

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLE CLARK,

Plaintiff-Appellant,

v

CLIFF HUCKLEBERRY and JUDY
HUCKLEBERRY,

Defendants-Appellees.

UNPUBLISHED

October 18, 2005

No. 263044

Ionia Circuit Court

LC No. 00-020725-NO

Before: Kelly, P.J., and Meter and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse.

This is the second time this case has come before us. The underlying facts in this case are not seriously disputed and have not materially changed from our prior opinion in the matter:

Plaintiff filed a two-count complaint alleging negligence and breach of contract. Plaintiff resided in a home leased from defendants. Prior to executing the month to month lease, plaintiff and co-tenant Steve McQueen examined the premises and noted the condition of a swinging door with four large panes of glass. Plaintiff alleged that the glass was visibly brittle, and one pane of glass was cracked, but held together by a piece of duct tape. Plaintiff alleged that defendant Cliff Huckleberry acknowledged that the door was faulty, but reassured the prospective tenants that he would repair or replace the door in the near future. Plaintiff alleged that she signed the lease based on this promise. During the course of the lease, McQueen routinely inquired when the door would be fixed. Defendant Cliff Huckleberry allegedly represented that the repair would occur "sometime soon." On February 12, 2000, McQueen left the home after learning about the hospitalization of his grandfather.¹ Plaintiff went to open the door to

¹ Defendants allege in their brief on appeal that the circumstances immediately surrounding the
(continued...)

ask where McQueen was going, and her hand went through one of the panes of glass. [(*Clark v Huckleberry*, unpublished opinion per curiam of the Court of Appeals, issued September 3, 2002 (Docket No. 231929)).]

There is apparently no real dispute, at least for the purposes of this appeal, that plaintiff sustained injuries as a result of her hand going through the glass. The only new circumstance is the deposition of plaintiff's expert witness Michael T. Williams, Professional Engineer, who inspected photographs of and some pieces of glass from the door. The trial court based its grant of summary disposition on Williams' testimony, and plaintiff contends that this was error.²

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all submitted evidence in the light most favorable to the non-moving party and grant summary disposition only where it fails to establish a genuine issue regarding any material fact. *Id.*, 120.

Defendant argued, and the trial court agreed, that Williams had testified that the door was safe, properly constructed, and properly maintained, thereby precluding any genuine issue of material fact. Defendant conceded the existence of a duty, and neither causation nor damages are disputed. The gravamen of plaintiff's case is that defendants breached their duty by failing to keep the door properly maintained. Therefore, if plaintiff's own expert witness indeed testified that the door had been properly maintained, summary disposition would be appropriate. However, our reading of Williams' testimony does not support that conclusion.

Williams testified that he had not been presented with any information from which he could conclude that the door was defective, improper, or out of compliance with the relevant legal requirements. However, Williams qualified his conclusion by emphasizing that there was a limited amount of information he could glean from the photographs he had seen, he might change his mind if he inspected the actual door, questions remained unanswered, compliance with the legal requirements did not necessarily make an installation "a good idea," and, in summary, he could also not conclude that the door was actually safe. Indeed, Williams emphasized that *he had not completed his opinion because he had not investigated the actual door*, and he stated that he advised plaintiff's attorney of that fact the morning of the deposition. Therefore, Williams' testimony is not that the door was safe and compliant. Rather, Williams' testimony is that the photographs do not show any obvious hazard or noncompliance, but there is no way to be sure without further information and an actual inspection of the door itself.

Williams' testimony does not provide a basis for concluding that there is no genuine issue of material fact. When read as a whole, Williams' testimony is that there remained a genuine issue of material fact regarding the safety of the door, and discovery remains incomplete. Accordingly, summary disposition was inappropriate. *Maiden, supra*, 461 Mich 120-121.

(...continued)

accident involved a heated argument between plaintiff and McQueen

² Plaintiff also argues promissory estoppel on appeal. The trial court apparently did not directly address this below, and we see no need to address it now.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Patrick M. Meter

/s/ Alton T. Davis