

STATE OF MICHIGAN
COURT OF APPEALS

JULIE SOCIA,

Plaintiff-Appellant,

v

PACERS BASKETBALL CORPORATION,
JERMAINE O'NEAL, and DAVID HARRISON,

Defendants-Appellees.

UNPUBLISHED

February 9, 2010

No. 284845

Oakland Circuit Court

LC No. 2007-087231-NO

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting defendants' motion for summary disposition. We affirm.

Defendants O'Neal and Harrison are two professional basketball players who were involved in a now infamous brawl that occurred at a basketball game at the Palace of Auburn Hills (the Palace) on November 19, 2004 (dubbed the "Palace brawl"), between their team, the Indiana Pacers, and the Detroit Pistons. The fight began on the court between the two teams, but soon spilled into the stands. The game was cancelled by officials and the players were directed to leave the playing floor through a tunnel.

Plaintiff was working at the Palace that night and at the time of her injury was helping to keep the tunnel clear so that the players could exit. As defendants were leaving, they confronted another spectator who the players said threw beer at them. As the players engaged with spectators near the tunnel, another spectator threw a chair, which struck plaintiff on the head, causing physical injuries that required ongoing treatment. Plaintiff filed this lawsuit against defendants alleging negligence and gross negligence.

Plaintiff argues that the circuit court erred in granting defendant's motion for summary disposition. Plaintiff asserts that defendants owe her a basic duty of care to not endanger her. Conversely, defendants argue that the issue of duty centers on whether they had a duty to protect others from the criminal acts of a third person. Ordinarily, whether a duty exists is a question of law for the court. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). If there is no duty, summary disposition is proper. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

We review de novo the court's granting of summary disposition to defendants, *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 52; 684 NW2d 320 (2004), as well as the court's conclusion on the existence of duty owed, *Fultz v Union-Commerce Assoc.*, 470 Mich 460, 463; 683 NW2d 587 (2004). When reviewing a motion brought under MCR 2.116(C)(10), a court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

To establish a prima facie case of negligence, a plaintiff must show (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff injuries, and (4) that the plaintiff suffered damages. *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). Duty requires the defendant to conform to a specific standard of conduct in order to protect others against unreasonable risks of harm. *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999); *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006). Policy factors that should be considered to determine whether a duty should be imposed include the relationship of the parties, the foreseeability of the harm, the burden that would be imposed on the defendant, and the nature of the risk presented. *In re Certified Question from Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 508; 740 NW2d 206 (2007). However, the most important factor considered determining a duty is the relationship of the parties. *Id.* at 505; *Eichhorn v Lamphere School Dist.*, 166 Mich App 527, 545; 421 NW 2d 230 (1988).

"[A]n individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves v Warner Bros*, 253 Mich App 486, 493; 655 NW2d 195 (2002). A special relationship exists where "one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." *Id.* at 494, quoting *Williams v Cunningham Drug*, 429 Mich 495, 498-499; 418 NW2d 381 (1988). Plaintiff has failed to establish the existence of a special relationship with defendants giving rise to a duty to protect her from the criminal acts of a third party. Although plaintiff assisted the Pacers' departure from the basketball court and was in proximity to them during their continued confrontation with spectators, plaintiff never alleged that she entrusted her safety to the control of defendants or lost control to protect herself. *Graves, supra*, 253 Mich App at 494. Absent a special relationship creating the duty to protect plaintiff from the criminal acts of a third party, it is unnecessary to address the other factors relevant to the duty analysis. *Miller v Ford Motor Co.*, 479 Mich 498, 507; 740 NW2d 206 (2007).

Plaintiff argues that finding defendants owed no duty is inconsistent with the law established in *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW 2d 517 (1999). In *Ritchie-Gamester*, the Court adopted reckless misconduct as the minimum standard of care for coparticipants in recreational activities. *Id.* at 89. Plaintiff argues that finding no duty of defendants toward spectators is non-sensical because coparticipants have to at least avoid reckless misconduct. However, the current case does not involve establishing a standard of care for an entire class of spectators, but rather involves determination of a duty for a particular plaintiff in a unique context. Whether defendants owed a duty to plaintiff will not conflict with the standard of care for coparticipants in a sport.

We also reject the argument that the court erred in not finding a contractual duty of care. Plaintiff states that the circuit court could not have found that defendants had no contractual duty to plaintiff because discovery was incomplete on this issue. Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed. *Colista v Thomas*, 241 Mich App 529, 537; 616 NW 2d 249 (2000). According to plaintiff, language in a sample standard player's contract amounts to independent evidence of this contractual duty. Plaintiff argues that this contract obligates National Basketball Association (NBA) players to conduct themselves according to the highest standards of citizenship and sportsmanship, and not do anything that is detrimental to the best interests of the team or league.

However, a negligence claim based on misfeasance of a contractual obligation is the "violation of a legal duty separate and distinct from the contractual obligation." *Fultz, supra*, 470 Mich at 467. Tort actions based on a contract and brought by a plaintiff who is not a party to that contract are analyzed by using a "separate and distinct" standard. *Id.* The threshold consideration in this analysis is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. *Id.* Plaintiff failed to cross this threshold.

Summary disposition prior to the close of discovery is appropriate if there is no reasonable chance that further discovery will produce factual support for the nonmoving party. *Colista, supra*, 241 Mich App at 538. The circuit court found, and we agree, that defendants owed no duty to plaintiff because no relationship existed between them. Absent a separate and distinct duty from defendants' contractual obligations, no tort action based on a contract could stand. *Fultz, supra* 470 Mich at 467. Thus, discovery of defendants' specific contractual obligations to the NBA and their team was irrelevant. See also *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW 2d 707 (1994) (observing that where a party opposes a motion for summary disposition by contending that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence).

Because of plaintiff's failure to establish the requisite duty of care, we need not address her arguments relating to causation.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder