STATE OF MICHIGAN

COURT OF APPEALS

ROBERT E. YORK II, Individually and as Next Fried of JAKOB YORK, a Minor, MICHELLE L. YORK, DAVID A. YORK, and SHEILA M. YORK,

Plaintiffs-Appellants,

v

BIG TEN RIBS, INC., d/b/a FAMOUS DAVE'S OF FLINT and FAMOUS DAVE'S BBQ, and JAY'S SEPTIC TANK SERVICE,

Defendants-Appellees.

UNPUBLISHED
October 26, 2006

No. 270592
Genesee Circuit Court
LC No. 04-080029-NO

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right, challenging the trial court's dismissal of their bystander liability claims for negligent infliction of emotional distress. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Jakob York, a minor, was injured when he fell into a septic tank at defendant Big Ten Ribs, Inc., d/b/a Famous Dave's BBQ restaurant (hereinafter "Famous Dave's"). Jakob's parents, Robert and Michelle York, his grandfather David York, and his step-grandmother Sheila York, were all present at the time of the accident. According to plaintiffs' complaint, Jakob was completely submerged in raw sewage and was pulled from the tank by Michelle, with assistance from Robert and David. Defendant Jay's Septic Tank Service (hereinafter "Jay's") had performed maintenance work on the septic tank approximately one month before the accident. Robert, Michelle, David, and Sheila each brought a claim for negligent infliction of emotional distress. The trial court granted defendants' motion for summary disposition on each of these bystander liability claims and dismissed the claims under MCR 2.116(C)(10).[1]

[1] The trial court denied summary disposition on an additional claim for negligence brought on Jakob's behalf, and that claim was later settled.

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Id*. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

To establish a claim for bystander liability, the following elements must be established: (1) the injury threatened or inflicted on the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock fairly contemporaneous with the accident. *Wargelin v Sisters of Mercy Health Corp*, 149 Mich App 75, 81; 385 NW2d 732 (1986). We agree with the trial court that there was no genuine issue of material fact regarding the actual physical harm element of the claims for bystander liability.

Michelle, Jakob's mother, stated that she suffered nervousness, sleep deprivation (due to bad dreams), fatigue (from sleep deprivation), nightmares, and an inability to perform household chores (due to sleep deprivation) after witnessing the accident, but admitted that she did not suffer any physical problems, other than fatigue, and that she did not seek any medical help for her sleep deprivation and fatigue. Robert, Jakob's father, also stated that he suffered from sleep deprivation and fatigue; he admitted to feeling stress when he thought about his son's accident, but did not suffer any physical injury. Neither Robert not Michelle offered any medical testimony or evidence in support of their claims. Even if Michelle and Robert experienced shock from witnessing their son's accident, it is undisputed that they cannot establish the actual physical harm element to support their claim for negligent infliction of emotional distress.

Jakob's grandfather, David, denied suffering any physical injuries or requiring medical treatment as a result of the accident. Jakob's step-grandmother, Sheila, stated that she had problems sleeping and other undefined problems, about which she talked to her doctor, but did not seek psychiatric or psychological help or request medication.

Like Michelle and Robert, David and Sheila also cannot establish that they suffered actual physical harm as a result of witnessing their grandson's accident. Accordingly, they cannot prove a claim for negligent infliction of emotional distress.[2] The trial court properly dismissed their claims under MCR 2.116(C)(10). Because the trial court properly dismissed

---

[2] Plaintiffs argue that our Supreme Court's decision in *Daley v LaCroix*, 384 Mich 4; 179 NW2d 390 (1970), supports their argument that nervousness, sleep disturbances, fatigue, and inability to perform household work are sufficient to show actual physical harm necessary to establish bystander liability. Because *Daley* involved a claim for emotional distress damages suffered by a direct victim of negligence, we conclude that it is not applicable to plaintiffs' bystander liability claims.

plaintiffs' claims for failure to prove the actual physical harm element, it is unnecessary to address the parties' remaining arguments.

We affirm.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens