ownership. Arlene testified that she had never seen Nickowski at all. Nickowski, in his own deposition, flatly denied having any knowledge of his tenants' dogs or the possibility that his tenants' dogs could be dangerous. Plaintiffs failed to set forth evidence to rebut Nickowski's deposition testimony and prove that Nickowski knew his tenants kept two vicious pit bulls. Plaintiffs did not establish a genuine issue of fact regarding the issue of knowledge, and Nickowski was entitled to judgment as a matter of law.

The trial court's consideration of Nickowski's motion was proper and did not reflect an improper burden-shifting from Nickowski to plaintiffs. A party moving for summary disposition under MCR 2.116(C)(10) must "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and support his or her motion with affidavits, depositions, admissions, or any other documentary evidence, MCR 2.116(G)(3). Under MCR 2.116(C)(10), the party moving for summary disposition has the initial burden of supporting its position by documentary evidence *or the lack thereof*. *Oliver*, 269 Mich App at 563-564. Once the movant has established that, on the facts presented, he is entitled to judgment as a matter of law, it becomes the non-movant's burden to establish that a genuine issue of fact exists where, if that fact weighed in the non-movant's favor, judgment might be rendered for the non-movant. *Id.* "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross v Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

In this case, Nickowski, as the movant, properly argued that based on the documentary evidence before the trial court, there were no disputed facts that, if resolved in plaintiffs' favor, could establish the crucial duty element of plaintiffs' claims. Thereafter, despite their protest on appeal, it was plaintiffs' burden under MCR 2.116(G)(4) to set forth evidence that a dispute of fact remained. Because they brought the complaint and would have shouldered the burden of proof at trial, plaintiffs could not rely on the allegations in their complaint. They were required to set forth specific evidence to create a dispute of material fact.

Plaintiffs suggest that because they set forth a variety of documentary and other evidence, and Nickowski relied only on his own statements of denial, the trial court must have failed to properly consider all of the evidence. We are unable to find any indication in the record that the trial court failed to consider all of plaintiffs' evidence. It is not the amount of evidence set forth by either party that determines the outcome of a summary disposition motion. It is whether the evidence properly establishes a genuine dispute of material fact to preclude the court's rendering a judgment in favor of one party or the other. Here, because the existence of a duty was the crucial issue, plaintiffs were required to set forth evidence to show that Nickowski knew of the dogs' presence on his tenants' property and that he knew that the dogs were vicious. Plaintiffs simply failed to meet their burden. Summary disposition under MCR 2.116(C)(10) was therefore appropriate.

Next, plaintiffs argue that the trial court abused its discretion when it denied their motion to amend the complaint to add a nuisance claim. Again, we disagree.

We review for an abuse of discretion a trial court's decision to deny a motion to amend a complaint. *Diem v Sallie Mae Home Loans, Inc*, 307 Mich App 204, 215-216; 859 NW2d 238 (2014). An abuse of discretion occurs only when the trial court's decision falls outside the range of reasonable and principled outcomes. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

A trial court should freely grant leave to amend a pleading "when justice so requires." MCR 2.118(A)(2). Motions to amend may be denied only for specific reasons such as (1) undue delay, (2) bad faith on the part of the movant, (3) repeated failure to cure deficiencies with any previous amendments, (4) undue prejudice to the opposing party, or (5) futility. *Franchino v Franchino*, 263 Mich App 172, 189-190; 687 NW2d 620 (2004). However, although motions to amend a complaint "are generally granted," futility is a proper basis for denial. *Diem*, 307 Mich App at 216. "An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face; (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *PT Today Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (citations omitted).

In this case, plaintiffs sought to amend their complaint to add a nuisance claim against Nickowski. Plaintiffs' amendment would have been futile. A nuisance claim against Nickowski is meritless on its face. Even assuming, arguendo, that the presence of a pile of leaves and two pit bulls on property owned by Nickowski could constitute a nuisance under the law, this writer can find no basis for imposing liability on Nickowski, the landlord, for the condition. " 'In general, even though a nuisance may exist, not all actors are liable for the damages stemming from the condition.' " *Sholberg v Truman*, 496 Mich 1, 6; 852 NW2d 89 (2014), quoting *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 191; 540 NW2d 297 (1995). "A defendant held liable for the nuisance must have *possession or control* of the land." *Sholberg*, 496 Mich at 6 (quotation marks and citation omitted; emphasis added). Ownership of the land alone does not create liability in nuisance, and "generally a landlord is not liable for a nuisance created by the tenant." *Id*. at 8-9. Our Supreme Court has made clear that an owner of property "cannot be held liable for a public nuisance that arose from that property, when someone other than the title owners is in actual possession of the property, is exercising control over the property, and is the one who created the alleged nuisance." *Id*. at 17.

Plaintiffs do not dispute that Nickowski had neither possession of nor control over the backyard containing the alleged nuisance on the day of the incident. Plaintiffs have not argued that Nickowski had any hand in creating the conditions that led to the alleged nuisance. There is simply no basis to impose liability on Nickowksi.

Additionally, plaintiffs' amended complaint simply restates the allegations raised in the initial complaint, styling them as a claim in nuisance in addition to negligence. As previously discussed, plaintiffs' initial complaint was subject to summary disposition on its merits, and restating the allegations made the proposed amended complaint no more likely to succeed. Amendment of the complaint was futile and the trial court did not abuse its discretion when it denied plaintiffs' motion to permit the amendment.

Finally, plaintiffs argue that the trial court's decision to grant summary disposition in favor of Nickowski and deny plaintiffs' motion to amend the complaint deprived them of their due process right to a jury trial and a fair hearing. We disagree.

Whether a party has been afforded due process is a question this Court reviews de novo. *Elba Twp v Gratiot County Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013).

Summary disposition has been an efficient method for determining whether issues of fact exist for jury determination upheld by Michigan Courts for more than 100 years. *People's Wayne County Bank v Wolverine Box Co*, 250 Mich 273, 277-278; 230 NW 170 (1930). Our Supreme Court considered whether summary disposition deprived a complainant of his or her right to due process or a jury trial in 1930, holding that a trial court's grant of summary disposition deprived a complainant of neither. *Id*. at 281-282. The Court explained that when there are no issues of fact to be determined, a complainant is not entitled in a civil case to trial by jury, and summary disposition would not deprive a complainant of his day in court if the documentary evidence established a question of fact. *Id*. at 281. Indeed, the Seventh Amendment "preserves the right to a jury trial" only if the claims "cannot be settled or determined as a matter of law." *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 133; 573 NW2d 61 (1997) (quotation marks and citation omitted).

Likewise, summary disposition of a case lacking in factual disputes does not deprive litigants of their Fourteenth Amendment procedural due process right to notice and an opportunity to be heard. *People's Wayne County Bank*, 250 Mich at 276-284.

> [I]t is clear that the fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action, instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not 'due process of law,' within the constitutional meaning of those words. [*Id*. at 282 (quotation marks and citation omitted).]

In this case, the relevant facts are not in dispute. Nickowski never had possession or control over the property where the pit bulls were located, or over the pit bulls themselves. The question of whether he had a duty to protect against the actions taken or conditions created by his tenants was therefore one of law. *Valcaniant*, 470 Mich at 86. Summary disposition under MCR 2.116(C)(10) was an appropriate, and efficient, method of procedure. It did not deprive plaintiffs of a right to a jury—finders of *fact*—that simply did not extend to the determination of legal issues.

To the extent plaintiffs argue that they were denied an opportunity to be heard, we can find no support for their argument in the record. Although plaintiffs' case was not tried before a

jury, plaintiffs were given every opportunity to argue the merits of their claims in response to Nickowski's motion for summary disposition. The trial court considered plaintiffs' written response to the motion, as well as plaintiffs' documentary evidence and plaintiffs' brief in support of their motion to amend the complaint. Plaintiffs also had the opportunity to appear and argue their position at a hearing. Plaintiffs have not suggested that they were unaware of any developments in the case or lacked adequate notice of the proceedings. Plaintiffs clearly had the opportunity to be heard and present their case. They were not deprived of any right to procedural due process.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola