STATE OF MICHIGAN

COURT OF APPEALS

NICOLE TRUDGEN,

Plaintiff-Appellant,

v

FRANK JANUSZ,

Defendant-Appellee.

UNPUBLISHED
July 10, 1998

No. 192460
Newaygo Circuit Court
LC No. 94-014889 NI

Before: Griffin, P.J., and Holbrook, Jr., and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition. We affirm.

I. BACKGROUND AND STANDARD OF REVIEW

Plaintiff was injured when she slipped and fell off of defendant's pontoon boat into Hess Lake. Plaintiff was paralyzed when she struck her forehead on the bottom of the lake. Plaintiff brought suit claiming that defendant was negligent for (1) failing to warn plaintiff that the portion of the lake where the boat was resting was too shallow for diving, and (2) failing to properly anchor the boat so that it would not drift into shallow water. The trial court granted defendant's motion for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10). We review motions for summary disposition de novo in order to determine "whether the moving party was entitled to judgment as a matter of law." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. . . . In a negligence action, summary disposition is proper under MCR 2.116(C)(8) if it is determined as a matter of law that the defendant owed no duty to the plaintiff under the alleged facts." *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995). "A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact . . . ." *Stehlik, supra* at 85.

II. ANALYSIS

A. Duty to Warn

"As part of a prima facie case of negligence, a plaintiff must prove that defendant owed him a" recognized duty of care. *Ross v Glasser*, 220 Mich App 183, 186; 559 NW2d 331 (1996). "Generally, with respect to nonfeasance, there is no legal duty that obligates a person to aid or protect another." *Id.* at 186-187. Accord *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988) (noting that "as a general rule, there is no duty that obligates one person to aid or protect another"); see also Restatement Torts, 2d, § 314, p 116 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). However, "[a]n exception [to this general rule] has developed where a special relationship exists between the persons." *Ross, supra* at 187. Accord *White v Beasley*, 453 Mich 308, 328; 552 NW2d 1 (1996) (Boyle, J.) ("Thus, the Court in *Williams* [,*supra*] concluded that for a person to be liable for nonfeasance, there must be a 'special relationship' that imposes a duty to protect the other."). "The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself." *Williams, supra* at 499.[1] Plaintiff's assertion that defendant was negligent for failing to warn her of the shallowness of the lake is a claim of nonfeasance.

In the case at bar, we do not believe that the record establishes that defendant had such a significant degree of control over the situation that plaintiff was effectively deprived of the ability to protect herself. *Dykema v Gus Maker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992) (observing that "the determination whether a duty-imposing special relationship exists in a particular case involves the determination whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself"). Furthermore, defendant's knowledge of the depth of the lake at the point where the boat was resting is, by itself, insufficient to impose an affirmative duty to act, absent the existence of a special relationship between the parties. See *id.* at 10 (observing that "[b]ecause no special relationship existed between plaintiff and defendant, defendant was under no duty to warn plaintiff of the" dangerous situation); *Harper v Herman*, 499 NW2d 472, 475 (Minn, 1993) (observing in a case involving a similar diving accident that "superior knowledge of a dangerous condition by itself, in the absence of a duty to provide protection, is insufficient to establish liability in negligence."). In any event, even without a specific warning from defendant that the water was too shallow to dive into, the record establishes that plaintiff was sufficiently wary of the situation to have decided against diving into the water. As plaintiff herself admitted: "I wasn't going to dive in, you know how you just flop in, or whatever . . . ." Therefore, summary disposition was appropriate pursuant to MCR 2.116(C)(8). *Ross, supra* at 186; *Dykema, supra* at 10.

B. Anchoring of the Boat

The concept of "legal" or "proximate causation" has been the source of much jurisprudential confusion and disagreement. See *Adas v Ames Color-File*, 160 Mich App 297, 301; 407 NW2d 640 (1987). As Prosser and Keeton observe: "There is perhaps nothing in the entire field of law which has

called forth more disagreement, or upon which the opinions are in such a welter of confusion." Prosser & Keeton, Trots (5th ed), § 41, p 263. The Michigan Supreme Court has noted that "[p]roximate cause can be thought of as a policy determination which is often indistinguishable from the duty question." *McMillan v State Hwy Comm*, 426 Mich 46, 51; 393 NW2d 332 (1986). Accordingly, the issue of proximate causation in any particular case often boils down to the question of "whether the defendant stands in any such relation to the plaintiff as to create any legally recognized obligation for the plaintiff's benefit." Prosser, *supra* at § 42, p 274. See also *Charles Reinhart Co v Winemko*, 444 Mich 579, 586 n 13; 513 NW2d 773 (1994) ("The question of fact as to whether the defendant's conduct was a cause of the plaintiff's injury must be separated from the question as to whether the defendant should be legally responsible for plaintiff's injury.").

In the case at bar, we conclude that under the circumstances defendant is not legally responsible for the injuries suffered by plaintiff. The record establishes that before plaintiff was injured, she had decided not to dive head first into the lake. As plaintiff indicated in her deposition, she had decided to "just flop" in the water. However, as she approached the edge of defendant's boat, her "foot slipped" and she just "went down" into the water. "When I slipped," plaintiff continued, "well, I slipped and I went 'whoa,' like that, and my arms hit the bottom of the water first and then my head hit." In these circumstances, we believe that defendant's conduct is not the legally cognizable cause of plaintiff's injuries. Plaintiff's slipping on the edge of the boat and her subsequent uncontrolled and unintended head first dive into the lake had the predominant effect in bringing about plaintiff's injuries. Thus, because we conclude that defendant's conduct was not a substantial factor in producing plaintiff's injuries, *Hagerman v Gencorp Automotive*, ___ Mich ___; ___ NW2d ___ (Docket No. 107059, rel'd 6/16/98) slip op p 19, we find that defendant should not be held legally responsible for this unfortunate accident.[2] See Restatement Torts, 2d, § 433 cmt d, p 433 ("Some other event which is a contributing factor in producing the harm may have such a predominant effect in bringing it about as to make the effect of the actor's negligence insignificant and, therefore, to prevent it from being a substantial factor."). Therefore, summary disposition pursuant to MCR 2.116(C)(10) on this claim was appropriate. *Adas*, *supra* at 300.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff

[1] Restatement of Torts, 2d, § 314A, cmt a, p 119 observes that the duty to protect "arise[s] out of special relations between the parties, which create a special responsibility, and take the case out of the general rule [set forth in § 314]."

[2] We also note that the record does not include evidence to support plaintiff's assertion that the boat had indeed drifted into shallower water.