S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ESTATE OF KAYLA MARTINEZ, by SONYA CHENE, Personal Representative, Plaintiff-Appellant,	UNPUBLISHED June 19, 2018
v ROXANNE FRASCA and BRENDA BANKS, Defendants-Appellees, and MARTIN MARTINEZ, Defendant.	No. 338369 Wayne Circuit Court LC No. 15-012456-NI

Before: BECKERING, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Sonya Chene, as the personal representative of the estate of Kayla Martinez, appeals as of right the order granting summary disposition to defendants, Roxanne Frasca and Brenda Banks, in this negligence and premises liability action.[1] Plaintiff also challenges on appeal the trial court's ruling denying plaintiff's motion to amend her complaint. We affirm.

This matter arises from the death of Kayla Martinez, the daughter of plaintiff and Martin Martinez, on September 14, 2014, in a house fire at 4540 Monroe Street in Ecorse, Michigan (the property). Frasca was the resident of the premises. Banks lived next door and had been the long-time companion of Frasca's deceased father, Jack Nipper. Martinez and Frasca had been friends for numerous years and, on the day before the fire, had been with Kayla at Frasca's home, painting Frasca's living room and dining room. Kayla was sleeping overnight at Frasca's home at the request of Martinez because he was going out to socialize with friends later in the evening.

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[1] Summary disposition was also granted to defendant, Martin Martinez, but plaintiff has not appealed this aspect of the trial court's ruling.

I. SUMMARY DISPOSITION

Plaintiff challenges the trial court's grant of summary disposition in favor of Banks and Frasca on her claims of negligence and premises liability. Plaintiff contends that a question of fact exists on her claim of negligence against Frasca and whether Frasca's breach of duties owed to Kayla were a proximate cause of Kayla's death. She asserts that the trial court did not actually address her claim of ordinary negligence and, instead, only analyzed her claims under a premises liability theory. With reference to her premises-liability claims, plaintiff asserts that Kayla was an invitee and not a licensee. Plaintiff contends that questions of fact exist regarding ownership, possession, and control of the property, and that credibility issues also existed. In addition, plaintiff argues that Frasca and Banks knew or had reason to know of the defective condition of the premises because Nipper, instead of a licensed contractor, performed the rehabilitation work on the property, and because they had actual knowledge that one of the smoke detectors in the home was inoperable.

The trial court granted summary disposition under MCR 2.116(C)(8) and (10). This Court "review[s] de novo a decision on a motion for summary disposition." *Lawrence v Burdi*, 314 Mich App 203, 210; 886 NW2d 748 (2016). Specifically:

> [a] motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews . . . a motion [for summary disposition] under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true. [*Id.* at 211 (citations omitted).]

In turn:

> A motion for summary disposition made under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Summary disposition under MCR 2.116(C)(10) is appropriate when, [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. In deciding a motion under subrule (C)(10), the trial court views affidavits and other documentary evidence in the light most favorable to the nonmoving party. [*Lockport Twp v City of Three Rivers*, 319 Mich App 516, 519; 902 NW2d 430 (2017) (quotation marks and citations omitted).]

A. NEGLIGENCE

Plaintiff's claim of ordinary negligence was asserted against Frasca and Martinez, but not Banks. " 'The elements of an action for negligence are (i) duty, (ii) general standard of care, (iii) specific standard of care, (iv) cause in fact, (v) legal or proximate cause, and (vi) damage.' " *Ray v Swager*, 501 Mich 52, 63 n 13; 903 NW2d 366 (2017), quoting *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). Distinguishing between cause in fact and legal or proximate causation, our Supreme Court has recently explained:

> Proximate cause, also known as legal causation, is a legal term of art with a long pedigree in our caselaw. Proximate cause is an essential element of a negligence claim. It "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." Proximate cause is distinct from cause in fact, also known as factual causation, which "requires showing that 'but for' the defendant's actions, the plaintiff's injury would not have occurred." Courts must not conflate these two concepts. We recognize that our own decisions have not always been perfectly clear on this topic given that we have used "proximate cause" both as a broader term referring to factual causation and legal causation together and as a narrower term referring only to legal causation. All this broader characterization recognizes, however, is that "a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." In a negligence action, a plaintiff must establish both factual causation, i.e., "the defendant's conduct in fact caused harm to the plaintiff," and legal causation, i.e., the harm caused to the plaintiff "was the general kind of harm the defendant negligently risked." If factual causation cannot be established, then proximate cause, that is, legal causation, is no longer a relevant issue. [*Ray*, 501 Mich at 63-64 (citations and footnotes omitted).]

The term "duty" comprises "a legally recognized obligation to conform to a particular standard of conduct to protect others against an unreasonable risk of harm." *Laier v Kitchen*, 266 Mich App 482, 495-496; 702 NW2d 199 (2005). Historically:

> Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others. This rule of the common law arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another. [*Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967).]

This Court has recognized that when an individual, such as Frasca, voluntarily assumes a duty of care to watch a minor child, she "assume[s] control over the child's safety and, thus, had a duty to use reasonable care in ensuring that the child's well-being was not endangered." *Babula v Robertson*, 212 Mich App 45, 51; 536 NW2d 834 (1995). Despite the assumption of a duty of reasonable care by Frasca with regard to Kayla, plaintiff cannot establish that Frasca breached that duty. *Id.*

Plaintiff implies that Frasca was negligent for having taken her prescription medications and leaving Kayla alone in the living room. However, when Frasca went into her bedroom, Kayla was laying on the sofa bed in the living room—where she planned to sleep—watching television. Once in her bedroom, Frasca closed the door, took her prescription medications, and

then watched a video for a short period of time before falling asleep. There is no demonstration that Frasca's conduct was negligent or unreasonable.

Plaintiff further argues that Frasca was negligent because one of the four smoke detectors in her home was not operational. However, plaintiff ignores that Frasca was awakened by a smoke detector alarm, indicating that at least one of the remaining three was functional. As such, plaintiff failed to establish that Frasca breached a duty to Kayla because of the one inoperable smoke detector or that Frasca's actions constituted a factual cause of Kayla's injury. See *Ray*, 501 Mich at 63 n 13.

Moreover, and significantly, uncontradicted evidence demonstrated that Frasca had no reason to suspect faulty electrical wiring in the home, which was the cause of the fire. Frasca resided at the property for approximately four years without a prior fire or having experienced any electrical problems. Before Frasca began residing at the property, an inspector for the city of Ecorse issued a certificate of occupancy after inspecting the property. Plaintiff suggests that because the home was repaired by Frasca's father—Nipper—and not a licensed contractor, the repairs were negligently effectuated. However, there is no evidence to support this contention. Banks indicated that the repairs performed by Nipper were more cosmetic than substantive in nature, and there was no evidence to indicate that the repairs to the residence encompassed the home's electrical wiring. Specifically, when asked about the repairs effectuated to the property by Nipper, Banks stated that "[i]t was pretty much just painting, cleaning the entire house," and that "he just kind of took his time and repaired and fixed." Further, there is no evidence that the repairs undertaken were defective, particularly given the certificate of occupancy obtained before Frasca began residing in the home after the repairs were made and the absence of any electrical problems or repairs in the home for the four-year period of Frasca's residence before the fire occurred that resulted in Kayla's death.

Plaintiff also suggests that Frasca was negligent in failing to extricate the child from the home. As recognized by our Supreme Court:

> It is axiomatic that there can be no tort liability unless [a] defendant[] owed a duty to [a] plaintiff. Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others. However, as a general rule, there is no duty that obligates one person to aid or protect another. Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law[.] [*Hill v Sears, Roebuck & Co*, 492 Mich 651, 660-661; 822 NW2d 190 (2012) (citations and quotation marks omitted).]

Plaintiff's suggestion that Frasca was negligent for failing to extricate Kayla from the home during the fire is without support. Frasca testified that, after being awakened by the smoke detector alarm, she called out to Kayla but did not receive any response. Frasca asserted that she tried, without success, to access the living room directly from her bedroom and then again through the kitchen. Both times, Frasca's efforts were precluded by the intensity of the smoke and heat. Frasca incurred injuries from the fire, necessitating her hospitalization. When Frasca exited the residence, she sought the attention of neighbors by screaming and striking the

bedroom window of Banks to obtain help. Frasca was informed by a neighbor that the fire department had been called and was in route.

Further, plaintiff's witness, Scott F. Douglas, a retired firefighter with the city of Ecorse, averred that, even as a trained firefighter and properly equipped to enter a burning building, he was also unable to reach the living room of the home where Kayla was located, despite two separate attempts. It was not until his second attempt failed that Douglas broke the front window and was able to extricate the child.

Ultimately, despite having assumed a duty to provide reasonable care with regard to Kayla, there is no evidence to support plaintiff's contention that Frasca breached that duty or was negligent. The origin of the fire, in this instance, was not foreseeable. No prior electrical problems or fires had occurred in the home before or after Frasca began residing at the property. While one smoke detector was not functional, three others remained in the home and were believed to be operational, with at least one actually emitting an alarm that awakened Frasca and apprised her of the fire. Frasca made reasonable attempts to extricate Kayla but, unfortunately, was not successful. Accordingly, plaintiff's negligence claim was properly dismissed by the trial court given plaintiff's inability to establish a question of fact for either factual or proximate causation.

B. PREMISES LIABILITY

1. STATUS

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land." *Id*.

Before addressing the claims of premises liability we must first ascertain Kayla's status in order to identify the duty to be imposed. Plaintiff contends that Kayla was afforded the status of an invitee as a result of the gratuitous worked performed by Martinez in painting Frasca's living room and dining room. "A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee." *Id*. "An owner 'owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.' " *Id*., quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Specifically, a "landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to make the premises safe, which requires the landowner to inspect the premises and, depending on the circumstances, make any necessary repairs or warn of any discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000). "Thus, an invitee is entitled to the highest level of protection under premises liability law." *Id*.

In response to plaintiff's contention that Kayla was an invitee, Banks and Frasca argued, and the trial court agreed, that Kayla was a social guest and, thus, a licensee. According to our Supreme Court:

> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit. [*Id*. at 596 (citations omitted).]

In distinguishing between the status of a licensee and invitee, it has been determined "that the imposition of additional expense and effort by the landowner, requiring the landowner to inspect the premises and make them safe for visitors, must be directly tied to the owner's commercial business interests." *Id*. at 604. Specifically:

> It is the owner's desire to foster a commercial advantage by inviting persons to visit the premises that justifies imposition of a higher duty. In short, we conclude that the prospect of pecuniary gain is a sort of quid pro quo for the higher duty of care owed to invitees. Thus, we hold that the owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose. [*Id*.]

Plaintiff's contention that Kayla was an invitee of Frasca is unsustainable based on undisputed facts. Martinez and Frasca were friends over an extended period of years. Martinez volunteered to paint Frasca's living room and dining room, without expecting or receiving any form of remuneration or compensation. The action comprised a personal favor extended to a friend. Kayla accompanied Martinez to Frasca's home. She did not perform any services for Frasca and there is no established precondition to afford Kayla the status of an invitee. Similarly, after the painting was concluded, Martinez left with Kayla to get dinner. Upon return to Frasca's home—and having completed the painting—Martinez requested Frasca to watch Kayla as a favor to him while he went out to socialize with friends. Frasca agreed, without the expectation or receipt of any financial remuneration. Because there was no question of fact that there was no commercial purpose, Kayla was properly determined to be a social guest of Frasca and, thus, the duty imposed was commensurate with that status.

2. DEFENDANTS BANKS AND FRASCA

Plaintiff asserts that questions of material fact existed regarding whether Banks was the actual owner of the property and had possession and control of the premises. As such, plaintiff contends that her premises liability claim against Banks was improperly dismissed by the trial court. Plaintiff also asserts error by the trial court in dismissing the premises liability claim against Frasca.

With respect to Banks, the trial court correctly granted summary disposition on plaintiff's premises liability claim. Based on Kayla's status as a licensee, even if there were a question of fact whether Banks was an owner or co-owner of the property, Banks would not have had a duty to warn of unknown dangers. The evidence was that the fire originated in a wall behind an electrical outlet. All testimony from Frasca and Banks indicated there was no history or

suspicion of any electrical problems with the property over the past four years. While one smoke detector was not functional at the time of the fire, three others were believed to be operable; one of the smoke detectors indisputably functioned because it awakened Frasca the night of the fire. As such, plaintiff's claim of premises liability against Banks was properly dismissed.

Turning to Frasca, her duty to Kayla was likewise dictated by Kayla's status as a licensee. Thus, Frasca had a duty to warn Kayla of any hidden dangers that Frasca knew existed or had reason to know existed. See *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004). Based on Kayla's status as a licensee, the trial court properly granted summary disposition in favor of Frasca on plaintiff's premises liability claim because there was no evidence that Frasca knew or had reason to know of the latent defect in the electrical wiring of her home. The home received a certificate of occupancy from the inspector for the city of Ecorse after Nipper had effectuated repairs to the premises. Uncontroverted testimony demonstrated that Frasca resided in the home for four years before the fire, without having experienced any electrical problems or fires on the premises. Frasca had routinely used the electrical outlet where the fire originated for her computer and vacuum without any prior incident. While Frasca was aware that one smoke detector was not functional, she believed that the remaining three smoke detectors were operational, and evidence established that at least one of the smoke detectors functioned by emitting an alarm. Further, Kayla's father, Martinez, was aware of the removal of the one smoke detector based on its location in the area he was painting. Despite this knowledge, Martinez obviously lacked any concern regarding Kayla's safety in the residence, having asked Frasca to permit his daughter to spend the night. In other words, there was no evidence to establish a question of fact whether Frasca knew or had reason to know of the latent, unseen danger. Without such evidence, we agree with the trial court's conclusion that Kayla's death was the result of a tragic and unforeseen circumstance, necessitating the dismissal of plaintiff's premises liability claim against Frasca.

II. AMENDMENT OF COMPLAINT

Plaintiff also challenges the trial court's denial of her motion to amend her complaint. She argues she should be permitted to amend her complaint to add a claim regarding the violation of MCL 554.139 against Banks and that the late inclusion of this claim would not be prejudicial to Banks.

This Court "review[s] a trial court's decision regarding a party's motion to amend its pleadings for an abuse of discretion." *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009). "Thus, [this Court] defer[s] to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Id*.

Initially, plaintiff contends that Frasca lacks standing to assert an argument regarding this issue on appeal, indicating the addition of a claim under MCL 554.139(1) is relevant only to Banks. However, plaintiff fails to recognize that her motion to amend the complaint contained, in addition to the new claim, allegations regarding the need for clarification and the inclusion of statements relevant to her premises liability claim. Because the premises liability claim was pertinent to both Frasca and Banks, plaintiff is mistaken in asserting Frasca's lack of standing to respond on this issue. However, plaintiff's correction of her failure to specifically allege

proximate cause and damages regarding her premises liability claim through amendment of the complaint would not result in her ability to avoid summary disposition.

In this instance, the legal theory serving as a primary basis for plaintiff's complaint—premises liability—was clear and recognized by the trial court and all involved. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). As such, there was no need for plaintiff to amend the complaint in the manner she sought regarding this claim. As already discussed, the deficiency was not the pleading of a premises liability claim, but the lack of factual and legal support to sustain such a claim. Plaintiff has not explained how amendment would cure this deficiency. Hence, we conclude that any amendment was futile. "An amendment is futile where the paragraphs or counts the plaintiff seeks to add merely restate, or slightly elaborate on, allegations already pleaded." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998).

The thrust of plaintiff's argument on appeal is that the trial court abused its discretion by failing to allow her to amend her complaint to include a claim under MCL 554.139(1) against Banks. However, the inclusion of a claim under MCL 554.139 would have been futile. MCL 554.139 states:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

"MCL 554.139 provides a specific protection *to lessees and licensees* of residential property in addition to any protection provided by the common law." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008) (emphasis added). Ignoring the absence of evidence regarding Banks's ownership of the property or the existence of a landlord-tenant relationship between Banks and Frasca, the recognized purpose of this statute is to protect a relationship that is not applicable to Kayla. The statutory language does not indicate or suggest that the protections afforded extend to anyone other than the parties to a lease. Accordingly, plaintiff is

unable to establish or state a viable claim under MCL 554.139 and, as such, any amendment to include this claim would have been futile.[2]

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

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[2] Given the futility of plaintiff's requested amendments to her complaint, we need not address whether the trial court properly denied plaintiff's request because of plaintiff's dilatory behavior. See *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").