STATE OF MICHIGAN

COURT OF APPEALS

EMMA PURCELL,

Plaintiff-Appellant,

v

NEVIN JOHNSON,

Defendant-Appellee.

UNPUBLISHED
July 11, 1997

No. 188673
Wayne Circuit Court
LC No. 92-230479 NO

NATANYA PURCELL and RACHEL PURCELL,

Plaintiffs-Appellants,

v

NEVIN JOHNSON,

Defendant-Appellee.

No. 190516
Wayne Circuit Court
LC No. 93-331054 NO

Before: Young, P.J., Jansen and R. Cooper*, JJ.

PER CURIAM.

This is a consolidated appeal. In docket no. 188673, plaintiff, Emma Purcell, appeals by right an order granting summary disposition in favor of defendant, Nevin Johnson. In docket no. 190516, plaintiffs, Natanya Purcell and Rachel Purcell, appeal by right an order granting summary disposition in favor of defendant, Nevin Johnson. We affirm in part, reverse in part, and remand for further proceedings.

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* Circuit judge, sitting on the Court of Appeals by assignment.

The facts of these consolidated cases are briefly as follows. In docket no. 188673, plaintiff Emma Purcell filed a claim for negligence alleging that defendant breached a duty to maintain her premises and adjacent walkways. Plaintiffs Natanya and Rachel Purcell filed a motion to intervene, which was withdrawn when the trial court granted defendant's motion for summary disposition, finding that defendant owed no duty to plaintiff. Plaintiff Emma Purcell successfully sought reconsideration of the trial court's decision on the basis that Detroit Code, art XVI, Sec 9-16-1 *et seq.* (adopting by reference the 1990 BOCA National Property Maintenance Code) ("BOCA Code") imposed an affirmative duty on defendant to maintain the walkway. However, the trial court subsequently granted defendant's renewed motion for summary disposition on the basis that plaintiff failed to plead the code, and denied plaintiff's motion for reconsideration. Meanwhile, in docket no. 190516, plaintiffs Natanya and Rachel Purcell filed a separate complaint alleging loss of consortium and negligent infliction of emotional distress. The trial court dismissed the loss of consortium claims as derivative of the now defunct primary negligence claim, and dismissed the claims for negligent infliction of emotional distress for failing to state a claim for relief.

Docket No. 188673

Plaintiff Emma Purcell argues that the trial court erred in dismissing her negligence claim for failure to plead the BOCA Code. We agree.

This Court reviews de novo the trial court's grant of summary disposition under MCR 2.116(C)(8). *Garvelink v Detroit News*, 206 Mich App 604, 607; 522 NW2d 883 (1994). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Eason v Coggins Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). Summary disposition under MCR 2.116(C)(8) is appropriate where the claim is "so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

Having reviewed the pleadings in this case, we conclude that summary disposition was inappropriate. MCR 2.111(B)(1) requires a complaint to contain "specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." See also *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Because judicial notice of Michigan statutes is mandatory, "it is not a fatal defect to fail to plead a statute if the pleadings set forth sufficient facts to show a claim or defense based on the statute." *Cassibo v Bodwin*, 149 Mich App 474, 477; 386 NW2d 559 (1986); *Crawford v Palomar*, 7 Mich App 21, 26 n2; 151 NW2d 236 (1967).

By the same token, Michigan courts are required to take judicial notice of "ordinances and regulations of governmental subdivisions or agencies of Michigan" where the requesting party has provided the court with sufficient information to enable it to comply with the request, and where adequate notice is given to the adverse party. MRE 202(b). We find that these requirements were met in this case. Thus, although plaintiff Emma Purcell's complaint did not specifically plead the BOCA code as the basis for defendant's liability, this was not a fatal defect because the pleadings set forth sufficient facts to show a claim based on the code. *Cassibo*, *supra* at 477. Proof of plaintiff's

allegations would show a violation of the code. *Id*. Consequently, the trial court erred in granting summary disposition to defendant on plaintiff Emma Purcell's negligence claim.

Plaintiff raises several other issues with regard to the trial court's decision, including claims that defendant waived the right to object to plaintiff's failure to plead the BOCA Code, and that defendant's renewed motion did not comport with the court rules. Because we reverse the trial court's grant of summary disposition, we decline to address those issues, and further find it unnecessary to address plaintiff's assertion that the trial court abused its discretion in denying her motion for reconsideration.

Docket No. 190516

The trial court dismissed plaintiffs Natanya and Rachel Purcells' derivative loss of consortium claims based on its decision to dismiss the primary negligence claim in docket no. 188673. In light of our decision in docket no. 188673, we likewise reverse the trial court's dismissal of those claims.

Plaintiffs also maintain that the trial court erred in dismissing their claims for negligent infliction of emotional distress. We disagree. As stated previously, this Court reviews the trial court's decision to grant summary disposition de novo. *Garvelink*, *supra* at 607. Based on the pleadings alone, we must determine whether the claim is "so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Eason*, *supra* at 263.

In order to recover for negligent infliction of emotional distress, a plaintiff must establish the following elements: (1) "'the injury threatened or inflicted on the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff'; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must be actually present at the time of the accident or at least suffer shock 'fairly contemporaneous' with the accident." *Wargelin v Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986) (quoting *Gustafson v Faris*, 67 Mich App 363, 368-369; 241 NW2d 208 (1976), which in turn adopted the statement of the rule contained in Prosser, Torts (4th ed), § 54, pp 334-335)).

Based on our review of the pleadings in this case, we conclude that plaintiffs' complaint was deficient in two respects. First, plaintiffs cannot establish the first *Gustafson* element, a serious injury of a nature to cause severe mental disturbance. In interpreting the first element of the *Gustafson* test, this Court has held that this element "essentially states a foreseeability test." *Wargelin*, *supra* at 85. "There is no duty owed . . . for witnessing any injury . . . unless the injuries are of such nature that it can reasonably be foreseen that mental disturbance will follow." *Id*. A review of pertinent Michigan case law indicates that plaintiffs did not allege the type of sudden, tragic injury that has previously supported recovery based on this tort. See, e.g., *Nugent v Bauermeister*, 195 Mich App 158; 489 NW2d 148 (1992); *Luce v Gerow*, 89 Mich App 546; 280 NW2d 592 (1979); *Toms v McConnell*, 45 Mich App 647; 207 NW2d 140 (1973). Therefore, dismissal of plaintiffs' claims for negligent infliction of emotional distress was appropriate on this basis.

Moreover, we find that plaintiffs have also failed to allege the second *Gustafson* element, a shock resulting in actual physical harm. Although we acknowledge that the trial court did not address the issue, because defendant raised the issue below and pursued it on appeal, it is properly before this Court. *Peterman v DNR*, 446 Mich 177, 183; 521 NW2d 499 (1994). In order to meet the physical harm element, a plaintiff must establish "a mental injury which resulted in definite and objective physical symptoms." *Luce*, *supra* at 548; *Daley v LaCroix*, 384 Mich 4, 12; 179 NW2d 390 (1970). In *Daley*, *supra*, this requirement was met by the plaintiff's allegations of "sudden loss of weight," "inability to perform household duties," and "extreme nervousness and irritability." *Daley*, *supra* at 15. In *Toms*, *supra*, it was met by allegations that the plaintiff withdrew from normal forms of socialization, was unable to function as she did previously, and was in a constant state of depression. *Toms*, *supra* at 657.

In the present case, plaintiffs' complaint was devoid of any allegations of physical manifestation of their alleged mental distress. In addition, the complaint averred that plaintiffs' "injuries" actually resulted from their mother's incapacitation, not as a result of their witnessing the accident itself. Accordingly, plaintiffs have failed to allege any physical harm that was the "*natural result* of the fright proximately caused by defendant's conduct." *Daley*, *supra* at 13. The trial court did not err in granting summary disposition on plaintiffs' claims for negligent infliction of emotional distress.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper