STATE OF MICHIGAN

COURT OF APPEALS

DEANNA ARBAUGH, Personal Representative of the Estate of LAWRENCE ARBAUGH, Deceased,

Plaintiff-Appellant,

v

DETROIT EDISON COMPANY and LAPEER CONCRETE & SUPPLY, INC.,

Defendants-Appellees.

UNPUBLISHED
November 16, 1999

No. 208927
Lapeer Circuit Court
LC No. 96-022873 NP

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's orders granting summary disposition to defendants Lapeer Concrete & Supply, Inc. ("Lapeer") and Detroit Edison Company ("Detroit Edison"). Plaintiff's claim resulted from an incident in which the decedent was electrocuted when, in the course of delivering concrete blocks to Lapeer, the boom of his delivery truck touched one of Detroit Edison's overhead power lines. We affirm.

Plaintiff argues on appeal that the trial court erred in granting summary disposition to defendants on the basis that defendants did not have a duty to protect the decedent because his injury was unforeseeable. This Court reviews a grant of summary disposition de novo to determine whether the successful party was entitled to judgment as a matter of law. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). We will address the duty of each defendant separately.

I

Lapeer, as the owner and occupier of the premises, had a special relationship with the decedent, an invitee, which imposed upon Lapeer a duty to exercise reasonable care to protect him from an unreasonable risk of harm caused by a dangerous condition of the land. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499-500; 418 NW2d 381 (1988). Pursuant to this duty, a business invitor may be held liable for injuries resulting from negligent maintenance of the

premises. *Id*. However, the Supreme Court recognized that this duty is not absolute, and that the duty does not extend to conditions from which an unreasonable risk of harm cannot be anticipated or to dangers so obvious and apparent that an invitee may be expected to discover them himself. *Id*; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). If the proofs create a question of fact that the risk of harm was unreasonable, the existence of duty , as well as breach of that duty, become questions for the jury to decide. *Bertrand, supra*, 617.

Plaintiff alleges that there was a question of fact as to whether Lapeer should have anticipated that unloading delivery trucks using a boom near the overhead power lines would create an unreasonable risk of harm. We disagree. The mere fact that there were power lines near the loading and unloading area, nearly thirty feet in the air, did not create a question of fact that the risk of harm was unreasonable.

Here, decedent was an experienced truck driver who had been trained to be watchful for overhead wires and who had made deliveries to Lapeer on at least eight prior occasions.[1] Moreover, the decedent demonstrated his knowledge of the dangers associated with overhead wires on the same day of this fatal accident when he refused to unload at a different job site near utility wires. In addition, the proofs revealed that the wires were 28 ½ feet above the ground and the pallets being unloaded were four feet high and were never stacked more than two high on the ground. Thus, even if the decedent had been unloading two pallets that were eight feet high and had to lift them over two pallets stacked on the ground, there would be no reason to anticipate that the decedent would raise the boom over thirty feet in the air when much less room for clearance was needed.

Based on the proofs presented to the trial court, we find that Lapeer had no reason to anticipate that the overhead power lines presented an unreasonable risk of harm to the decedent. Therefore, we find that the trial court properly granted summary disposition to Lapeer.

II

Although Detroit Edison was not the owner of the premises on which the decedent was injured, the existence of Detroit Edison's duty to the decedent turns on similar considerations of foreseeability. "The test to determine whether a duty was owed is not whether the [electric] company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure." *Schultz v Consumers Power Co*, 443 Mich 445, 452; 506 NW2d 175(1993).

Plaintiff claims that the decedent's accident was foreseeable to Detroit Edison because an employee of Detroit Edison frequently passed by the accident site and because Detroit Edison reconducted the power lines over the accident site. However, we see no distinction between the circumstances here and a trilogy of cases in which the Supreme Court held that the injury was unforeseeable. See *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289(1996). There is no evidence that the power line here was defective, which *Groncki* recognized as a factor in the foreseeability analysis. *Groncki, supra* at 657-658. Moreover, the decedent was experienced with operating boom trucks and with the dangers associated with power lines. See *id*. at 657-660. Further,

as in *Groncki*, the decedent had just recently evidenced his awareness of the dangers surrounding power lines. *Id*.

Although the power company's knowledge regarding the use of machinery near its lines was considered in the *Groncki* trilogy, we note that plaintiff presented no evidence that Detroit Edison was actually aware that any high profile machinery was being used at Lapeer. Evidence that Detroit Edison's employee drove by Lapeer daily and that Detroit Edison had reconducted the lines over the site does not indicate that Detroit Edison had actual notice that boom trucks were being operated near its power lines. Plaintiff presented no evidence that any Detroit Edison employee ever saw high profile machinery operating on the premises. Thus, from the facts that plaintiff submitted, plaintiff essentially argues that when a Detroit Edison employee drove by the site or worked on lines above the site, that employee should have noticed that piles of concrete blocks lay on the site and should further have deduced that high profile machinery would be used in conjunction with the blocks. The trial court correctly found that this conclusion required too great a deductive leap.

Given the decedent's expertise and the lack of evidence regarding knowledge by Detroit Edison, we find that reasonable minds could not dispute that it was unforeseeable to Detroit Edison that anyone would be injured by the power lines in question. Therefore, we find that the trial court properly granted summary disposition to Detroit Edison for lack of duty.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] Plaintiff argues that the trial court improperly considered evidence of the decedent's negligence and alleged violations of MIOSHA safety standards in determining that Lapeer owed no duty to the decedent. We disagree. Although the negligence of a plaintiff does not relieve a defendant of any duty owed the plaintiff, it is implicitly relevant in any determination of the existence of duty that turns on whether an accident was foreseeable with regard to a person who was acting reasonably prudent. See *Riddle, supra* at 98-99, quoting *Ward v Kmart Corp*, 136 Ill 2d 132; 554 NE2d 223, 228-229 (1990) (the obviousness of a condition and the plaintiff's previous encounter with it are relevant to the existence of a duty on the part of the defendant).