STATE OF MICHIGAN

COURT OF APPEALS

DALE CHIMENTI, LIZABETH CHIMENTI, JOEY CHIMENTI and STEFANIE CHIMENTI,

Plaintiffs-Appellants,

v

APPLE VACATIONS, INC., and KIMBERLY TRAVEL, INC.,

Defendants-Appellees.

UNPUBLISHED
November 17, 2000

No. 208446
Macomb Circuit Court
LC No. 94-005355 NO

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

ZAHRA, P.J. (concurring).

I concur in the conclusion of the majority opinion that plaintiffs do not have a valid cause of action under the MCPA. I write separately to address the question raised by Judge Gage in her thoughtful dissent. To the extent that a common law tort claim was asserted in the trial court and was properly preserved for appeal to this Court, I conclude that defendants did not owe a common law duty to warn of dangers associated with the current off the coast of Cozumel.

The preliminary question to be addressed is whether a common law negligence action can survive the fair trade contract executed between the litigants. This contract expressly relieves defendants of liability for the negligent acts of third parties/independent suppliers over whom defendants had no control. The travel agent knew that it was important to plaintiffs that jet ski equipment be available for use. However, neither the tour operator nor the travel agent expressly warranted that the jet ski equipment available for use would be in good repair. Further, neither the tour operator nor travel agent had reason to know that the jet ski equipment rented to plaintiffs by an independent supplier would be in disrepair. By executing the fair trade contract, the litigants agreed that defendants would not be responsible to insure that the independent supplier of the jet ski maintained its equipment in good repair. For this reason, I conclude that any common law tort action arising from the injuries sustained by plaintiffs was properly dismissed.

Plaintiffs cannot avoid the effects of the fair trade contract by focusing on the current off the coast of Cozumel, rather than the malfunctioning jet ski.[1] Whether a duty exists under common law is a question of law to be resolved by the court. When determining whether to impose a common law duty, courts must apply the facts of a given case to the following factors: (1) the foreseeability of harm; (2) the degree of certainty of injury; (3) the relationship between the parties; (4) the closeness of the connection between the conduct and the injury; (5) the blame attached to the conduct; (6) the burdens and consequences of imposing a duty and the resulting liability for breach. *Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997). These factors are to be weighed and considered against each other. No single factor is dispositive of the question of duty. Rather, it is the sum total of these various policy considerations that will determine whether a duty exists. *Id.* at 424-425.

Plaintiff Dale Chimenti's activity in this case must be considered when weighing the above-cited considerations. The foreseeability of harm, the degree of certainty of injury, the closeness of the connection between the conduct and the injury, and the blame attached to the conduct weigh against the imposition of a duty. The undisputed evidence establishes that Dale Chimenti operated the jet ski more than one mile off the coast of Cozumel, away from mainland Mexico and into the Gulf of Mexico.[2] The hotel provided a corded-off area of the beach to identify the area that was safe for swimming. Whether any danger was presented by a current immediately beyond the corded-off area depends upon the activity undertaken. While Apple Vacation's on-site representative expressed the opinion that the current in the water in front of the hotel could be dangerous, no evidence was presented to support the conclusion that the current in the water in front of the hotel was so inherently dangerous that it was unsafe to operate small seaworthy vessels, like jet skis. Similarly, no evidence was presented of any prior incidents in which a person operating a properly functioning jet ski in front of the hotel was pulled out to sea by an extraordinary current. Indeed, plaintiffs' companion, who was also a mile deep in the Gulf of Mexico, was able to maneuver the currents without incident while operating his properly functioning jet ski. Thus, it was not the current but the malfunction of the rented jet ski that resulted in plaintiffs' misfortune.

The dissent suggests that a duty should be imposed upon defendants in this case because Apple Vacation's on-site representative "knew" that the current beyond the corded-off area of the beach could be dangerous. The Apple representative stated that, had she been asked, she would have advised plaintiffs to jet ski on the side of the island

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[1] Even if the parties did not enter into a fair trade contract I would conclude, for the reasons set forth in this opinion, that defendants did not owe plaintiffs a common law duty to warn about dangers associated with the current in the Gulf of Mexico.

[2] Although not the basis for my opinion, it is worthy to note that the risk of being lost at sea should have been obvious to plaintiff. It is foreseeable that a small motorized water craft, like a jet ski, can malfunction while in use. The risk of being pulled deeper into the Gulf of Mexico when you are floating on a jet ski a mile or more off the coast of Mexico should be obvious to any reasonably prudent person.

that faces mainland Mexico. Therefore, the dissent concludes, defendants knew of a danger about which they should have warned plaintiffs.

It is a dangerous and unwise proposition to make a legal duty contingent upon matters that are "known" to a litigant. Such a rule serves as a disincentive for putative defendants to become informed of significant risks and would actually provide less protection to putative plaintiffs.

People travel to an island resort, like Cozumel, for a myriad of reasons. Some intend to relax without leaving the resort; others may want to participate in site-seeing activities; others may want to shop; some may want to snorkel; some may want to scuba dive; others may want to para-sail; some may want to fish; and some may also want to jet ski. There are risks of serious injury inherent in each of these activities. If Apple Vacations had a legal duty to warn of every known risk inherent in such activities, it would likely replace its on-site representative with a lengthy contractual disclaimer that would be ignored by all vacationers except, perhaps, the lawyers.

Viewing the facts of this case in a light most favorable to plaintiffs, I conclude that there is no duty to warn of all known risks of serious harm, particularly since plaintiffs executed a fair trade contract that absolved defendants from protecting against the harm that resulted in plaintiffs' injuries. I would therefore conclude that plaintiffs have no cause of action in common law as well as concluding that there is no cause of action under the MCPA.

/s/ Brian K. Zahra