

STATE OF MICHIGAN
COURT OF APPEALS

LILLIAN DIRETTE, Personal Representative and
Individually for the Estate of GUSTY MELVIN
DIRETTE,

UNPUBLISHED
January 14, 2014

Plaintiff-Appellant,

v

No. 309604
Roscommon Circuit Court
LC No. 10-728737-NO

DAIRY QUEEN OF PRUDENVILLE, a/k/a
PRUDENVILLE DAIRY QUEEN, DOROTHY
RUMSLEY TRUST, and DOROTHY RUMSLEY,
d/b/a DAIRY QUEEN OF PRUDENVILLE,

Defendants-Appellees,

and

AMERICAN DAIRY QUEEN CORPORATION,
INTERNATIONAL DAIRY QUEEN
CORPORATION, and BERKSHIRE
HATHAWAY, INC.,

Defendants.

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

In this tort action, plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants Prudenville Dairy Queen, Dorothy Rumsley, and the Dorothy Rumsley Trust. Plaintiff also appeals the trial court's award of costs to defendants under MCR 2.118(A)(3). We affirm the summary disposition, but reverse the award of costs.

I. FACTS AND PROCEDURAL HISTORY

On August 11, 2007, plaintiff's decedent was killed when his motorcycle struck the rear driver's side of a car driven by Casey Robert VanWormer. Plaintiff's decedent was traveling eastbound on M-55, a public highway. VanWormer was stopped at a stop sign at the highway's intersection with Clearwater, facing northbound, waiting to turn left. Defendants' Dairy Queen

store was located at the corner of the intersection, to VanWormer's left. VanWormer testified in a deposition that on the day of the accident he pulled up to the stop sign and waited because he could not see past the people and telephone poles in front of the Dairy Queen. He estimated that there were roughly ten or fifteen people standing in front of the store, and that he had been waiting at the intersection for ten or fifteen minutes before attempting to pull out onto M-55. As VanWormer turned left onto M-55, the decedent's motorcycle collided with his car.

Plaintiff sued defendants Dairy Queen of Prudenville, the Dorothy Rumsley Trust, Dorothy Rumsley, the American Dairy Queen Corporation, the International Dairy Queen Corporation, and Berkshire Hathaway, Inc. The trial court dismissed the claims against defendants Berkshire Hathaway and the Dairy Queen corporations, and those dismissals are not at issue in this appeal. The remaining defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10). On October 17, 2011, the trial court heard plaintiff's motion to adjourn defendants' motion for summary disposition. Plaintiff moved to file a second amended complaint under MCR 2.118. The trial court granted plaintiff's motion to amend, but also assessed plaintiff \$900 in costs to be paid to defendants under MCR 2.118(A)(3). Following a hearing on March 5, 2012, the trial court granted summary disposition for the remaining defendants.

II. STANDARD OF REVIEW

The trial court did not expressly identify the rule under which it granted summary disposition. However, the court concluded that defendants owed no duty to plaintiff. The question of whether a defendant owes a duty is a matter of law to be decided by a court. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). Because the trial court concluded, as a matter of law, that defendants had no duty that would support plaintiff's claims, we review the summary disposition under the standard applicable to MCR 2.116(C)(8). See *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000).

Our Supreme Court has explained the standard of review for a summary disposition under MCR 2.116(C)(8):

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).]

III. ANALYSIS

A. NEGLIGENCE AND GROSS NEGLIGENCE CLAIMS

Plaintiff's first two claims are for negligence and gross negligence. To withstand summary disposition on these claims, plaintiff had to allege facts to support each of the four elements of a negligence action: duty, breach, causation, and damages. *Brown v Brown*, 478

Mich 545, 552; 739 NW2d 313, 317 (2007). “The threshold question . . . is whether the defendant owed a duty to the plaintiff.” *Id.* (internal quotation marks and citation omitted). “Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.” *Id.* (citation omitted). Among the factors to consider when deciding whether a duty exists are “the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.” *Hill*, 492 Mich at 661 (internal quotation marks and citation omitted). A court first considers the relationship between the parties and the foreseeability of the harm. *Id.* If either of these two factors is missing, there is no legal duty and the court need not consider the remaining factors. *Id.*

In this case, the issue was whether defendants, the owners and operators of a Dairy Queen ice cream stand, owed a duty of care to the motorcyclist traveling on M-55. Plaintiff maintains that an ice cream stand operator has a duty to patrol the land near the ice cream stand, so as to ensure that no ice cream customer is ever in a location that might impede a motorist’s view of traffic. We disagree, for two reasons. First, plaintiff has not alleged any cognizable relationship between the motorcyclist and the ice cream stand operators. Absent any relationship between the motorcyclist and defendants, there is no foundation to support the imposition of a duty. See *Hill*, 49 Mich 661-665. Second, plaintiff alleged no facts to indicate that the motorcyclist entrusted himself to defendants’ control. Although our Courts have on occasion imposed a duty when there is a special relationship of entrustment, nothing in the pleadings supports the inference of a special relationship in this case. See *id.* at 666-667. Accordingly, although the death of the motorcyclist was a tragic accident, the trial court correctly concluded that the defendant ice cream stand owners had no duty to plaintiff or to the decedent as a matter of law.

B. PUBLIC NUISANCE CLAIM

Plaintiff’s final claim against defendants was for public nuisance. To withstand summary disposition on this claim, plaintiff had to allege facts to support the elements of a public nuisance action: that defendants engaged in unreasonable interference with a common right enjoyed by the general public. *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 427; 770 NW2d 105 (2009), quoting *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). Specifically:

The term “unreasonable interference” includes: (1) conduct that significantly interferes with public health, safety, peace, comfort, or convenience; (2) conduct that is prescribed by law; (3) conduct of a continuing nature that produces a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect on public rights. [*Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450, 453-454 (1990).]

An allegation of an actual obstruction on a public highway may support a public nuisance claim. See *Long v New York Central R Co*, 248 Mich 437, 439; 227 NW2d 739 (1929). However, a general allegation of an interference with public safety does not necessarily establish a public nuisance claim. See *Askwith v Sault Ste Marie*, 191 Mich App 1, 6; 477 NW2d 448 (1991) (Sawyer, J., concurring in part, dissenting in part).

In this case, there is no allegation that defendants' conduct caused an actual obstruction on M-55 or on the adjacent street. Rather, plaintiff alleges that defendants failed to prevent ice cream customers from standing in any spot that might impede the view of a driver on the adjacent street. According to plaintiff, defendants should have rebuilt or relocated the ice cream stand to provide more room for customers on the sidewalk and should have engaged in "crowd control." These allegations are insufficient to withstand summary disposition on the public nuisance claim.¹

Essentially, plaintiff alleges that an ice cream stand operator creates a public nuisance any time that ice cream customers are standing in locations that might create a blind spot affecting a motorist on an adjacent street. The possible existence of a blind spot is not a public nuisance in this case. Our Supreme Court explained, "[t]o be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several." *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957), quoting Prosser, Torts, § 71, pp 401-402. Here, the allegation is that the existence of customers on the sidewalk directly or indirectly affected two individuals: the motorcyclist and the driver of the car. There is no allegation that the location of ice cream customers always affected the general public. Even if the ice cream customers may have created a temporary blind spot during a peak time in the summer, the creation of a blind spot required adjacent motorists to yield or to wait until customers stepped away to clear the view. A condition that requires a motorist to yield or to wait does not unreasonably interfere with the safety of the general public. In sum, we conclude that plaintiff failed to allege facts to support the public nuisance claim.

C. AWARD OF COSTS

Plaintiff also challenges the court's award of costs to defendants. "This Court reviews a trial court's ruling on a motion for costs and attorney fees for an abuse of discretion." *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.*

MCR 2.118(A)(3) states:

On a *finding that inexcusable delay* in requesting an amendment has caused or will cause the adverse party additional expense that would have been unnecessary had the request for amendment been filed earlier, the court may condition the order allowing amendment on the offending party's reimbursing the adverse party for the additional expense, including reasonable attorney fees. [Emphasis added.]

¹ With this conclusion, we adopt the reasoning presented by Judge Murray in his dissent in *Veremis v Gratiot Place, LLC*, unpublished opinion per curiam of the Court of Appeals, issued June 4, 2013 (Docket No. 302658) lv app pending (Murray, J., concurring in part, dissenting in part).

MCR 2.116(I)(5) states, “If the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.”

The record contains nothing to indicate that plaintiff engaged in inexcusable delay in filing the second amended complaint. The trial court granted plaintiff’s motion to amend its pleadings, but made no finding of inexcusable delay. Rather, the court stated that it was assessing costs because “[t]his is the second time we’ve had this issue come up.” The record indicates that plaintiff amended the complaint once before, but there is no indication that this amendment was contested, or that there was inexcusable delay in the second amendment.

MCR 2.116(I)(5) uses mandatory language requiring that the court “shall give the parties an opportunity to amend their pleadings . . . unless the evidence then before the court shows that amendment would not be justified.” The trial court in this case did not state any reason why amendment would not be justified under circumstances. Assessing costs was, therefore, outside the range of principled outcomes and constituted an abuse of discretion.

Summary disposition affirmed; cost award reversed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ William C. Whitbeck

/s/ E. Thomas Fitzgerald

/s/ Peter D. O’Connell