STATE OF MICHIGAN

COURT OF APPEALS

MARY GAINES,

Plaintiff-Appellant,

v

SHELL OIL COMPANY, AMERITECH CORPORATION, INC., RIBHI BADAR ABDELWALI and SALMA ABDELWALI, d/b/a BADER SHELL, and RONALD F. BROWN,

Defendants-Appellees.

UNPUBLISHED
April 10, 2001

No. 218659
Wayne Circuit Court
LC No. 98-802969-NO

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting summary disposition in favor of defendants Ameritech Corporation, Shell Oil Company, and Ribhi Badar and Salma Abdelwali, d/b/a Bader Shell,[1] pursuant to MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted). We reverse.

Plaintiff argues that the trial court erred in ruling that defendants were not negligent because they did not owe her a duty of care as a matter of law. We agree.

We review the trial court's decision de novo. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(8), we must accept plaintiff's allegations as true and construe them in plaintiff's favor; only the pleadings may be considered. *Maiden*, *supra* at 119; MCR 2.116(G)(5). 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." *Maiden*, *supra* at 119.

Whether a defendant owes a duty to a plaintiff is a question of law for the court. *Maiden, supra* at 131. We analyze the relationship of the parties to see if it is such that a legal obligation should be imposed on one for the benefit of another. *Id.* Here, plaintiff has one type of

[1] Defendants Ribhi and Salma Abdelwali, d/b/a Bader Shell, will be referred to collectively as Bader Shell.

relationship with Ameritech (a utility) and another with Shell Oil and Bader Shell (the premises owners). These different relationships bear different obligations.

Utility companies are charged with a duty to protect against foreseeable harm. *Groncki v Detroit Edison*, 453 Mich 644, 654; 557 NW2d 289 (1996). Thus, whether a duty exists depends in part on foreseeability. *Brown v Michigan Bell Tel, Inc*, 459 Mich 874, 874-875; 585 NW2d 302 (1998); *McMillan v State Hwy Comm*, 426 Mich App 46, 61-62; 393 NW2d 332 (1986). The questions of duty and proximate cause depend on whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). Where there could exist a reasonable difference of opinion regarding foreseeability of a particular risk, reasonableness of a defendant's conduct with respect to that risk, or the character of the intervening cause, the issue is for the jury. *Richards v Pierce*, 162 Mich App 308, 317; 412 NW2d 725 (1987). In order to state a claim that gives rise to a legally cognizable duty in cases of negligence involving utilities, a plaintiff's allegations of foreseeability must be tailored to the circumstances of the particular incident. See *Brown*, *supra* at 874-875. It is not sufficient for a plaintiff to merely allege that there had been previous accidents in the vicinity, nor for the complaint to address the availability of less dangerous alternatives and the effect of moving the telephone on its accessibility to the public. *Etter v Michigan Bell Tel Co*, 179 Mich App 551, 556-557; 446 NW2d 500 (1989).

In the present case, plaintiff alleged that defendants owed a duty to protect plaintiff against unreasonable and foreseeable harm and not to injure her by negligent acts. The complaint further alleged that patrons using the pay telephones attached to an outside wall at Bader Shell were "required to stand in the foreseeable pathway of vehicular traffic" and would therefore be at risk of being struck. Plaintiff also alleged that safer locations existed, such as inside the building or away from known traffic pathways, and that defendants could have installed barriers, provided more delineation and separation from vehicular areas, or warned patrons of the danger. Accepting these allegations as true and construing them in the light most favorable to plaintiff, we conclude that plaintiff sufficiently alleges a claim upon which relief can be granted. The allegation that the telephones were placed so that users would be required to stand within the traffic pattern or driveway of the service station is more specific than just saying it was an unsafe location or that accidents could happen in that area. It creates a question of fact beyond mere generalization; at the least, a reasonable difference of opinion could exist regarding foreseeability. The allegations of the complaint are sufficient to reasonably inform defendants of the nature of the claims. MCR 2.116(C)(8).

Furthermore, defendant is not automatically relieved of a duty simply because the telephones were placed outside of the traveled portion of the roadway; the duty imposed on a utility is not dependent on the location per se, but the *reasonableness* of that location: a question for the jury. *McMillan*, *supra* at 60, 63-64. Although the telephones were not near the public road, plaintiff alleged that they were in the traveled portion of the service station. Likewise, the lack of evidence of previous accidents at that location does not require a finding that an accident is not foreseeable; *Brown* and *Etter* merely state that such evidence is one factor, and must be specifically indicative of defendant's conduct. To hold that previous accidents are always required would be to always allow defendants to be negligent once, no matter how obvious the

"accident waiting to happen." Finally, in *Brown*, the complaint did not allege that it was foreseeable that the telephone user would be struck by a car; rather, this was what the trial court concluded. *Brown v Michigan Bell (On Remand)*, 225 Mich App 617, 624; NW2d (1997). Here, the complaint clearly alleged that the accident was foreseeable because the telephone user had to stand in the way of traffic. Under the standard of MCR 2.116(C)(8), this is sufficient. Other contributing factors described in *Etter* were inappropriate to consider regarding this defendant because the motion there was brought under MCR 2.116(C)(10), examining the factual support for the pleadings. Here, only the pleadings themselves were to be considered for legal, not factual, sufficiency. The question of whether there were safer locations or if guards should have been used is a question of *breach*, not duty, and thus should not come into consideration when a court is deciding as a matter of law whether a duty existed. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96-97; 485 NW2d 676 (1992); *Arias v Talon Development*, 239 Mich App 265, 268; 608 NW2d 484 (2000). Whether a defendant has breached a duty of care is ordinarily not appropriately decided by summary disposition. *Latham by Perry v National Car Rental Sys Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000).

The other defendants, Shell Oil and Bader Shell, had a relationship with plaintiff because they owned the premises. A landowner has a duty to protect invitees such as plaintiff from harm caused by a condition on the land only if he knows or should know of the condition and should realize that it involves an unreasonable risk of harm that the invitees either will not discover or against which they will fail to protect themselves. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). If the risk of harm remains unreasonable, *despite* its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the landowner is required to undertake reasonable precautions. *Id*. at 611. The question of unreasonableness of the risk is a matter of law for the courts to decide; whether the landowner took reasonable precautions is a question of fact. *Singerman v Municipal Service Bureau*, 455 Mich 135, 142-143; 565 NW2d 383 (1997).

In this case, the complaint included allegations that defendants owed a duty to protect their invitees against unreasonable and foreseeable harm and not to injure them by negligent acts, that the location of the telephones forced a caller to stand in the way of traffic, risking injury. This is sufficient to allege a condition involving an unreasonable risk of harm against which the invitee could not take steps to avoid, short of not using the telephone at all. Here, too, the question of steps defendants could have taken to protect the telephone area is a matter for the jury. If these defendants had brought their own motion under MCR 2.116(C)(8), it would not have succeeded.

Although only the pleadings are to be considered when deciding a motion under MCR 2.116(C)(8), we note that the trial court here indicated that it had looked at the copies of plaintiff's photographs, attached to the motion response. To the extent the trial court looked beyond the pleadings, the motion must be reviewed under MCR 2.116(C)(10) (there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law). See *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). However, a motion for summary disposition under MCR 2.116(C)(10) is generally premature when discovery on a disputed issue has not been completed unless there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Colista v Thomas*, 241 Mich

App 529, 537-538; 616 NW2d 249 (2000). In this case, there had been essentially no discovery at all and under the circumstances, there stood a fair chance that the completion of discovery might result in factual support for plaintiff. Therefore, the trial court erred in considering the photographs because supplemental documentary evidence is prohibited under MCR 2.116(C)(8) and it was inappropriate to treat the motion as being brought under MCR 2.116(C)(10).

The trial court also erred in granting summary disposition for all defendants, since only Ameritech brought the motion. Plaintiff did not have notice that the issues concerning the other defendants would be considered, and because the duty owed by a landowner is different from that of a utility, the issues would have been different. Notably, the trial court did not discuss the issue of unreasonableness of the harm, only its foreseeability, apparently treating all three defendants as having equal legal status. When a court contemplates sua sponte summary disposition against a party, that party is entitled to unequivocal notice of the court's intention and a fair chance to prepare a response. A court that fails to afford that constitutionally rooted courtesy has no authority to grant summary disposition. *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84, 89; 492 NW2d 462 (1992), (Corrigan, J, concurring). The procedure followed in this case was, at best, questionable. We do not address the procedural irregularities, however, because each of the court's conclusions on the merits was erroneous, and we reverse on that ground.

Reversed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald