

STATE OF MICHIGAN
COURT OF APPEALS

HARONDO EVANS,

Plaintiff-Appellant,

v

CITY OF TAYLOR, WILLIAM DEMAGGIO,
GREGORY SMITH and JAMES HUBBARD,

Defendants-Appellees.

UNPUBLISHED

October 21, 2004

No. 247736

Wayne Circuit Court

LC No. 99-935631-CZ

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition to defendants, William DeMaggio and Gregory Smith, in this action alleging gross negligence in the investigation and reporting by defendants, in their respective capacities as fire inspector and fire marshal for the city of Taylor, of the cause of a fire at plaintiff's home. Plaintiff also alleges error in the trial court's denial of his motion to amend the first amended complaint and in the denial of his motion to file transcripts. We affirm.

Plaintiff first argues that the trial court erred by concluding that defendants did not owe plaintiff a duty at common law in the investigating and reporting on the fire at plaintiff's residence.¹ Whether a duty exists is a question of law subject to de novo review. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004); *Benejam v Detroit Tigers*, 246 Mich App 645, 648; 635 NW2d 219 (2001). In a negligence action, summary disposition is properly granted pursuant to MCR 2.116(C)(8) if it is determined as a matter of law that the

¹ In a prior appeal, *Evans v City of Taylor*, unpublished memorandum opinion of the Court of Appeals, Docket No. 230792 (issued July 5, 2002), a panel of this court concluded that the trial court improperly granted summary disposition in favor of defendants based on the public duty doctrine. The panel, citing *Beaudrie v Henderson*, 465 Mich 308; 552 NW2d 1 (1996), concluded that defendants' duty to plaintiff must be determined under common law principles, and that any immunity from liability must be determined under the Governmental Immunity Act, MCL 691.1407. *Id.* at slip op p 1.

defendant owed no duty to the plaintiff. *Schneider v Nectarine Ballroom, Inc (On Remand)*, 204 Mich App 1, 4; 514 NW2d 486 (1994).

In determining whether a legal duty exists, courts examine a variety of factors, including (1) foreseeability of the harm, (2) degree of certainty of injury, (3) closeness of connection between the conduct and injury, (4) moral blame attached to the conduct, (5) policy of preventing future harm, and (6) the burdens and consequences of imposing a duty and the resulting liability for breach. *Valcaniant, supra* at 86.

With regard to the first factor, it is foreseeable that the investigators' actions could affect the insurer's determination whether plaintiff is to be reimbursed for the fire on his premises. With regard to the second and third factors, certainty of injury and closeness of connection between the conduct and the injury, plaintiff argues that defendants' "poisonous invective" against plaintiff to plaintiff's insurer meant that plaintiff's injury, i.e., that he received less than half of the value of his loss from the fire, was certain to occur. However, intervening factors were utilized by the insurer to determine plaintiff's claimed loss. The claims adjuster for plaintiff's insurer testified that he made the decision to deny plaintiff's claim for benefits based in part on defendants' conclusions regarding the origin of the fire, but also because the independent fire investigator retained by the insurer concluded that the fire was the result of arson. Plaintiff did not present any evidence that the insurer would have approved benefits if defendants had found that the fire was accidental. Further, the denial of benefits by the insurer was not itself the determining factor regarding whether plaintiff received less than half of the insurance benefits due to him because of the fire. The record indicates that plaintiff sued his insurer to recover his benefits, and, instead of pursuing his claim, he chose to settle with the insurer on the date of trial for \$68,000, which plaintiff alleges was less than half the value of his loss. Plaintiff's decision to settle with the insurer, instead of pursuing his rights to a recovery of the full amount of his fire loss by going to trial, made his claimed injury certain. Therefore, the intervening factors, i.e., the insurer's decision to deny benefits based partially on its own investigator's report and plaintiff's decision to settle with the insurer for half the value of his claimed loss, operated to greatly reduce the certainty that the loss by plaintiff was bound to occur as a result of any sloppy investigation by defendants and to reduce the closeness in connection between the two events.

With regard to the fourth factor, the moral blame attached to the conduct, plaintiff alleged in his complaint that Smith assigned the investigation of the fire to DeMaggio when he knew or should have known that DeMaggio was unqualified to conduct the investigation. But according to Smith's testimony, he assigned the investigation to DeMaggio believing that DeMaggio was qualified, by experience and training, to conduct a fire investigation report. Smith's belief in DeMaggio's qualifications was supported by DeMaggio's testimony that he was a state certified fire inspector and possessed an advanced degree in fire investigation from Oakland College. Plaintiff provided no evidence to counter this testimony. Plaintiff also alleged that Smith and DeMaggio willfully neglected to consider the kitchen as a possible starting point in the fire. However, Smith and DeMaggio testified that they considered the kitchen as the starting point of the fire but ruled it out because of the evidence of high burn in the kitchen. They both determined that the fire began in the living room because of the burn pattern in the house. Again, plaintiff presented no evidence to contradict this testimony. Lastly, plaintiff alleged that DeMaggio and Smith were morally culpable for unleashing "poisonous invective" on the insurer

about plaintiff's role as possible arsonist. DeMaggio acknowledged that he communicated to the insurer his conclusion that the fire was intentionally set but plaintiff came forward with no evidence to show that this communication was a breach of any policy or procedure of the fire department, let alone a morally reprehensible act. A review of the record indicates that plaintiff did not produce any evidence before the trial court that defendants' conduct was morally blameworthy.

With regard to the fifth factor, the public policy of preventing future harm, public policy is in favor of a citizen recovering the value of his loss if that loss was the result of an accidental fire and would be against a citizen being denied insurance benefits due to sloppy fire investigation that resulted in a mistaken conclusion about the fire's origin. But here, plaintiff failed to present any evidence to support a finding that defendants performed their investigation in a negligent or sloppy fashion or that defendants were mistaken in their conclusion that the fire was the result of arson.

With regard to the last factor, the burdens and consequences of imposing a duty and the resulting liability for breach, imposing a duty on the fire investigator and fire marshal to individual citizens who have need of their services would be to invite lawsuits by every citizen who disagreed with the conclusion of the fire officials. Fire officials' time would then be spent in giving testimony and appearing in court. As noted by the trial court, this consequence would have a chilling effect on the officials and on their ability to investigate a fire in a disinterested manner. The heavy burden that would be imposed on the fire officials if there were a duty found to plaintiff on the facts of the case is as unacceptable as it is unnecessary where citizens have other recourse if they disagree with the conclusions of a cause and origin investigation conducted by the fire department.²

With only one of the factors, foreseeability, favoring the finding of the existence of a duty, we conclude that the trial court did not err in finding that no duty was owed by defendants to plaintiff. Duty is an essential element of a claim of negligence or gross negligence. Thus, summary disposition in favor of defendants was properly granted.

Plaintiff also argues that the trial court abused its discretion in denying his motion to amend the first amended complaint. Amendment of the complaint would be futile in light of our conclusion that defendants did not owe a duty to plaintiff. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Finally, the trial court did not abuse its discretion by denying plaintiff's motion to file transcripts in support of its response to defendants' motion for summary disposition after the motion had been briefed, argued and decided. These transcripts did not form part of the evidentiary record at the time the trial court decided defendants' motion for summary

² For example, a citizen can hire an expert and conduct his own investigation, and he can file suit against his insurance company if he believes his benefits were wrongfully denied based on an erroneous fire investigation report.

disposition, and this Court would not be able to consider these transcripts on appeal. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter