STATE OF MICHIGAN

COURT OF APPEALS

RONALD M. NASTAL and IRENE NASTAL,

Plaintiffs-Appellees,

v

HENDERSON & ASSOCIATES INVESTIGATIONS, INC., NATHANIEL STOVALL and ANDREW CONLEY,

Defendants-Appellants.

UNPUBLISHED
October 30, 2003

No. 241200
Wayne Circuit Court
LC No. 00-030589-NZ

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff Ronald Nastal,[1] brought this action against defendants, claiming that they negligently conducted an insurance investigation on him and stalked him. Defendants appeal by leave granted from an order of the circuit court granting in part and denying in part their motion for summary disposition. We affirm in part and reverse in part.

I. Facts

In 1997, plaintiff suffered a minor concussion when a semi-tractor trailer ran through a red or yellow light and struck plaintiff's car. In the weeks following the accident, plaintiff began to complain of headaches, blurred vision, unsteady gait, forgetfulness, depression and mood changes. One of plaintiff's physicians reported that plaintiff suffered a closed-head injury. Plaintiff was placed on temporary disability from his job.

In 1998, plaintiff filed a third-party claim against the driver of the semi-tractor trailer. The driver's insurer, Citizens Insurance Company of America ("Citizens"), assumed the defense. The case was mediated for $450,000. Citizens considered that amount to be excessive, particularly in light of two medical evaluations performed respectively by the independent medical examiners of Citizens and plaintiff's employer. The first was a neuropsychological

[1] Plaintiff Irene Nastal's claim in this case is for loss of consortium. This opinion refers to Ronald Nastal as "plaintiff."

evaluation that concluded plaintiff may not be suffering from a closed-head injury or any residual effects from the accident but from a personality disorder called "somatoform disorder." The second was a neurosurgery evaluation that concluded plaintiff was fit to return to work but recommended a psychiatric evaluation. Accordingly, Citizens referred plaintiff to Dr. Leon Quinn, a psychiatrist, for an independent psychiatric examination. Citizens also hired Henderson & Associates Investigations, Inc. ("Henderson"), to perform credit report background and activities checks and to conduct a surveillance on plaintiff.

Henderson performed the first surveillance on the morning of June 30, 1999. Plaintiff left his house at 7:08 a.m. Henderson's investigator, defendant Andrew Conley, followed plaintiff's car. About forty-five minutes later, Conley suspected that plaintiff may have spotted him because plaintiff appeared to be driving in a manner trying to evade Conley's vehicle. Seven minutes later, plaintiff parked his car and entered a medical rehabilitation facility. A few minutes later, plaintiff left the medical facility and walked to Conley's vehicle where he confronted Conley. Plaintiff did not believe Conley when he said that he was not following plaintiff. Plaintiff was belligerent and profusely swore at Conley. Conley rolled up his window and drove away, only to park his vehicle about one hundred to three hundred yards away. He radioed his supervisor Gregory Henderson to inform him that the surveillance had been compromised. Henderson ordered Conley to terminate the surveillance. Conley remained in his car and began filing out paperwork when a police officer approached him and asked whether he was following plaintiff. Conley informed the officer that he was investigating an insurance claim. Plaintiff testified that he did not believe the police office when she later told him that Conley was not following him.

The second surveillance took place on July 6, 1999. Conley was accompanied by a second investigator, defendant Nathaniel Stovall, who was driving a separate vehicle. That morning, Conley followed plaintiff as he drove to a number of places. Plaintiff returned home at 10:52 a.m., where he remained except for taking two walks in the afternoon. The surveillance ended at 4:40 p.m.[2]

According to a document issued by the police dispatch, the police received a call from plaintiff's address at 10:58 a.m. on July 6, 1999, complaining that the caller believed the "suspects" were following him. A scout car was dispatched at 11:02 that morning. The report indicated a vehicle was involved in investigating an insurance fraud. Conley testified that he was unaware that plaintiff had called the police five minutes after returning home that morning, and he testified that he was unaware that a police unit drove up to Stovall's car and questioned him about his presence there. Stovall testified that he was parked about eight houses away from plaintiff's house that day. He did not remember where Conley was parked. Two or more police

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[2] We note that the documentary evidence before the trial court at the time of summary disposition is inconsistent with Conley's testimony about the time in which plaintiff remained at home on July 6, 1999. According to the independent psychiatric evaluation performed by Dr. Leon Quinn, plaintiff was at Dr. Quinn's office at 12:05 p.m., that day, and the examination continued for 105 minutes. It does not appear from the evidence before the court that this discrepancy was noted or resolved.

units approached Stovall and a police officer questioned him about his presence in the neighborhood, stating that "someone in the neighborhood" had called over a suspicious vehicle. The officer did not tell Stovall that plaintiff had made the call and Stovall believed that the call was made by one of plaintiff's neighbors. Stovall did not specifically ask the officer whether plaintiff had made the call. He did not radio Henderson with the information because such encounters with the police are frequent and he did not know that plaintiff called the police, even though he testified that it "very well could have been" plaintiff.

The third surveillance took place on July 8, 1999. According to the documentary evidence that was before the trial court at the time of summary disposition, this surveillance was uneventful because plaintiff remained at home all day. It does not appear from the record that Conley or Stovall were involved in the third surveillance.

Meanwhile, on the same day, July 8, 1999, Dr. Quinn issued his psychiatric evaluation of plaintiff. Dr. Quinn noted that all of the medical examinations that had been taken on plaintiff since the accident showed no abnormalities. Dr. Quinn opined that plaintiff was experiencing a "depressive illness and there may be more factors contributing to that depression than simply the accident and possible trauma associated with it." He recommended that any investigative surveillance on plaintiff be terminated because of its "potential to provoke additional symptomatology."

Citizens' adjuster Penny Judd testified that Dr. Quinn's independent psychiatric evaluation report was received at Citizens' mailroom on Friday, July 30, 1999. She read the letter the week of Monday, August 2, 1999, a few days after the fourth and final surveillance had occurred. The fourth surveillance took place on Saturday, July 31, 1999. Both Conley and Stovall followed plaintiff from his home in separate cars. At 11:58 a.m., plaintiff arrived at Wonderland Mall in Livonia. Conley's written report indicates that, at 12:09 p.m., plaintiff was driving behind Conley's car. Conley believed that plaintiff was trying to take down the plate number of Conley's car. At some point, plaintiff stopped behind Conley's car. Plaintiff then turned in tight circles and tried to get behind Stovall's car. Conley radioed his supervisor, Gregory Henderson, who instructed him to continue the surveillance until plaintiff reached his next point of destination. Conley's written report indicates that plaintiff left the parking lot at 12:16 p.m., and performed "maneuvers at Ford and Central" at 12:27 p.m. The surveillance was terminated at Ford and Newburgh roads at 12:41 p.m.

Judd and Gregory Henderson communicated on August 4, 1999. Based on Dr. Quinn's recommendation to cease the investigation and Gregory Henderson's information that that plaintiff spotted the investigators during the Saturday, July 31, 1999, surveillance, Judd ended Henderson's investigation of plaintiff.

II. Procedural History

Plaintiff filed the instant lawsuit against Citizens, Henderson and "John Does," alleging defamation, intentional infliction of emotional distress, negligence and stalking. After discovery was complete, the trial court entered an order replacing "John Does" with the names of Conley and Stovall. Citizens and defendants filed separate motions for summary disposition. The trial court granted summary disposition on all claims except the claim of negligence against Citizens, and the claims of stalking and negligence against defendants. Plaintiff subsequently settled with

Citizens and an order was entered dismissing Citizens from the case. This Court granted defendants leave to appeal.

III. Standard of Review

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). Although the trial court did not state the particular subrule under which it decided the summary disposition motion, it is clear that the court relied on proofs outside the pleadings in reaching its decision. Accordingly, the issues on this appeal will be reviewed under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). We review a trial court's decision to grant a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

II. Analysis

A. Stalking

Defendants argue that the trial court improperly ruled that the elements of stalking were met in this case. We disagree.

The civil stalking statute, MCL 600.2954, creates a civil cause of action for victims of stalking as defined by the criminal stalking statute, MCL 750.411h, regardless whether the alleged stalker is charged or convicted under the equivalent criminal stalking statute. According to MCL 750.411h(1)(d), "stalking" is the "wilful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

The term "harassment" as used in subsection 411h(1)(d) is defined as:

> . . . conduct directed toward a victim that includes, but is not limited to, repeated or continued unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. [MCL 750.411h(1)(c).]

Defendants argue that the surveillance activities did not rise to the level of harassment as defined by subsection 411h(1)(c). Defendants first assert that there was no genuine issue of material fact in this case because the surveillance served a legitimate purpose. We disagree. Defendants fail to address on appeal the fact that the trial court determined that the surveillance initially served a legitimate purpose but that a genuine issue of material fact as to its legitimacy

arose when the second and fourth surveillance activities continued after plaintiff discovered that he was followed. Defendants Conley and Stovall and their supervisor, Gregory Henderson, all testified that once the subject of the surveillance discovered that he was being followed, the surveillance activity served no purpose and should be discontinued. We conclude that the court did not err in this ruling.

Defendants next argue that plaintiff failed to meet the "reasonable person" standard as used in subsection 411h(1)(c) and (d) because plaintiff was suffering from a closed head injury and had apparent emotional problems that rendered him unreasonable in any feeling of being harassed. As this Court has held, "generally, once a standard of conduct is established, the reasonableness of an actor's conduct under the standard is a question for the factfinder, not the court." *Jackson v Saginaw Co*, 458 Mich 141, 146; 580 NW2d 870 (1998), quoting *Tallman v Markstrom*, 180 Mich App 141, 144; 446 NW2d 618 (1989). However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992). Under the circumstances and facts of this case, we conclude that the question whether plaintiff's feelings of being harassed were reasonable was one for the factfinder, not the trial court.

Defendants' next argument is unclear. It appears defendants argue that plaintiff failed to meet the "emotional distress" and the "unconsented contact" standards as set forth in subsection 411h(1)(c). However, defendants analyze this argument within the context of plaintiff's separate claim of intentional infliction of emotional distress that was dismissed by the trial court on summary disposition and is not part of this appeal. Because that claim is not before us, we address defendant's argument under the context of the civil stalking statute.

Specifically, defendants assert that plaintiff fails to meet the "emotional distress" and "unconsented contact" standards because it was he who initiated contact with Conley. We disagree. Subsection 411h(1)(e)(i) provides that an unconsented contact occurs when the stalker initiates or continues a contact with an individual without the individual's consent by "[f]ollowing or appearing within the sight of that individual." After the first surveillance was thwarted when plaintiff made it clear that he did not consent to being followed by Conley, Conley nonetheless continued to appear within plaintiff's sight until the police arrived. Once plaintiff detected Conley and Stovall in the second and fourth surveillances, a question of fact arose with respect to whether their continued appearance in his sight were unconsented contacts for purposes of the civil stalking claim. Further, defendants present nothing to this Court to establish that the element of "emotional distress" could not be met because plaintiff confronted Conley in the first surveillance or attempted to take down the license plate numbers of the vehicles driven by Conley and Stovall in the fourth surveillance.

Defendants next assert that public policy considerations mandate a finding by this Court that the surveillance was a legitimate activity. Defendants specifically argue that a ruling by this Court affirming the trial court's decision would have "a chilling effect on the private investigation industry throughout the state and a business' or insurance company's legitimate right to invest claims." We disagree.

The facts in this case establish that the surveillance did serve a legitimate purpose. However, as previously mentioned in this opinion, defendant investigators expressly admitted in deposition testimony that once plaintiff detected the investigators, the surveillance served no

purpose. The unique facts in this case did not establish the reasons why the activities of the first, second and fourth surveillances were not discontinued immediately when plaintiff detected the investigators, contrary to Henderson's policies. Given the above, we conclude that the trial court correctly ruled that a genuine issue of material fact existed as to the legitimate purpose of the surveillance after the investigators were detected in the second and fourth surveillances.

B. The Negligence Claim

Defendants argue that the trial court improperly denied summary disposition on the negligence claim. Specifically, defendants assert that they did not owe a legal duty to plaintiff. We agree.

Whether a duty exists to protect a person from a reasonably foreseeable harm is a question of law for the court. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). "'Duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Buczkowski v McKay*, 441 Mich 96, 100-101; 490 NW2d 330 (1992) (citation omitted). Whether a plaintiff has stated a valid independent cause of action under the common law, a court must examine "whether the situation is one in which there is a recognized duty at common law, that is, 'whether the actor was under any obligation to exercise reasonable care under the circumstances . . . .'" *Madejski v Kotmar Ltd*, 246 Mich App 441, 446; 633 NW2d 429 (2001), quoting *Millross v Plum Hollow Golf Club*, 429 Mich 178, 193; 413 NW2d 17 (1987).

In his complaint, plaintiff failed to allege that defendants owed him a duty. Rather, plaintiff alleged that Citizens negligently hired defendants and that defendants "negligently caused their presence to be known" to him during their surveillance. Plaintiff also claimed that defendants "intentionally cause[d] their presence to be known" to plaintiff. In their motion for summary disposition, defendants argued that no duty existed in this case. In his response to the motion, plaintiff asserted that defendants owed him a common law duty to refrain from harming a fellow human being and that they had "an ordinary duty of care to another." At the hearing for summary disposition, the parties failed to address the question whether a duty existed and the trial court failed to make a ruling on the matter. Nonetheless, it appears that the court may have concluded that a duty existed when it ruled that a question of fact existed as to whether defendants failed to exercise ordinary care.

"A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999) (citation omitted). "In determining whether to impose a duty, this Court evaluates factors such as: the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock, supra* at 53-54. The existence of a duty is essentially a question of whether the relationship between the actor and the injured party gives rise to a legal obligation on the actor's part for the benefit of the injured party. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). In this case, we find no authority supporting the existence of such a common law duty and will not search for authority where plaintiff provides none. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Further, we decline to address plaintiff's claim that a statutory duty arises under MCL 338.826, which is raised for the first time on appeal.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot