

STATE OF MICHIGAN
COURT OF APPEALS

KAREN MOOSE,

Plaintiff-Appellant,

v

GERALD E. MICHAEL and PATRICIA MICHAEL,

Defendants-Appellees.

UNPUBLISHED
October 28, 1997

No. 195750
Iosco Circuit Court
LC No. 95-009321-NO

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm.

Plaintiff first argues that she was misled because she misinterpreted defendants' brief, and thus failed to produce controverting evidence at the motion hearing. Plaintiff contends that in a passage in defendants' brief in support of their motion for summary disposition, defendants admitted that questions of fact existed, and that this representation led plaintiff to believe that defendants' motion was based only on (C)(8) grounds. As a result, plaintiff did not submit any documentary evidence with her response opposing defendants' motion. When the passage in defendants' brief is read in context, it is clear that defendants acknowledged that there were questions of fact regarding causation and plaintiff's veracity that would preclude summary disposition if the motion were premised on these issues. However, defendants in no way conceded that there were questions of fact regarding duty and breach of duty. When a party moves for summary disposition "the trial court may proceed under the appropriate subrule so long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996) At the motion hearing, plaintiff argued that the factual predicates to establish a duty existed. Therefore, plaintiff treated the motion as a test of sufficiency of the facts, and based on *Blair, supra*, the trial court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Plaintiff also argues that there was a genuine issue of material fact regarding whether defendants owed plaintiff a duty. A possessor of land has a duty to warn a licensee of a hidden condition that the

possessor knows or has reason to know poses an unreasonable risk of harm to the licensee unless the licensee will likely discover or realize the condition. *D'Ambrosia v McCready*, ____Mich App ____; ____NW2d____ (Docket No. 194226, issued 8/15/97), slip op p 2. A motion for summary disposition pursuant to MCR 2.116(C)(10) is properly granted when there “is no genuine issue of material fact with respect to defendant’s knowledge” of the hidden condition. *Id.* at 3. Because there were no facts to show that defendants knew or should have known about the wooden board’s rotted condition due to exposure to the elements, defendants were entitled to a legal determination that they did not owe plaintiff a duty. Accordingly, the trial court properly granted defendants’ motion for summary disposition.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Stephen J. Markman

/s/ Michael R. Smolenski