STATE OF MICHIGAN

COURT OF APPEALS

DAVID DUNMIRE and ALEXIS DUNMIRE,

Plaintiffs-Appellants,

v

BECHTEL POWER CORPORATION; VIDEO-TECH-TRONICS, INC.; and BORG WARNER PHYSICAL SECURITY CORPORATION, d/b/a BURNS INTERNATIONAL SECURITY SERVICES,

Defendants-Appellees.

UNPUBLISHED
January 9, 1998

Nos. 190951;196680
Van Buren Circuit
LC No. 93-037899-NH

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition in favor of defendants in this personal injury case. We affirm.

Plaintiff David Dunmire was a welder for Consumers Power Company at its Palisades nuclear power plant facility. The Palisades plant was designed and built by defendant Bechtel Power Corporation between 1967 and 1970. Consumers Power contracted with defendant Video-Tech-Tronics for the installation of a security alarm system at the plant. Defendant Borg Warner provided the security personnel for the Palisades plant.

On March 11, 1991, defendant Video-Tech-Tronics was installing an alarm for some hatch covers in the fuel storage facility of the plant. The second floor of this fuel facility has a twelve- by twenty-four-foot opening in it that is covered by four hatch covers. Each of these hatch covers measures six by twelve feet and weighs 1,700 pounds. The purpose of the opening in the second level was to facilitate access for bringing up fuel and equipment from a receiving area about twenty-five feet below the second level. The hatch covers had been in use for nineteen years. Consumers Power needed an alarm system for the hatch covers to restrict access to the fuel pool, which was vital to the

plant. After Video-Tech-Tronics installed the alarm, which included security switches on the hatch covers, some alterations were made and tests conducted to work out some bugs in the system.

Video-Tech-Tronics' electronic technician, Michael Henry, installed a new motion detector camera on the wall of the track alley, aimed up at the hatch covers from underneath. Consumers' supervisors arranged to have a crane operator available to move the hatch covers to test the alarm. Welder John Muday and plaintiff David Dunmire were assigned to operate the crane and assist with the test. Muday and plaintiff decided that they would raise the north end of each hatch cover about three inches to activate the mechanical security switches. Apparently, Muday and plaintiff did not know that they were lifting the covers in order to test the new motion detector camera. Instead, they thought they merely had to lift the north ends of the covers to trip the security switches installed earlier.

Henry asked Gary Balcom, Consumers' senior property protection supervisor, if he could speak with the crane operator to discuss what they were going to do. Balcom told Henry that he could make contact by radio through the Borg Warner guards. Plaintiff, Muday, and a Borg security guard, Jeff Isom, were on the second level where the hatch covers were located. Joe Gipson, another Borg security guard, was below the hatchway in the track alley with Henry. Henry informed Muday by radio, through the security guards, that he would like them to lift the hatch covers "straight up." However, Borg's radios were not operating properly, preventing Henry's message from being adequately conveyed.

Muday, using a radio control device, positioned the overhead crane above the north end of hatch cover number one. Plaintiff stepped over the temporary guard rail that was around the hatch covers, onto hatch cover number one, and attached the crane wire rope to the north end of the cover. He then stepped back over the railing and off the hatch cover. They waited until they received word via radio from Borg guard Gipson before lifting the cover. The alarm sounded after about a three-inch lift of the cover, and Muday then lowered it back into position. The same steps were taken to effectuate a lift of hatch cover number two. While preparing to lift number three, Isom received word from Gipson that another lift of number two was necessary.

When Muday moved the crane back over cover number two, plaintiff positioned himself atop the cover at its south end to aid in the alignment of the auxiliary hook. While plaintiff was standing on the cover, the wire rope tightened and caused the north end of the hatch cover to rise, twisting the cover to the east. The southwest corner of the cover became dislodged from its 1-3/8 inch supporting ledge, swinging down against the north edge of the opening. The cover bounced back and struck plaintiff as he fell to the track alley floor some twenty-five feet below. Plaintiff suffered facial lacerations, multiple fractures to his feet, leg, pelvis, collarbone and face, and traumatic brain injury with a severe concussion.

Plaintiffs brought this negligence action, claiming that defendants were jointly and severally liable in excess of $10,000 for David Dunmire's physical injuries and Alexis Dunmire's loss of consortium. Defendants Video-Tech-Tronics and Borg Warner each filed motions for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10). Defendant Bechtel Power filed a motion for summary disposition

pursuant to the statute of repose, MCL 600.5839; MSA 27A.5839. The trial court granted defendants' motions.[1]

I

Plaintiffs first argue that the trial court erred in granting defendant Video-Tech-Tronics' motion for summary disposition based on a lack of duty. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). In order to state a claim of negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff. *Hammack v Lutheran Social Services*, 211 Mich App 1, 4; 535 NW2d 215 (1995). The question of the existence of a duty of care in a negligence case must be decided by the trial court as a matter of law. *Riddle v McLouth Steel Products*, 440 Mich 85, 95; 485 NW2d 676 (1992). Where there is no duty, summary disposition is proper. *Eason v Coggins Memorial Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995).

Plaintiffs first allege that Video-Tech-Tronics had a duty based on a contract between Video-Tech-Tronics and Consumers Power Company. A relationship giving rise to a duty can arise from a contract. *Antoon v Community Emergency Medical Service, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991). However, to recover in tort, there must be some active negligence or misfeasance that is distinct from the breach of duty owed under the contract. *Id.* at 595. Plaintiffs rely on the principle that in every contract there is a common law duty to perform with ordinary care the thing agreed to be done, and that negligent performance of a contract constitutes a tort as well as a breach of contract. *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967).

The contract between Video-Tech-Tronics and Consumers Power provided that Video-Tech-Tronics was to upgrade the "Access Security System in the Outage Building." The contract did not require the installation of a motion detector alarm camera for the hatch covers in the spent fuel facility. Neither does the contract provide for testing of the alarm system on the hatches or for Video-Tech-Tronics to supervise such testing. Video-Tech-Tronics, therefore, did not have a common law duty arising from contract because the common law duty accompanying every contract is "to perform with ordinary care *the thing agreed to be done*." *Clark, supra* at 261 (emphasis added). Video-Tech-Tronics had not agreed to perform the test during which plaintiff was injured.

Plaintiffs next argue that Video-Tech-Tronics had a duty as a general contractor to guard against readily observable and avoidable dangers in common work areas. See *Johnson v Turner Construction*, 198 Mich App 478, 480; 499 NW2d 27 (1993). However, the record does not support a finding that there was a general contractor/sub-contractor relationship between Video-Tech-Tronics and plaintiff David Dunmire or his employer Consumers Power. Therefore, plaintiffs' argument has no merit.

Plaintiffs also claim that Video-Tech-Tronics had a statutory duty pursuant to 29 CFR 1926.20(a)(1), which, plaintiffs assert, imposes a duty as the condition of a construction contract to discontinue working whenever unsafe working conditions exist. Plaintiffs' expert asserted that the

contract between Video-Tech-Tronics and Consumers adopted the standard of care imposed by § 1926.20(a)(1). However, in a negligence case, duty and standard of care are separate issues. *Schuster v Sallay*, 181 Mich App 558, 562; 450 NW2d 81 (1989). Because we find that Video-Tech-Tronics did not have a common law duty to plaintiffs arising out of its contract with Consumers, the issue of the standard of care need not be reached. Therefore, summary disposition was proper.

II

Next, plaintiffs claim that the trial court erred in granting defendant Borg Warner's motion for summary disposition based on a lack of proximate cause. We disagree.

Proximate cause is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). Proximate cause is usually a factual issue for the jury to determine. *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992). However, if facts bearing on proximate cause are not disputed and if reasonable minds could not differ, then the issue is one of law for the court. *Rogalski v Tavernier*, 208 Mich App 302, 306; 527 NW2d 73 (1995).

Here, plaintiffs specifically argue that because defendant Borg Warner failed in its duty to provide adequate radio communications, a second lift of hatch cover number two was necessary, which caused plaintiff's fall from cover number two. The trial court stated:

> [W]e have a number of lifts that were done in the manner in which the employees concluded was sufficient to permit the testing of the switches and the fact that a communication created a need to relift simply put us back in the same situation with the same type of actions that were engaged in earlier, so I don't think there is a connection there. The facts don't leave any dispute there was no proximate cause between these two things. . . .

We agree with the trial court. The radio static may explain why a second lift of cover number two was necessary. However, this does not account for how the second lift of cover number two was conducted. The second lift was apparently done hastily by Muday and plaintiff, and plaintiff did not have sufficient time to get off the cover before Muday engaged the crane. It was Muday and plaintiff who decided to lift the covers by one end, and there was no connection between this and Borg Warner's radio miscommunications. There was no causal connection between the radio communication problems and plaintiff's injuries. Therefore, there was no genuine issue of material fact with regard to whether defendant Borg Warner's radios were a proximate cause of plaintiff's injuries, and summary disposition was proper.

III

Plaintiffs next argue that the trial court erred in granting defendant Bechtel Power Corporation's motion for summary disposition based on the statute of repose, MCL 600.5839; MSA 27A.5839. We disagree.

MCL 600.5839(1); MSA 27A.5839(1) applies to actions against architects, engineers or contractors arising from improvements to real property, and states in pertinent part:

> No person may maintain any action to recover damages for . . . bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . . more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

Plaintiffs argue that defendant Bechtel Power did not meet its burden of producing documentary evidence to support its position that the hatch covers at issue were an improvement to real property. When filing a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Id.* Here, defendant Bechtel's motion for summary disposition was filed timely, and included the assertion that the hatch covers were an improvement to real property and thus covered by the statute of repose. Attached to this motion was a copy of a transmittal letter supporting this assertion. Bechtel also submitted an affidavit supporting its position, which was attached to its amended motion for summary disposition Therefore, defendant Bechtel Power met its initial burden of supporting its position with documentary evidence.

Plaintiffs next argue that the trial court erred in finding that the hatch covers were an improvement to real property. An improvement to real property is defined as "'a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.'" *Pendzsu v Beazer East, Inc,* 219 Mich App 405, 410; 557 NW2d 127 (1996), quoting *Adair v Koppers Co, Inc*, 741 F2d 111 (CA 6, 1984). The test for whether something is an "improvement" is not whether it can be removed without damage to the land, but whether it adds to the value of the realty for the purposes for which it was intended to be used. *Id.* at 410-411.

> The issue is whether a component of a system which is definitely an improvement to real property is an improvement to real property itself. However, to artificially extract each component from an improvement to real property and view it in isolation would be an unrealistic and impractical method of determining what is an improvement to real property. Frequently . . . an improvement to real property is going to consist of a complex system of components. [*Id.* at 411, quoting *Adair v Koppers Co, Inc,* 741 F2d 111, 115 (CA 6, 1984).]

According to the definition of "improvement" set forth in *Pendzsu,* the hatch cover system was an improvement to real property. When built by defendant Bechtel Power between 1967 and 1970,

the system was a permanent addition to, and betterment of, the plant. The system enhanced the plant's value and involved the expenditure of labor and money, and was designed to make the property more useful by facilitating access to the second level of the fuel pool area for the loading of equipment and fuel. The hatch cover system was also an integral component to the fuel pool area operations at the plant which, in its entirety, consists of a complex system of components.

Because the hatch cover system was an "improvement to real property," and was completed and occupied by Consumers Power more than ten years before plaintiff's injury, the trial court did not err in finding that plaintiffs' claim against the designer and installer, defendant Bechtel Power, was barred by MCL 600.5839(1); MSA 27A.5839(1). Accordingly, the trial court properly granted defendant Bechtel Power's motion for summary disposition.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald

[1] Plaintiffs do not appeal the trial court's grant of summary disposition in favor of Consumers Power Company.