STATE OF MICHIGAN

COURT OF APPEALS

RICK BEAVERS, Plaintiff-Appellant,	UNPUBLISHED May 20, 2008
v	No. 269007 Wayne Circuit Court
BARTON MALOW COMPANY, JOMAR BUILDING COMPANY, INC., SPILLIS CARDELLA, DMJM, a/k/a DMJA, INC., and ROBERT SMITH, Defendants-Appellees.	LC No. 03-309389-NO ON REMAND

Before: Saad, C.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

We previously dismissed this appeal for lack of jurisdiction pursuant to MCR 7.205(F)(3). *Beavers v Barton Malow Co*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2007 (Docket No. 269007) (*Beavers I*). In lieu of granting leave to appeal, our Supreme Court reversed our judgment and directed that we "exercise [our] discretion as to whether to hear the appeal." *Beavers v Barton Malow Co*, 480 Mich 1049; 743 NW2d 741 (2008) (*Beavers II*). We grant plaintiff's application for leave to appeal, reverse the trial court's grant of summary disposition in defendants' favor, and remand this matter for further proceedings consistent with this opinion.

On December 18, 2001, plaintiff was a safety director for Jenkins Construction Company (JCC). The Detroit Public School Project Management Team (DPSPMT) had hired JCC as their general contractor on a project that involved asbestos abatement and demolition of old buildings. Robert Smith was plaintiff's contact with DPSPMT for environmental issues and, on that date, Smith agreed to tour the Tanner building with plaintiff who was to determine what had to be done before its demolition was scheduled. The building had been vacant for a long time and plaintiff was hesitant to enter, but Smith told him not to worry because he had been in the building on numerous occasions, the electricity was still on, and there were lights. Smith also indicated that he had a flashlight, so plaintiff would not need one.

Smith and plaintiff walked through the building for about an hour, looking at areas that still needed asbestos abatement. There were two areas in the basement without lighting. In the first area, plaintiff followed Smith down some steps. They stood at the bottom of the stairs and Smith shined his flashlight around the area. Then they went to the second area. Again, plaintiff followed Smith down some steps. Smith pointed his flashlight to show plaintiff an area with asbestos and oil drums. Smith then swept the flashlight to his left and was pointing something out to plaintiff. When plaintiff, who was slightly behind and to the right of Smith, stepped out to look at where the light was shining, he immediately fell three or four feet to the concrete floor below. Smith went down to plaintiff and said, "I'm sorry, I should have told you." Plaintiff had fallen from a loading dock, sustaining injuries.

Plaintiff filed this action, alleging that his injuries resulted from defendants' negligence, including the failure to provide a safe work environment and the failure to warn plaintiff about the loading dock. Pursuant to MCR 2.116(C)(10), defendants moved to dismiss on the ground that they did not owe plaintiff a duty of reasonable care because one contractor does not owe a duty to another contractor at a job site and no special relationship existed that would give rise to a legally recognized duty. In response, plaintiff argued that defendants had voluntarily assumed a duty of care with regard to plaintiff because Smith, who had assured plaintiff that he was familiar with the building, voluntarily led plaintiff on a tour of the building and knowingly placed plaintiff into the dangerous situation, without warning, that led to plaintiff's injuries. The trial court agreed with defendants, concluding that no duty existed and dismissed the case. The trial court's reasoning was not placed on the record.

The procedural history of plaintiff's appeal efforts was detailed in *Beavers I* and will not be repeated at length here. In brief, plaintiff's appeal of right filed January 26, 2005, was involuntarily dismissed on April 13, 2005 "for want of prosecution, appellant having failed to timely file the brief on appeal . . . ." *Beavers v Barton Malow Co*, unpublished order of the Court of Appeals, entered April 13, 2005 (Docket No. 260475). After plaintiff's motion for reconsideration was denied, plaintiff sought leave to appeal from our Supreme Court. Leave was denied on November 29, 2005. *Beavers v Barton Malow Co*, 474 Mich 936; 706 NW2d 13 (2005). On March 13, 2006, plaintiff filed this application for leave to file a delayed appeal. The application was granted. *Beavers v Barton Malow Co*, unpublished order of the Court of Appeals, entered July 11, 2006 (Docket No. 269007). After concluding that the filing requirements of MCR 7.205(F)(3) were not tolled during the pendency of plaintiff's appeal of right, this Court held that it did not have jurisdiction to consider plaintiff's application for leave to appeal. *Beavers I*, *supra*.

Again plaintiff sought leave to appeal from our Supreme Court. The Court held that we "erred in dismissing the appeal on the basis of MCR 7.205(F)(3) because, in doing so, [we] ignored *Riza v Niagara Machine & Tool Works, Inc*, 411 Mich 915 (1980), and *People v Kincade (On Remand)*, 206 Mich App 477, 483 (1994)." *Beavers II*, *supra*. Thus, in lieu of granting leave to appeal, the Supreme Court reversed our judgment and directed that we "exercise [our] discretion as to whether to hear the appeal." *Id*. This we shall do. Pursuant to MCR 7.205(D)(2) and 7.216(A)(7), plaintiff's application is granted. The substantive issue on appeal having been fully briefed, we now turn our attention to that issue.

Plaintiff argues that the trial court erred in summarily dismissing this case on the ground that defendants did not owe a duty of reasonable care to him because defendants' agent, Smith (1) was familiar with the site, (2) agreed to take plaintiff on a tour of the building, (3) knew about the dangerous condition and, (4) should have warned plaintiff of the drop off in light of the foreseeable and serious harm it posed to plaintiff. After de novo review of this dismissal decision, considering the evidence in the light most favorable to plaintiff to determine whether a genuine issue of material fact exists, we agree. See MCR 2.116(C)(10); *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

To recover in negligence, the plaintiff must prove duty, breach, causation, and damages. *Schuster v Sallay*, 181 Mich App 558, 562; 450 NW2d 81 (1989). The question of duty is a threshold inquiry because there can be no liability without duty. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). Whether a duty exists is a question of law. *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997).

Where injury occurs on a construction site, generally only the injured person's immediate employer will be found to have been responsible for job safety. *Johnson v A & M Custom Built Homes*, 261 Mich App 719, 721; 683 NW2d 229 (2004). However, "nothing in our state's jurisprudence absolves a subcontractor—or anyone on a construction job—of liability under the common-law theory of active negligence." *Id.* at 722. The common law "'imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.'" *Id.*, quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Our Supreme Court has recognized that, "[t]he general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors or inspectors, or anyone else lawfully on the site of the project, is well settled." *Id.* at 262.

Under the circumstances presented, we agree with plaintiff that defendants owed him a common-law duty of reasonable care. Smith, defendants' environmental contact person, agreed to lead plaintiff on a tour of the building knowing plaintiff had never been inside. Smith told plaintiff that he had been inside the building numerous times. Smith also told plaintiff that he would not need a flashlight—Smith had one. Smith eventually led plaintiff down dark stairs to a loading dock that Smith knew was there. As plaintiff stood behind Smith in the darkness, on the last step, Smith moved a flashlight right to left pointing out aspects of the building Smith felt would be of interest to plaintiff. Plaintiff, who did not know about the loading dock and could not see it, stepped around Smith to see what he was pointing at and fell three or four feet to the floor below.

The relationship of the parties was such that Smith essentially acted as the leader of the inspection, invited plaintiff to trust his experience and guidance in the matter, and controlled where the parties went, as well as what plaintiff saw in the dark. It was reasonably foreseeable

that plaintiff could fall off the loading dock because (1) it was dark, (2) plaintiff did not know that he was standing at its edge, and (3) Smith was directing plaintiff's attention to an area that plaintiff could not see without stepping out from behind Smith. The burden on Smith, who knew of the drop off, was minimal as he could have informed plaintiff of the situation by simply giving him a warning. And any such burden on Smith was outweighed by the potential serious danger to plaintiff from unexpectedly falling several feet below to a concrete floor. See *Hughes*, *supra*. We conclude that defendants owed plaintiff a duty of reasonable care. Thus, the trial court erred in granting defendants' motion for summary disposition.

Reversed and remanded for further proceedings on plaintiff's complaint. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette