

STATE OF MICHIGAN
COURT OF APPEALS

LOIS A. LACROSS, as Personal Representative of
the Estate of SARAH M. LACROSS, Deceased; and
DAVID LACROSS, as Personal Representative of the
Estate of GORDON D. LACROSS, Deceased.

UNPUBLISHED
January 17, 1997

Plaintiffs-Appellants,

v

No. 190833
Midland Circuit Court
LC No. 94-003045

CONSUMERS POWER COMPANY, a Michigan
corporation,

Defendant/Counter-Plaintiff-
Appellee,

v

GORDON D. LACROSS,

Counter-Defendant.

Before: McDonald, P.J., and Murphy and M.F. Sapala,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). Plaintiffs' decedents were killed when their Cessna aircraft struck a set of defendant's unmarked power lines that extended across Sanford Lake. Plaintiffs filed a wrongful death action alleging negligence, breach of warranty, and strict liability. The latter two claims were disposed of by summary disposition in favor of defendant and are not before us. Regarding the negligence count, the trial court held that plaintiffs' crash was not foreseeable and concluded that defendant did not owe plaintiffs a duty to mark the power lines. We affirm.

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

Plaintiffs argue that it was foreseeable that an airplane would crash into defendant's unmarked power lines because in 1973, an airplane crashed into defendant's lines over the same lake. Plaintiffs claim that defendant knew or should have known about the 1973 crash because defendant repaired the lines and customers made complaints to defendant that the lines should be marked or relocated. We disagree. When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

The determination of whether a duty should be imposed upon a defendant is based on a balancing of the societal interest involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence (foreseeability), and the relationship between the parties. *Swartz v Huffmaster Alarms*, 145 Mich App 431, 434; 377 NW2d 393 (1985). Our determination whether defendant owed plaintiffs a duty to mark the power lines is guided by our decision in *Gunn v Edison Sault Electric Co*, 24 Mich App 43; 179 NW2d 680 (1970), where we held that the defendant did not have a duty to mark its power lines because the plaintiff's airplane crash into the lines was an unforeseeable, fortuitous event. In *Gunn*, the plaintiff was attempting to land his amphibious airplane on a seldom used area of a river over which the defendant's power lines ran. The lines were approximately 38 feet above the water level and were not marked. The lines were erected in 1911, but were not marked on any aeronautical chart. The plaintiff was en route to one of two marinas that were located in the immediate vicinity. However the plaintiff did not use any of the usual landing patterns or designated approach areas. The Court indicated that the owner of the power line had no reason to foresee an unreasonable risk of harm in an area which was not an official aircraft approach, and refused to impose a duty upon the power company to mark or relocate its power lines.

Similarly, we conclude that plaintiffs' airplane crash was not foreseeable by defendant. The power lines that plaintiffs struck have been in place since 1952. There was at least seven miles of visibility on the day of the accident. The power lines were not located in an official aircraft approach area. In fact, there were no airports or marinas in the vicinity, and plaintiffs were not in an amphibious aircraft that could have been landed on the water. Additionally, plaintiffs were flying at an altitude in violation of the minimum safe flying altitude and did not observe proper side clearances. Plaintiffs were required at the very minimum to maintain 500 feet clearance from any person, vessel, or structure. See 14 CFR CH. 1 sec. 91.119. The power lines were forty feet above the water level at the point of impact and the lake was less than 600 feet wide. The shores of Sanford Lake are lined with houses and docks. We do not think that it was foreseeable that a pilot would fly at such a low altitude in violation of minimum side clearances.

We are unpersuaded by plaintiffs' argument that their crash was foreseeable because there was a similar incident twenty years prior to plaintiffs' accident. In 1973, an aircraft struck defendant's power lines that stretched across Sanford Lake. Plaintiffs did not establish whether that accident involved the same power lines as the instant accident. We do not think that one unforeseeable event renders another similar incident, which takes place twenty years later, foreseeable. We conclude that

defendant did not owe plaintiffs a duty to mark or relocate its power lines. Thus the trial court properly granted summary disposition in defendant's favor.

Plaintiffs also argue on appeal that the trial court injected personal bias into its decision and that it failed to view the facts and evidence in a light most favorable to plaintiffs. We find no indication in the record that the trial court committed such errors.

Affirmed.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ Michael F. Sapala