STATE OF MICHIGAN

COURT OF APPEALS

JASON MADGWICK, Personal Representative of the LISSA MCASKIN ESTATE,

Plaintiff-Appellant,

v

RICHARD HUEY,

Defendant-Appellee,

and

DETROIT ENTERTAINMENT, L.L.C. d/b/a Motor City Casino,

Defendant.

UNPUBLISHED
February 3, 2004

No. 243060
Wayne Circuit Court
LC No. 01-111836-NO

Before: Owens, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In this negligence case, plaintiff, Jason Madgwick, appeals the trial court's grant of summary disposition in favor of defendant, Richard Huey, pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). We affirm.

I. FACTS

This case arises out of events that occurred on the evening of December 16, 2000, and in the early morning hours of December 17, 2000. Defendant and his girlfriend, Lissa McAskin, went out to dinner and then out for a night of gambling at a local casino. Both had consumed several alcoholic beverages. After leaving the casino, McAskin fell asleep in the car on the way home and defendant was unable to rouse her. When they arrived home, defendant carried her into the house, but left her lying on the kitchen floor, near an open door with steps leading down to the basement. When he awoke the next morning, defendant found McAskin at the bottom of the basement stairs with a severe head wound. McAskin died a few days later. Plaintiff Jason Madgwick, McAskin's brother, filed a wrongful death suit against defendant and the casino on behalf of McAskin's estate. The trial court granted summary disposition in favor of both

defendants, and plaintiff now appeals only the summary disposition of his suit against defendant Huey.

Defendant and McAskin met in 1996. McAskin was recently divorced and had a young daughter. In his deposition, defendant testified that in 1998, McAskin selected a home that he purchased. He maintained that they lived in the home with McAskin's daughter. Plaintiff contends that McAskin resided with her mother and did not reside with defendant. Defendant stated that he and McAskin became engaged to be married in August 2000.

On December 16, 2000, McAskin's daughter was spending the weekend with her father. The main source of information regarding the events of the following hours comes from defendant's deposition, because he and McAskin were alone for much of the evening. Defendant suggested that the couple go gambling at Motor City Casino ("casino"). McAskin agreed and before leaving, consumed a half glass of wine. The couple decided to have dinner at Carl's Chop House on the way to the casino. McAskin ate a light dinner of salad and shrimp and consumed two alcoholic beverages (a glass of wine and a cup of coffee with Bailey's Irish Cream). At around 11:00 p.m., the couple left for the casino, where they parked their car, and proceeded to spend the next four hours drinking and gambling. Defendant played the slot machines, then withdrew $300 from an ATM with which McAskin played blackjack. A videotape recorded by the casino showed that defendant consumed four beers at the casino and McAskin consumed four "B&B's" (a liqueur).

Defendant and McAskin left the casino and shortly after their drive began, McAskin fell asleep with her head on the center console of the jeep in which they were riding. McAskin did not awaken during the thirty minute ride home. Upon their arrival home, defendant attempted to awaken McAskin, but was unable to do so. He stated that he was unconcerned by this because he had been unable to awaken McAskin on past occasions.

Defendant assisted McAskin into the house by putting his arms around her. He testified that she would not have been able to walk on her own free will if she were sleeping. Defendant stated that McAskin entered the house and lay down on the kitchen floor. She was approximately three feet from the basement stairs. Defendant left McAskin on the floor in her coat, went into his bedroom, set his alarm clock and went to sleep.

The following morning, defendant's alarm clock woke him around 7:15 or 7:30 a.m. Defendant looked for McAskin and saw her laying on her back at the bottom of the basement stairs. McAskin was no longer wearing the coat or sweater that she had been wearing when defendant last saw her. Defendant assumed she was sleeping and placed a blanket on McAskin then went back upstairs. Defendant did not notice that pictures and other items had been knocked off a shelf along the staircase, nor did he notice the blood, vomit or urine on McAskin.

Defendant stated that between fifteen and thirty minutes later, he went back downstairs, in order to place a towel under McAskin's head, to make her more comfortable. At that point, defendant noticed blood on the back of McAskin's head and some vomit. He then called 911. McAskin was immediately transported by ambulance to the hospital where she was diagnosed with severe cranio-cerebral trauma. McAskin died on December 22, 2000.

Police investigated the accident and found McAskin's watch and earrings in defendant's bedroom. Defendant stated that McAskin had been wearing those items when he left her on the kitchen floor. Police also found McAskin's coat on the kitchen table. Defendant stated that he had not heard McAskin get up during the night, but he assumed she must have. Police administered a lie detector test to defendant. They asked him whether he pushed McAskin down the stairs, or did anything to cause her to fall down the stairs. He answered "no" and the polygraph examiner determined that defendant had answered truthfully. During his deposition, defendant admitted that he had exercised "bad judgment" by not carrying McAskin into the bedroom.

Plaintiff's complaint alleged that defendant had a duty to inspect, repair or maintain his premises, or to warn McAskin of the stairway. Plaintiff later clarified that his claim was based on defendant's negligence, and not on a theory of premises liability. He stated that defendant had voluntarily assumed a duty when he undertook to carry McAskin into the home. Further, once he undertook that duty, he was required to perform that duty carefully and not omit what an ordinary prudent person would do.

Defendant filed a motion for summary disposition based on MCR2.116(C)(8) and MCR 2.116(C)(10). With regard to plaintiff's claims against defendant, the trial court noted that the majority of plaintiff's allegations in his complaint involved premises liability. The trial court determined that because McAskin was at least a frequent visitor to defendant's home, McAskin was a licensee. The trial court opined that defendant only had a duty to warn McAskin of hidden dangers or defects. The trial court concluded that plaintiff had not shown any hidden dangers or defects and therefore, granted summary disposition on all premises liability allegations.

The trial court next addressed plaintiff's negligence theory stating:

> Letting someone lie on a floor near a staircase or putting someone on a floor near a staircase, which might be bad judgment, cannot be negligence. Even if it were bad judgment query whether he was the proximate cause of her injuries and her ultimate death because, again, no one knows what happened between – or at least no one has any real proof of what happened between 3:00 in the morning and 7:30 in the morning.

The trial court then granted defendant's motion for summary disposition. Plaintiff now appeals as of right.

II. STANDARD OF REVIEW

Summary disposition against a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. MCR 2.116(C)(8), *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts, and construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817

(1999). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden, supra*. A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Beaty v Hertzberg & Golden, PC,* 456 Mich 247, 253; 571 NW2d 716 (1997).

Summary disposition of all or part of a claim or defense may be granted when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). The purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *Shepherd Montessori Center Milan v Ann Arbor Twp,* ___ Mich App ___; ___ NW2d ___ (Docket No. 233484, issued 11/6/03), slip op p 4.

When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v City of Center Line,* 242 Mich App 560, 574; 619 NW2d 182 (2000).

The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4), *Maiden, supra* at 120, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *Smith, supra,* and the disputed factual issue must be material to the dispositive legal claims, *Auto Club Ins Ass'n v State Automobile Mut Ins Co*, 258 Mich App 328, 333; 671 NW2d 132 (2003). The existence of a disputed fact must be established by admissible evidence, MCR 2.116(G)(6), *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). All reasonable inferences are to be drawn in favor of the nonmovant. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999).

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins,* 458 Mich 288, 294; 582 NW2d 776 (1998).

Questions regarding duty are for the court to decide as a matter of law, *Harts v Farmers Ins Exchange,* 461 Mich 1, 6; 597 NW2d 47 (1999), and are subject to de novo review, *Benejam v Detroit Tigers, Inc,* 246 Mich App 645, 648; 635 NW2d 219 (2001). If there is no duty, summary disposition is proper. *Beaudrie v Henderson,* 465 Mich 124, 141; 631 NW2d 308 (2001). However, if factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the factfinder. *Howe v Detroit Free Press, Inc,* 219 Mich App 150, 155; 555 NW2d 738 (1996).

III. VOLUNTARY ASSUMPTION OF DUTY

Plaintiff argues that the trial court erred in granting summary disposition of plaintiff's negligence claim. We disagree.

Plaintiff asserts that defendant was negligent in that he voluntarily assumed the performance of a duty and then failed to exercise reasonable care, thereby increasing the risk of harm to McAskin. In order to present a prima facie negligence case, the plaintiff must prove the defendant owed him a duty. *Schultz v Consumers Power Co,* 443 Mich 445, 449; 506 NW2d 175 (1993). A duty is a legally recognized obligation to avoid negligent conduct. *Moning v Alfono,* 400 Mich 425, 437; 254 NW2d 759 (1977). The issue of whether a duty exists is usually one of law to be decided by the trial court, *Schmidt v Youngs,* 215 Mich App 222, 224; 544 NW2d 743 (1996); *Terrell v LBJ Electronics,* 188 Mich App 717, 719-720; 470 NW2d 98 (1991), but if the relationship between the parties is not clear, the duty issue may be bifurcated for the court to determine the requisite elements of the relationship, and the jury to determine whether the evidence establishes the elements of that relationship. *Smith v Allendale Mut Ins Co,* 410 Mich 685, 714-715; 303 NW2d 702 (1981).

Both parties cite to Michigan case law that discusses the voluntary assumption of duty doctrine in conjunction with the duty to protect from third parties. Plaintiff cites *Sponkowski v Ingham County Road Com'n,* 152 Mich App 123, 127-128, 393 NW2d 579 (1986), for the proposition that "[w]here a person voluntarily assumes the performance of a duty (*i.e.,* to lead another motor vehicle to an unfamiliar destination), he is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task.

In this case, the duty assumed by plaintiff was to protect McAskin based on her helpless state. The Michigan case law cited by the parties involved the assumption of a duty in connection with protection from a third party and, because this case does not involve protection from a third party, these cases are not relevant to the present analysis. However, we find some guidance in the provisions of Restatement Torts, 2d, § 324, p 139, which sets forth the Duty of One Who Takes Charge of Another Who is Helpless. Section 324 at 139 states:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or
>
> (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him.

Comment b of § 324 specifically states that the rule applies to an actor who takes charge of one who is drunk.[1] The bodily harm for which the actor is liable may be either a further injury or an increase in the existing injury, due to the improper manner in which the actor is giving the aid or protection, or it may be an aggravation of the original harm which would have been avoided if the actor had exercised reasonable care for the other's safety. Restatement Torts § 324, comment c. Comment d to § 324 discusses the nature of the care to be exercised:

> The care which the actor must exercise is only that which the recipient of gratuitous services is entitled to expect. Thus the actor is not required to conform to a high standard of diligence and competence, to possess any special skill, or to subordinate his own interests to those of the other, to the same extent as would be necessary if the services were obligatory or for compensation. He must, however, act in good faith and with common decency, with due allowance made not only for physical infirmities of the actor but also for any inferiority in intelligence and judgment.

From precedent established in existing Michigan case law, and with the help of Restatement Torts, § 324, we conclude that defendant assumed a duty when he carried the helpless McAskin from the car and left her on the kitchen floor. However, the question then becomes, "When did defendant's duty to McAskin cease?" Defendant argues that his duty ended when McAskin lay down on the kitchen floor. Plaintiff argues that defendant could have taken McAskin to numerous safer locations and that defendant's duty to her existed until he transported her to a safe place. We find that defendant's duty ceased to exist when McAskin was no longer in a state of helplessness.

Here, there is evidence that McAskin removed the coat, sweater and jewelry that she had been wearing when defendant left her on the kitchen floor. In fact, her jewelry was found on the nightstand in the bedroom. This evidence indicates that McAskin was able to walk around and was cognizant enough to remove her jewelry and put it in a safe place. Furthermore, items were knocked off a shelf leading down to the basement, indicating that McAskin did not roll down the stairs, as plaintiff asserts, but fell down from an upright position. Additionally, although this court was not provided with a floor plan of defendant's house, defendant's description of the layout of his home in his deposition indicates that McAskin would have had to maneuver around a 90-degree angle and through a 30-inch doorway in order to roll down the basement stairs.

Even if this Court were to find that defendant had a duty, under Michigan law plaintiff must prove defendant's actions were the proximate cause of McAskin's injury. The mere possibility of causation is not enough, and the casual sequence of events posited by plaintiff, although conceivably true, must be based on evidence and cannot be "wholly speculative."

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[1] Whether McAskin was drunk or merely sleeping at the time defendant left her on the floor is unknown. The record indicates that she weighed around 100 pounds and consumed about six drinks over a period of six hours. McAskin was able to play blackjack well enough to win $50 that evening. In any event, defendant's testimony clearly indicates that at the time he assisted her into the house, McAskin was "helpless."

Moody v Chevron Chemical Co, 201 Mich App 232, 238; 505 NW2d 900 (1993) (in a wrongful death action stemming from an allergic reaction to a bee sting, the court ruled that because the stinging bee was not recovered, plaintiff could not prove that the bee that stung his son came in contact with the pesticide produced by the defendant, or that its behavior was caused by the pesticide). *See also, Pete v Iron Co*, 192 Mich App 687; 481 NW2d 731 (1992) (the plaintiff admitted that she did not know what caused her to slip on courthouse stairs and that she might have slipped because of water on the stairs. She also could have fallen because of the type of shoes she was wearing or because of the material of the stairs. The plaintiff's expert testified during deposition that he did not know what caused the plaintiff's fall and did not establish a casual link between the accident on the courthouse stairs and any negligence on the part of the county). Conclusions unsupported by allegations of fact do not suffice to establish a genuine issue of material fact. *Easley v University of Michigan*, 178 Mich App 723, 726; 444 NW2d 820 (1989).

We have no way of knowing for certain how McAskin ended up on the basement floor. What little evidence we do have supports the theory that McAskin woke up, got up from the kitchen floor and moved about the house on her own sometime before her fall. Plaintiff's theory that she rolled down the stairs is inconsistent with the physical evidence. Furthermore, plaintiff has not shown that defendant was the proximate cause of McAskin's injury. Even when we construe all evidence in the light most favorable to plaintiff, *Ritchie-Gamester, supra* at 76, we are still convinced that plaintiff presented no evidence that could support a finding of negligence by defendant. We conclude that the trial court correctly granted defendant's motion for summary disposition.

Affirmed.

/s/ Donald S. Owens
/s/ Bill Schuette
/s/ Stephen L. Borrello