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STATE OF MICHIGAN
COURT OF APPEALS

EDGAR M. BALCOM as Personal Representative of
the Estate of MARY JANE BALCOM, Deceased,

Plaintiff-Appellant,

v

FREDERICK P. ANDERSON and VICKI
ANDERSON,

Defendants-Appellees.

UNPUBLISHED
September 23, 2021

No. 354826
Roscommon Circuit Court
LC No. 19-724587-NO

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Plaintiff Edgar M. Balcom, as personal representative of the Estate of Mary Jane Balcom, appeals as of right the August 31, 2020 order granting summary disposition for defendants and dismissing plaintiff's complaint alleging statutory strict liability, MCL 287.351, common-law strict liability, MCL 287.288, common-law negligence, and wrongful death, MCL 600.2922. We reverse and remand for further proceedings.

STATEMENT OF FACTS

Defendants, Frederick Anderson and Vicki Anderson, were visiting Vicki's mother Judith Olsen (Judy) and stepfather Bernard Olsen (Bernie) in Roscommon on April 5, 2019. Plaintiff, Edgar M. Balcom, and his now-late wife, Mary Jane Balcom (decedent), lived in the same neighborhood as Judy and Bernie. Decedent suffered from advanced Alzheimer's disease at that time. Although the following events occurred in the month of April, decedent was wearing a quilted winter jacket with a sweatshirt underneath. Upon arriving at the residence, plaintiff entered through the garage, and decedent followed a few minutes afterwards. Plaintiff stopped to speak with Bernie about some stone-work, and decedent continued into the living room where Vicki was

watching a movie on the couch with her dog, Buffum, by her side.¹ Judy and Frederick were both in bedrooms in a different part of the house. Because of the house's narrow structure, plaintiff had his back towards Vicki and decedent while conversing with Bernie, who was facing all three individuals. As a result, only Bernie, Vicki, and decedent could see the events that occurred.

Decedent approached Vicki and Buffum, extending her arm to pet the dog. Upon making contact with the dog's head, the dog let out a small "yip" while moving his head in an upwards direction. Decedent's arm also moved in an upwards direction. Due to the commotion, Vicki helped decedent into a chair, put the dog away in a bedroom, and returned to the living room. Decedent commented on about a burning sensation in her fingers on the hand that reached toward Buffum, but could move them around. Plaintiff stated in his affidavit he heard decedent seconds after the interaction say that the dog had bitten her. Bernie and Vicki testified that neither ever saw the dog make contact with decedent's arm. Plaintiff, at this point, made his way over to decedent and rolled up her sleeve, exposing a large avulsion injury roughly 4 centimeters in diameter on decedent's right forearm.²

Vicki went to the bedroom and woke up Judy, who had worked for several decades as a registered nurse and had experience with wound care. Judy and Bernie both opined that the wound was somewhat of an older one based on their observations that it was not actively bleeding and appeared dry. There were no puncture marks, teeth impressions, or dog saliva on decedent's winter jacket. Judy dressed the wound with supplies she kept at home and called an ambulance despite plaintiff's protestations. Two ambulances arrived and took decedent to the hospital, where the following day she had surgery to clean the wound. After recovering from the surgery, decedent was transferred to Grayling Nursing and Rehabilitation Center on April 15, 2019.

Upon arrival at the rehabilitation center, decedent was in relatively good health and able to walk with assistance. The wound on her right forearm had healed and presented no signs of infection. While staying at the facility, decedent's health began to deteriorate when she stopped eating and drinking. She died at the facility on April 29, 2019. The cause of death was listed on the death certificate as "natural," resulting from Alzheimer's disease and a dog bite to the right forearm.

Plaintiff filed suit alleging statutory strict liability, MCL 287.351, common-law strict liability, MCL 287.288, common-law negligence, and wrongful death, MCL 600.2922. Defendants filed a motion for summary disposition under MCR 2.116(C)(10), which was heard on August 20, 2020. The court granted defendants' motion for summary disposition and dismissed the case with prejudice.

¹ Buffum is an 8-year-old, Shepherd/Plott hound/Rottweiler mix and weighs approximately 100 pounds. Vicki Anderson is listed as the owner of Buffum.

² An "avulsion" is "a tearing away of a body part surgically or accidentally." *Black's Law Dictionary* (11th ed).

I. ANALYSIS

Plaintiff argues that summary disposition was improper because there was a genuine issue of material fact whether the dog bite occurred, which was the only issue raised in defendants' motion.

A. PRESERVATION OF ISSUE

This Court has stated that “an issue is preserved for appellate review when it is raised in and decided by the trial court.” *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 10; 930 NW2d 393 (2018). Thus, the issue on appeal of whether the trial court erred in dismissing the case for failure to establish a genuine issue of material fact is preserved.

B. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10). *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). This motion “tests the factual sufficiency of the complaint.” *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). To grant a motion pursuant to MCR 2.116(C)(10), there must be “no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” The documentary evidence must be “viewed in a light most favorable to the nonmoving party.” *Lowrey*, 500 Mich at 5. If “reasonable minds could differ” on an issue, then “a genuine issue of material fact exists.” *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712; 777 NW2d 205 (2009).

When a motion for summary disposition is brought before the trial court,

the court “is not permitted to assess credibility, or to determine facts . . . Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact *exists to warrant a trial*.” [*Lima Twp v Bateson*, 302 Mich App 483, 492; 838 NW2d 898 (2013) (citations omitted and emphasis added).]

While reviewing the record evidence, “if the evidence before [the court] is conflicting, summary disposition is improper.” *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). See also *Spiek v Mich Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998) (specifying that record evidence includes “affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action”). In addition, “all reasonable inferences are to be drawn in favor of the *nonmovant*.” *Westlake Transp, Inc v Public Serv Comm*, 255 Mich App 589, 595; 662 NW2d 784 (2003) (emphasis added). However, “the nonmoving party . . . must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

C. APPLICATION

Dog bite claims for statutory strict liability, common-law strict liability, and common-law negligence all require that the dog cause the harm suffered by the plaintiff. MCL 287.351(1); MCL 287.288. See also *Hiner v Mojica*, 271 Mich App 604, 609; 722 NW2d 914 (2006) (stating

harm must result for strict liability to attach); *Trager v Thor*, 445 Mich 95, 106; 516 NW2d 69 (1994) (stating injury must result for negligence cause of action to succeed). Without evidence that the dog bit decedent, plaintiff cannot succeed on any of his claims.

Several undisputed and material facts existed at the time the motion was decided. First, decedent approached the dog while he was sitting on the couch and she tried to pet him. Second, at some point quickly after this, the dog reacted to decedent's approach by moving his head up and letting out a small "yip." Third, after the alleged bite, decedent's fingers had a burning sensation, and her forearm revealed an oblong wound roughly 2 inches in length.

There are, however, also several disputed material facts surrounding whether the dog actually bit decedent. Both parties presented evidence to support their respective arguments.

Plaintiff presented evidence that the bite did occur, including his own affidavit, some photos, and various medical records and reports. Plaintiff's affidavit states that decedent "stated that she had been bitten by the dog" and that she "made the statements in the seconds following the interaction with the dog." The death certificate lists "dog bite" as one of the causes of death, and the emergency room report indicates as part of the initial physical exam that "bleeding [was] controlled with gauze." In addition, the photos presented by plaintiff portray the forearm wound before and after surgery, and decedent's sweatshirt from the time of the incident.

On the other hand, defendants offered evidence through various depositions, the animal control report, and an affidavit from the medical examiner to make the argument that a dog bite did *not* occur. The animal control report indicates there were no puncture marks on decedent's jacket. Vicki and Bernie both testified that the dog didn't touch decedent and the wound looked significantly older than if it had immediately resulted from a dog bite. In his affidavit, the medical examiner stated that he has no opinion as to the cause or manner of decedent's death.

Based on the evidence, defendants argue that when considering the physical evidence presented in a light most favorable to plaintiff, there is no genuine issue of material fact that the dog did not bite decedent. First, defendants submit that the dog did not bite decedent because there was no active bleeding in the wound and it appeared to be dry. The emergency room documents presented by plaintiff contradict this, though, stating that initially there was bleeding which had been controlled through the use of gauze by the time decedent arrived at the hospital. Second, defendants contend that the lack of bite marks or saliva on decedent's jacket indicate the bite did not occur. Defendants rely on the animal control report, which states there were no "puncture marks," as well as their own depositions for support. However, the photo of decedent's sweatshirt presented by plaintiff shows some liquid on the sleeve. Although the liquid itself and its origin may be disputed, this would have been sufficient to create a question of material fact.

In addition, defendants argue that because the medical examiner had no medical opinion whether the cause of death resulted from a dog bite, the death certificate is not *prima facie* evidence that the bite occurred. However, just because the medical examiner did not offer an opinion regarding decedent's *cause of death* is not evidence that the dog bite did not actually occur, and

plaintiff presented several reports that indicate a dog bite was a contributing cause of death.³ This, again, presents conflicting evidence which creates an issue of material fact.

Defendants' argument that the dog did not make contact with or bite decedent is in part based on Vicki and Bernie's testimony that they did not see the dog bite decedent. However, plaintiff's affidavit contains decedent's own statement that she stated that she was bit by the dog. Based on all of the conflicting evidence presented by both parties, there are two versions of how these events occurred. Because the trial court is required to draw all reasonable inferences in favor of the nonmovant, the trial court erred in not concluding that there was a genuine issue of material fact whether the bite occurred.

In fact, the trial court recognized at the motion hearing that "the affidavit of [plaintiff] that says he heard [decedent] say that she was bit" is an "item" that could "potentially create a genuine issue of material fact." However, the court then proceeded to say that "there's not corroborating evidence to back [plaintiff] up on this point by any of the other eyewitnesses." However, it is irrelevant whether there was corroborating evidence to support the statements in plaintiff's affidavit, because the court "may not make a finding of fact or *weigh credibility* when ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 637; 808 NW2d 804 (2011) (citation omitted and emphasis added). Plaintiff presented evidence that the dog bite occurred and instead of evaluating whether this evidence created a genuine issue of material fact, the court essentially chose to believe defendants' version of the events and improperly weighed the evidence in defendants' favor.

Because the parties presented conflicting evidence as to whether the dog actually bit decedent, there was a genuine issue of material fact for the jury to resolve. As a result, the trial court improperly granted summary disposition in favor of defendants.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

³ Defendants theorize that each medical report's statement that the injury was caused by a dog bite was based on a previous report and no medical professional actually opined that the wound was caused by a dog bite. While this theory is possible, no evidence has been presented that this is what actually occurred or that the medical professionals *did not opine* it was a dog bite. Defendants merely surmise that there is a lack of opinion or knowledge on the part of the medical professionals.