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DISTRICT II

November 16, 2022

To:

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Circuit Court Judge
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You are hereby notified that the Court has entered the following opinion and order:

2021AP2082 Kira Gabriel v. Renaissance Entertainment Productions, Inc. (L.C. # 2020CV548)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kira Gabriel appeals from an order of the circuit court granting Renaissance Entertainment Productions, Inc. and National Casualty Company's (hereinafter collectively "Renaissance") motion for summary judgment. Based upon our review of the briefs and record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

Gabriel filed suit alleging negligence and a safe place violation in relation to an injury she sustained when she fell while walking with her sister at the Bristol Renaissance Faire. The circuit court granted summary judgment to Renaissance on the ground that, based upon the record, it would be "purely speculative" for a jury to conclude that a defect in Renaissance's property caused Gabriel's injury.

Our review of a circuit court's decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

Challenging the circuit court's ruling on appeal, Gabriel points to a report by a landscape architect that noted potential concerns in "[t]he area" of her fall such as issues with slope, uneven ground plane, and "numerous tripping hazards."[2] Gabriel admits on appeal, however, that "[n]either [she] nor her sister could do more than point out the general location on the path where the accident took place but not what mechanism caused her to lose her balance and fall."

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] The landscape architect's report does not identify when she examined the general area of Gabriel's fall, but the report is dated September 30, 2021—more than four years after the incident. Gabriel has not identified, and we cannot find, anything in the record indicating that the conditions of the "general area" at the time of the examination provided a true and correct representation of the conditions at the time of Gabriel's fall.

She also directs us to an emergency room staff record she claims shows that shortly after the accident she indicated to staff "that the gravel beneath her feet gave way causing her to turn her ankle and fall." The record itself, however, does not actually state that, but instead indicates Gabriel stated she was "walking and then her leg twisted on the gravel, fell to the ground …." It does not say Gabriel stated the gravel "gave way" or even that it "caus[ed]" her to "turn her ankle and fall." This evidence does not preclude summary judgment as it suggests no defect with the gravel that might have caused her injury; instead, it merely indicates her leg twisted while she was on gravel, which twisting could simply have been due to her own misstepping.

Significantly, Gabriel's and her sister's depositions highlight the correctness of the circuit court's ruling in this case. When asked at her deposition, "At the time you fell, fair to say you have no idea what caused you to fall?" Gabriel responded, "Yes." When then asked, "And in retrospect, as you sit here today, thinking back with the benefit of hindsight and everything you've heard and talked to, do you have any idea what caused you to fall?" Gabriel responded, "No." Gabriel's sister, who was with her at the time of the fall, testified similarly. When asked, "Before [Gabriel] fell, did you see any obstruction or defect in the path where you were walking?" She responded, "As far as I could see, the path looked smooth." And when asked, "At the time [Gabriel] fell, were you aware what caused her to fall?" she responded, "No."

Focusing primarily on her safe place claim, Gabriel insists we should presume that one or more of her asserted defects caused her injury. Such a presumption, however, does not apply based upon the facts of this case.

In ***Baker v. Bracker***, 39 Wis. 2d 142, 158 N.W.2d 285 (1968), the plaintiff sought such a presumption in his lawsuit following a knee injury he sustained while dancing in a bar in the

general area of indentations in the tile that had been caused by various objects over time. ***Id.*** at 144. He claimed he was entitled to the presumption that one of the indentations caused his knee to buckle "because he was in the area of the defects." ***Id.*** at 145. Our supreme court disagreed, stating:

> [T]he plaintiff's argument that proof of an accident in the general area of a defect is sufficient to call forth the presumption is without merit and must be rejected. The presumption is not that his foot came in contact with a defect (because [plaintiff] was dancing in the area of the defects) but rather that if his foot did come in contact with a defect, such defect caused his injury.

Id. at 147-48.

The case now before us is similar to ***Baker***. Considering the evidence in the record and her briefing on appeal, Gabriel has speculated that she may have fallen because of the slope of the area, depressions, tree roots, potholes, ruts, gravel, soil, "debris, twigs, and dirt," or perhaps a combination of some of these.[3] The most favorable reading of the evidence of record is that there may have been such "hazards" in the general area where she fell. Despite opportunity to do so, however, she has been unable to identify any particular defect or combination of defects that caused her to fall. The best she has been able to do is guess.

The circuit court noted in its summary judgment ruling that "there was no defect that has been even vaguely identified." We agree that the record identifies no nonspeculative basis for a

[3] Attempting to stave off summary judgment with an affidavit following her deposition in which she admitted she had "no idea what caused [her] to fall," Gabriel averred that "[t]here *may* have been debris, twigs, and dirt that shifted which I *believe* caused me to lose my balance and fall violently to the ground." (Emphasis added.) Such a "cause," of course, is significantly different in nature than stumbling on a tree root, for example.

jury finding that a defect in the Renaissance premises caused her to fall as opposed to Gabriel herself simply misstepping.[4]

As the circuit court stated, it would be "purely speculative" for a jury to conclude that anything Renaissance did or failed to do caused Gabriel's injury. It is just as likely her own misstep caused her to fall as any of the multiple alleged defects with the grounds. Gabriel cannot secure a judgment "when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced." ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 460-61, 267 N.W.2d 652 (1978) ("[I]t is impermissible to base a judgment on 'conjecture, unproved assumptions, or mere possibilities.'" (citation omitted)). As a result, we conclude the circuit court did not err in granting Renaissance summary judgment.

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[4] Gabriel further speculates in her appellate briefing that she "*could have* lost her balance because she tripped on an exposed tree root, … stepped in a pothole, lost her balance on the steep and pitched slope *or* stepped on the dirt covered gravel that gave way under her." (Emphasis added.) Each of these of course would constitute a notably different mechanism of injury, as would simply misstepping.