STATE OF MICHIGAN

COURT OF APPEALS

DEREK LEONARD

Plaintiff-Appellant,

v

NATIONAL BANK OF DETROIT and ABIGAIL NEW,

Defendant-Appellees.

UNPUBLISHED
October 15, 1996

No. 177310
LC No. 94-406709

Before: White, P.J., and Smolenski, and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiff appeals a circuit court order granting summary disposition to defendant National Bank of Detroit (NBD), and assessing sanctions against plaintiff's attorney for filing a frivolous action. We reverse.

Plaintiff's complaint alleged that on June 8, 1993, at approximately 6:00 a.m., Abigail New was driving her Ford Probe with plaintiff as a passenger when she stopped at an NBD drive-in branch. New parked her car and got out to use the ATM machine. After obtaining money from the ATM machine, New got back into the car and backed up into a pole, injuring plaintiff.

Plaintiff's complaint claimed negligence on the part of New and NBD. As to NBD, plaintiff asserted that NBD had a duty to maintain its bank branches and parking lots so as to minimize the possibility of injury to customers and to passengers of customers; that NBD failed to paint the abutment and the pole that was within the abutment struck by New the same bright yellow color that other poles and railings were painted; that because the pole and abutment were not painted yellow they were practically invisible in the slight fog that was occurring that morning, and in any weather were less visible than the other poles; that because the other poles were painted bright yellow there was a tendency for New to subconsciously think that any pole or abutment that was there would be painted yellow and thus be more noticeable than the "non-descript" abutment and pole that she struck; and that by failing to

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* Circuit judge, sitting on the Court of Appeals by assignment.

paint the pole and abutment with a bright color when the other poles and abutments were painted bright yellow, NBD acted in a negligent manner causing plaintiff to suffer injuries.

NBD moved for summary disposition, pursuant to MCR 2.116 (C)(8), arguing that plaintiff failed to state a claim because NBD had no common law or statutory duty to paint the pole or abutment, and, alternatively, that New's negligence was a superseding and proximate cause of plaintiff's injury. Plaintiff responded that he had validly pled a claim for negligence, that the question is whether he will be able to support that claim with facts, and that there had been no discovery. Plaintiff also referred to pictures showing that the pole has marks on it, indicating that it had been hit before and was a hazard.

The court stated:

> THE COURT: Well, if there's any negligence in this, it would be on the part of the driver, Abigail New. She was the one that backed ino[sic] the light post.
>
> I don't see under any theory how NBD could be liable for having a light post and somebody backs into it. Clearly, if anyone is at this falt[sic], it would be the driver of the car, not NBD for putting a light in their parking lot. Defendant's motion is granted. NBD is out.

NBD then requested that the court award sanctions pursuant to NBD's earlier-filed motion for sanctions. The court ruled:

> I think it is outrageous and frivolous in suing NBD for a light pole the driver banged into. I'm assessing costs against you for filing such a frivolous action.

We first observe that the trial court erred in apparently concluding that because New was negligent, NBD could not also be liable. There may be more than one proximate cause for the same injury and a defendant cannot escape liability for negligent conduct merely because the negligence of others may have also contributed to the harm. *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW 650 (1988). Thus, New's negligence does not relieve NBD of responsibility if plaintiff stated a claim against NBD.

We further conclude that the court's grant of summary disposition pursuant to MCR 2.116(C)(8) was improper.[1] A motion for summary disposition pursuant to MCR 2.116 (C)(8) tests the legal sufficiency of a claim by the pleadings alone. All factual allegations or conclusions are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Boumelhem v Bic Corp*, 211 Mich App 175; 535NW2d 574 (1995).

A prima facie case of negligence requires proof of four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages. *Schneider v Nectarine Ballroom, Inc, (On Remand)*, 204 Mich App 1, 4; 514 NW2d 486 (1994). Plaintiff adequately pled

these elements.[2] The absence of specific common law or governmental requirements regarding the painting of poles and abutments in parking lots does not mean that plaintiff's complaint was deficient as a matter of law. The governing standard is reasonable care. It is a separate question whether the manner in which the pole and abutment were marked breached NBD's duty to exercise reasonable care for the safety of business invitees,[3] and still a different question whether New was the sole proximate cause of plaintiff's injury and damage. These additional questions should not have been decided by granting judgment on the pleadings.

For the same reasons, we conclude the court erred in assessing sanctions, although we express no opinion on the question whether sanctions may prove to be appropriate when the record is more fully developed.

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

/s/ Helene N. White
/s/ Michael R. Smolenski
/s/ Richard R. Lamb

[1] We express no opinion on the question whether summary disposition will prove to be appropriate under MCR 2.116(C)(10) after the completion of discovery.

[2] Defendant's motion was not based on plaintiff's inartful expression of the duty owed -- "to maintain its… parking lots so as to minimize the possibility of injury to customers and to passengers of customers" -- a defect easily cured by amendment.

[3] In its brief in support of its motion for summary disposition, defendant used the business invitee standard.