

STATE OF MICHIGAN
COURT OF APPEALS

LAMONT EVANS, Personal Representative of the
Estate of LAMONT EVANS, Deceased,

Plaintiff-Appellee,

V

IJN ENTERPRISES, L.L.C.,

Defendant-Appellant,

and

MICHAEL THOMAS,

Defendant.

UNPUBLISHED
November 28, 2006

No. 257574
Wayne Circuit Court
LC No. 03-316740-NO

JESSE WORD, Personal Representative of the
Estate of BRUCE CAIN, Deceased,

Plaintiff-Appellee,

V

IJN ENTERPRISES, L.L.C.,

Defendant-Appellant,

and

MICHAEL THOMAS,

Defendant.

No. 257575
Wayne Circuit Court
LC No. 03-316912-NO

Before: Sawyer, P.J., and Wilder and Hood,* JJ.

PER CURIAM.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In this consolidated appeal, defendant, IJN Enterprises, L.L.C., appeals by leave from the circuit court order denying its motion for summary disposition in two wrongful death actions filed by plaintiff, Lamont Evans, as personal representative of the Estate of Lamont Evans, and plaintiff, Jesse Word, as personal representative of the Estate of Bruce Cain. We reverse and remand.

This cause of action arises out of the drowning deaths of plaintiffs' decedents, Lamont Evans and Bruce Cain, on May 18, 2003, in Lake St. Clair. Mike Ward rented a fishing boat for a party of three from Michael Thomas of Fisherman's Marina in Detroit. Originally, five persons had wished to rent the boat, but Thomas told Ward that the boat would only hold three passengers. Two of the group left the marina and walked down the street. Ward pulled the boat out of the marina and picked up the two individuals who had left the marina. The group came into rough waters near the Windmill Pointe Pier, and the boat began filling with water. The passengers moved to one end of the boat, and the boat capsized. Three of the passengers were rescued, but the two decedents drowned.

Subsequently, plaintiffs filed wrongful death actions against defendant and Michael Thomas, alleging that either or both defendant and Thomas were the owners of Fisherman's Marina and that Thomas was the agent of defendant. Defendant opposed the action and filed a motion for summary disposition, which the trial court denied based on its finding that there were genuine issues of material fact regarding whether defendant violated a duty to decedents as a chattel donor and whether the life jackets given to the decedents' party were defective and their defective condition contributed to the decedents' deaths.

On appeal, defendant claims that the trial court erred as a matter of law in concluding that it owed plaintiffs' decedents a common law duty as a chattel donor under the facts and circumstances of this case. First, defendant claims that the trial court misapplied the Restatement of Torts, 2d, § 405 and *Schenk v Mercury Marine Division*, 155 Mich App 20; 399 NW2d 428 (1986). Second, defendant claims that plaintiffs failed to establish a genuine issue of material fact that defendant owned the life jackets, that the life jackets were defective, or that the so-called "poor condition" caused or contributed to decedents' deaths. We agree.

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) if the affidavits, pleadings, depositions, admissions and other documentary evidence, when viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Id.*

A prima facie case of negligence requires proof of (1) a duty, (2) a breach of that duty, (3) causation, and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The court determines the existence of a duty as a matter of law. *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). Duty is defined as the legal obligation to conform to a specific standard of conduct so as to protect others from the unreasonable risks of injury. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). "In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the

parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.” *Hakari v Ski Brule Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998). There can be no actionable negligence if no duty exists. *Id.*

In concluding that defendant was a donor of a defective chattel to decedents and had a legal duty to the decedents under the common law, the trial court relied on *Schenk, supra*, and 2 Restatement Torts, 2d, § 405, p 365, which states:

One who directly or through a third person gives or lends a chattel for another to use, knowing or having reason to know that it is or is likely to be dangerous for the use for which it is given or lent, is subject to the same liability as a supplier of the chattel.

In *Schenk, supra* at 22-23, the defendant, the plaintiff’s decedent, and another person were going duck hunting. When the defendant observed that the decedent, who was an inexperienced outdoors person, brought low hip waders, he loaned her a “more appropriate” pair of full length waders. *Id.* at 23. The party’s boat capsized and the decedent drowned. *Id.* at 23-24. The trial court granted the defendant’s motion for summary disposition, concluding that the defendant owed no duty of care to the decedent as a matter of law. *Id.* On appeal, the plaintiff asserted that a legal duty existed because the defendant allowed the decedent to use his full-length waders. *Id.* This Court upheld the trial court’s ruling, and the majority opinion held that the defendant owed no duty of care to the decedent since the defendant’s gratuitous act of loaning “more appropriate” waders “cannot be considered the rendering of a service or an undertaking which would have been performed for [the defendant’s] benefit” nor did the act “increase any danger accepted by the decedent.” *Id.* at 25-26. In the dissent, Judge Kelly cited § 405, and concluded that the plaintiff sufficiently pleaded a cause of action because the defendant loaned the decedent personal property with knowledge that the decedent’s use of that property under the circumstances was dangerous. *Id.* at 26-28.

Here, defendant sold the business to Thomas in April 1997. The boating accident at issue occurred six years later, on May 18, 2003. There was evidence that defendant owned the premises and leased it to Thomas. There was also evidence that, under the terms of the lease, defendant provided seat cushions and life jackets to Thomas for the boat rental business.

Even assuming that the life jackets provided to the decedents were the ones leased by defendant, not the ones recently purchased by Thomas, we conclude that there is insufficient evidence to subject defendant to liability under § 405 because plaintiffs failed to show that, at the time that defendant provided the life jackets to Thomas, it knew or had reason to know that the life jackets were or were likely to be dangerous for their intended use by others. Plaintiffs offered no evidence that the subject life jackets were in poor condition or somehow defective at the time that defendant sold the business and leased the premises to Thomas, or in other words, at the time that the life jackets were provided. Moreover, defendant cannot be held responsible for any defects that may have occurred over the six years after the life jackets were provided to Thomas. Thomas was responsible for maintaining the condition of the life jackets and for having them inspected annually. Therefore, if the decedents were placed in a worse position because of the alleged defective condition of the life jackets at the time that Thomas supplied them, it was Thomas, not defendant, who was the one responsible.

Furthermore, defendant could not be subject to liability under § 405 because plaintiffs failed to show that the life jackets were “dangerous” or defective at the time of the boating accident. According to Thomas’ deposition testimony, the life jackets he furnished the decedents’ party were new and “seaworthy.” The only evidence to the contrary was an eyewitness’ statement that the life jackets were “cheap ones” and “came off” when the boat passengers hit the water. Debatably, the trial court should not have relied on this statement since it was inadmissible hearsay. See MCR 2.116(G)(6); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 333-334; 657 NW2d 759 (2002). In addition, plaintiffs’ aquatic expert averred, in relevant part:

Based upon my inspection and examination of the subject life jackets, it is my opinion, based upon their physical condition, that none of the jackets were new or recently purchased, and that all of the jackets were at least six years of age (preceding date of incident), with a couple of the jackets being even older (those having the markings of “Fisherman’s Marina, Inc.”, thereon).

The affidavit merely states the expert’s opinion concerning the age of the life jackets, not their condition. Debatably, the trial court should not have considered the affidavit since it was unsigned and not notarized. See MCR 2.116(G)(6); *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000).

Pursuant to MCR 2.116(G)(4), the facts set forth by the nonmoving party with the burden of proof at trial must be more than purely speculative in order to overcome summary disposition. *Westry v Bell Helmet Co*, 194 Mich App 366, 370-371; 487 NW2d 781 (1992). In its opinion, the trial court indicated that the life jackets were in “poor condition” and defective because they did not remain on the decedents and save them from drowning. The trial court noted that “the whole purpose of a life-jacket is to provide assistance once the wearer enters the water” and found it significant that, of the two youths in the boat, the one who kept his life jacket on survived. Even viewing the evidence in the light most favorable to plaintiff, such an inference is too speculative given the facts presented. Rather, it is likely that the decedents were either not wearing or not properly wearing the life jackets at the time the boat capsized. As one eyewitness indicated, the life jackets were “not properly secured.” Because the evidence did not demonstrate that the life jackets were “dangerous” or defective, defendant cannot be held liable under § 405. Accordingly, we hold that the trial court erred in denying summary disposition in favor of defendant.

Apart from this common law theory of liability, plaintiffs asserted below and argue on appeal that defendant was liable under the boat owner’s liability statute, MCL 324.80157, which provides, in pertinent part:

The owner of a vessel is liable for any injury occasioned by the negligent operation of the vessel, whether the negligence consists of a violation of the statutes of this state, or in the failure to observe such ordinary care in the operation as the rules of the common law require. The owner is not liable unless the vessel is being used with his or her expressed or implied consent.

An appellee is limited to issues raised by the appellant unless he files a cross-appeal pursuant to MCR 7.207. *Rohl v Leone*, 258 Mich App 72, 77 n 2; 669 NW2d 579 (2003).

Because plaintiffs did not file a cross-appeal in this case, this issue is not properly before this Court. *Id.* Nevertheless, we conclude that no genuine issue of material fact existed regarding ownership of the subject boat. Although plaintiffs presented the current registration for the boat at issue, which showed that the boat was owned by Fisherman's Marina, Inc., the trial court determined that defendant had sold the business to Thomas. According to Thomas' testimony and the terms of the lease, the boats were included in the sale of the business, not provided as part of the lease.

In sum, we hold that plaintiffs failed to provide evidence beyond mere speculation that defendant was liable for the decedents' deaths. Because defendant did not owe decedents the duties alleged by plaintiffs, summary disposition under MCR 2.116(C)(10) should have been granted. See *Hakari, supra* at 359.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Kurtis T. Wilder

/s/ Harold Hood