

STATE OF MICHIGAN
COURT OF APPEALS

MICHELLE NARANJO,

Plaintiff-Appellant,

v

SKY CHEFS, INC., individually, and d/b/a
LSG SKY CHEFS, INC.,

Defendant-Appellee.

UNPUBLISHED

October 19, 2004

No. 245320

Wayne Circuit Court

LC No. 02-207921-NO

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Plaintiff Michelle Naranjo appeals as of right from the order granting summary disposition in favor of defendant Sky Chefs, Inc. Plaintiff was a flight attendant for Northwest Airlines (“Northwest”), while defendant provided catering services for the pertinent Northwest flight. Plaintiff was apparently injured during that flight due to a brake not being set on a serving cart that defendant loaded onto the airplane. The essential issue in this appeal is whether defendant owed plaintiff a duty to set the brake on that serving cart when it was loaded on the airplane. We hold that defendant does not owe plaintiff a common-law duty based on the evidence presented in this case, and as such plaintiff has no actionable claim against defendant. Therefore, we affirm the trial court’s decision granting summary disposition in favor of defendant.

I. Facts

Plaintiff alleged in her complaint that on or about May 1, 1999, defendant, through its employees or other agents, placed multiple beverage carts in the main cabin galley of a Northwest flight on which she was working as a flight attendant. The galley of the airplane is configured with “slots” for about four rows of beverage carts “stacked side by side” to fit under the counters on each of the galley’s two sides. One row could accommodate one full cart or two beverage carts. If two beverage carts were in a row, one would be directly behind the other and could not be seen without removing the front cart.

About fifteen to twenty minutes into the flight, plaintiff pulled out a front beverage cart and the rear cart followed the front cart out of the compartment, allegedly because its brake was not set. Because of the added weight of the rear cart, plaintiff could not stop it from coming out and was pinned to the opposite galley latch, which struck plaintiff in the back. Plaintiff could

not push the carts off herself because of their heavy weight. She then called to another flight attendant who came to her assistance. Plaintiff asserts that defendant owed her a duty to load the carts onto the airplane in such a manner so that the carts would be secure and not come rolling out. Plaintiff claims that defendant negligently placed one of the rear beverage carts in the main cabin galley in an unsecured state and that, as a result, suffered various injuries when she was struck by the front beverage cart which was propelled by the weight of the rear cart rolling forward.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10) on the grounds that (1) federal regulations, specifically 14 CFR 121.576–.577, mandated that it was the duty of Northwest and its employees to secure each serving cart in a stowed position and to provide and use means to prevent the carts from becoming a hazard during a flight, and (2) plaintiff acknowledged that it was her duty to check to make sure the carts were locked and secure. Plaintiff argued in response that Northwest and plaintiff expected and relied on defendant to properly secure the serving carts in the galley by depressing the brake on each cart to insure that it would not move until it was released by a flight attendant. With regard to defendant’s argument that plaintiff acknowledged it was her duty to check that the carts were locked and secured, plaintiff replied that this was “a broad generalization” of her deposition testimony. Plaintiff stated that she also testified that it was defendant’s duty to make sure the carts were properly locked and secured after being loaded on the airplane by its employees and that defendant knew and understood its responsibility with regard to the braking device of the carts.

II. Standard of Review

A trial court’s grant of summary disposition under MCR 2.116(C)(10) is reviewed de novo.¹ *Rose v Nat’l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). In doing so, this Court should consider the documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition is properly granted under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

III. Analysis

In order to set forth a prima facie case of negligence, a plaintiff must prove duty, breach of duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The sole issue on appeal is whether defendant owed plaintiff a duty. The existence of a duty presents a question of law, which is reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

¹ The trial court did not specify the subrule under which it granted summary disposition. However, because the trial court’s ruling appears to have been based on more than the pleadings, we assume that summary disposition was granted pursuant to MCR 2.116(C)(10). *Verna’s Tavern, Inc v Heite*, 243 Mich App 578, 584-585; 624 NW2d 738 (2000).

“Duty” is an obligation to conform to a specific standard of care toward another. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). And is essentially a question 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. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992). Here, plaintiff alleges that defendant owed her a common-law duty to perform with reasonable care its responsibilities, which she asserts includes securing the rear beverage carts, under the catering services contract between defendant and Northwest. Plaintiff also claims that defendant assumed this duty. This Court has recognized a party to a contract may be held liable in tort for its negligent performance of the contract that resulted in an injury suffered by a foreseeable third party. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 708; 644 NW2d 779 (2002); citing *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967); *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 212; 565 NW2d 907 (1997).

Historically, in determining whether a third party could maintain an action for negligent performance of a contract, Michigan courts have focused on whether the performance constituted misfeasance or nonfeasance.

Misfeasance is negligence during performance of a contract. While performing a contract, a party owes a separate, general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability. [*Clark, supra* at 261.] The duty to act with due care encompasses the duty to prevent injury from a peril created during performance. See *Hart [v Ludwig]*, 347 Mich 559, 565; 79 NW2d 895 (1956)]. In contrast, failure to perform a contract altogether constitutes nonfeasance and gives rise only to a suit for breach of contract. *Id.* [*Courtright v Design Irrigation, Inc*, 210 Mich App 528, 530; 534 NW2d 181 (1995).]

However, as the *Courtright* Court noted, the distinction between nonfeasance and misfeasance is often difficult to make. *Id.* Our Supreme Court explained in *Hart, supra* at 564-565:

The division thus made, between misfeasance, which may support an action either in tort or on the contract, and the nonfeasance of a contractual obligation, giving rise only to an action on the contract, is admittedly difficult to make in borderland cases. There are, it is recognized, cases in which an incident of nonfeasance occurs in the course of an undertaking assumed. Thus a surgeon fails to sterilize his instruments, an engineer fails to shut off steam, a builder fails to fill in a ditch in a public way. These are all, it is true, failures to act, each disastrous detail, in itself, a “mere” nonfeasance. But the significant similarity relates not to the slippery distinction between action and nonaction but to the fundamental concept of “duty”; in each a situation of peril has been created, with respect to which a tort action would lie without having recourse to the contract itself. [Citations omitted.]

Recognizing that the distinction between nonfeasance and misfeasance is often only an exercise in semantics, our Supreme Court in *Fultz, supra*, recently rejected this analysis, stating that the nonfeasance/misfeasance inquiry improperly focuses on the breach of duty element of negligence. “We believe the ‘slippery distinction’ between misfeasance and nonfeasance of a

duty undertaken obscures the proper initial inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff.” *Id.* at 467.

Instead, the Court instructed lower courts to analyze a third party’s tort claim arising from a contract utilizing a “‘separate and distinct’ mode of analysis,” which has also been employed by Michigan courts in determining whether a tort action based on a defendant’s contractual obligations can be sustained.² *Id.*

Accordingly, the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a “‘separate and distinct’ mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations. If no independent duty exists, no tort action based on a contract will lie.

* * *

To summarize, if defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id.* at 467, 469-470.]

Therefore, we must first determine whether defendant had a specific duty under the contract to set the carts’ brakes.

The contract between defendant and Northwest was for catering services on Northwest’s flights. It delineates defendant’s duties with respect to the maintenance and repair of the beverage carts, but it does not speak to onboard procedures. Although the contract does state that defendant agrees to abide by all applicable federal, state, and airport regulations, none impose a duty directly on a catering service to ensure that the carts are secured onboard a flight. Indeed, if the much discussed FAA regulations³ were applicable to defendant through a contract

² Specifically, *Fultz* noted that this state’s courts “have defined a tort action stemming from misfeasance of a contractual obligation as the ‘violation of a legal duty separate and distinct from the contractual obligation.’” *Fultz, supra* at 467, quoting *Rinaldo’s Constr Corp v Michigan Bell Tel Co*, 454 Mich 85, 84; 559 NW2d 647 (1997). The Court also cited *Ferrett v Gen Motors Corp*, 438 Mich 235, 245; 475 NW2d 243 (1991), and *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 48; 649 NW2d 783 (2002), for this proposition.

³ The pertinent federal regulations are 14 CFR 121.576-.577. 14 CFR 121.576 provides:

The certificate holder [e.g., an airline] must provide and use means to prevent each item of galley equipment and each serving cart, when not in use, and each item of crew baggage, which is carried in a passenger or crew compartment from becoming a hazard by shifting under
(continued...)

provision, then plaintiff's claim in tort could not stand because defendant's duty to act would stem from one of its contractual obligations. Under the contract, we find there is no evidence that defendant was required to follow any specific protocol when it placed the carts onboard Northwest's aircraft. Defendant argues that, therefore, because the FAA regulations place on Northwest the duty of securing the carts before, during, and after flight, defendant cannot be held liable. However, this argument presupposes that multiple parties cannot owe a duty to the same plaintiff, which is simply untrue.

Having concluded that a duty to set the carts' brakes does not arise out of the contract in terms of the promises made therein, we must determine whether another source imposes liability on defendant. A "duty" separate and distinct from contractually imposed duties will be found where the defendant affirmatively acts, yet does so negligently. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 83; 559 NW2d 647 (1997); *Hart, supra* at 562. Here, defendant has a contractual duty to place the beverage carts onboard Northwest's flights. And it has a general common-law duty to do so with reasonable care. *Rinaldo's, supra* at 84; *Hart, supra* at 564. This is not a situation where defendant simply failed to perform its contractual duties, but rather involves a situation where defendant arguably did so negligently, i.e., placing the carts onboard the airplane without properly securing them.⁴

Certainly, Northwest has a duty to ensure that the carts are secure before, during and after flight as provided in 14 CFR 121.576-.577. The first critical inquiry is whether defendant voluntarily assumed this duty as well. Plaintiff argues that defendant assumed this duty by virtue

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the appropriate load factors corresponding to the emergency landing conditions under which the airplane was type certificated.

14 CFR 121.577 provides:

(a) No certificate holder may move an airplane on the surface, take off, or land when any food, beverage, or tableware furnished by the certificate holder is located at any passenger seat.

(b) No certificate holder may move an airplane on the surface, take off, or land unless each food and beverage tray and seat back tray table is secured in its stowed position.

(c) No certificate holder may permit an airplane to move on the surface, take off, or land unless each passenger serving cart is secured in its stowed position.

(d) No certificate holder may permit an airplane to move on the surface, take off, or land unless each movie screen that extends into an aisle is stowed.

(e) Each passenger shall comply with instructions given by a crewmember with regard to compliance with this section.

⁴ We note that plaintiff does not argue that the brake was defective and that defendant's negligence stems from its failure to inspect the carts.

of its standard operating procedures. While these procedures do speak to an employee's responsibility to properly secure the carts after they are loaded onto the vehicle that delivers them to the aircraft, none of the procedures regard actions to be taken onboard the aircraft. Notably, the contract between Northwest and defendant states that Northwest may review defendant's "training curriculum and provide training recommendations regarding galley loading procedures." However, plaintiff fails to present any evidence delineating defendant's training of its employees regarding galley loading procedures.

Plaintiff also argues that defendant assumed the duty to secure the carts because it knew of Northwest's flight attendants' reliance on defendant's employees to secure the rear carts' brakes. While defendant did admit that it was aware of at least one other incident in which a flight attendant was injured as the result of a rolling unsecured cart, defendant did not admit to any liability. Simply because defendant knew of this accident and perhaps others does not equate to knowing that Northwest's flight attendants 1) did not comply with the FAA regulations requiring them to ensure that the carts were secure because they were not required by their employer to check the rear carts and 2) relied on defendant's employees to secure the carts' brakes. Furthermore, there was no evidence presented to establish that defendant assumed this duty by virtue of its past practices, i.e., defendant's employees regularly set the brakes on the rear lermers. Had such evidence been presented, we would likely have found that defendant did voluntarily assume a duty to secure the carts. But, in light of the above-noted missing evidence, we cannot find that defendant assumed this duty or, at the very least, that an issue of fact remains as to whether defendant assumed this duty.

The only other avenue by which defendant could be said to have a duty to secure the cart brakes is through the imposition of a common-law duty, i.e., a finding that because defendant did have a duty to load the carts onto the aircraft, it had a duty to do ensure that the carts were stowed in a safe manner; thus, extending defendant's duty beyond those contractually imposed. Generally, one does not owe a duty to protect another. *Dykema, supra* at 8. However, a duty may be imposed where there is a special relationship between the defendant and the plaintiff. *Id.*

The rationale behind imposing a legal duty to act in these special relationships is based on the element of control. In a special relationship, one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is in the best position to provide a place of safety. Thus, the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself. [*Id.* at 8-9 (citations omitted).]

In determining if a legal duty exists for tort law purposes, "courts examine a variety of factors, including 'foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and . . . the burdens and consequences of imposing a duty and the resulting liability for breach.'" *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004), quoting *Buczowski v McKay*, 441 Mich 96, 101 n 4; 490 NW2d 330 (1992).

From the evidence presented, we find no basis for imposing tort liability on defendant in this case. There is no indication that defendant was required or expected to do anything more than place the beverage carts under the galley counters. Plaintiff did not testify, or provide any other basis for concluding, that defendant's employees regularly set the carts' brakes or that defendant knew the flight attendants relied on defendant to perform this function. Indeed, we are not even apprised of what defendant's expectations were of its employees regarding onboard galley procedures. In sum, there was simply no reason for defendant to foresee that plaintiff, as an agent of Northwest, would not perform her duty under the FAA regulations to ensure that the carts were secure before the flight was airborne. Accordingly, we find no support for plaintiff's contention that this duty should also be imposed on defendant. The trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Brian K. Zahra