STATE OF MICHIGAN

COURT OF APPEALS

JOE SMITH,

Plaintiff-Appellant,

V

STEELCASE, INC.,

Defendant/Cross-Plaintiff/Appellee,

and

KOLENE CORPORATION and KENT COMPANIES, INC., d/b/a KENT CONCRETE, INC.,

Defendants/Cross-Defendants/Appellees.

UNPUBLISHED
November 30, 2001

No. 223892
Kent Circuit Court
LC No. 97-005658-NO

Before: Neff, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

In this premises and contractors liability case, plaintiff appeals as of right from the trial court's order granting defendants summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts and Proceedings

Plaintiff, an employee of Robinson Cartage Company (Robinson), was injured while removing a barricade that surrounded a eleven-foot-deep concrete pit constructed by defendant Kent Companies, Inc. (Kent) at one of defendant Steelcase, Inc.'s (Steelcase) desk plant's in Grand Rapids.[1] The pits had been constructed to house tanks that had been sold to Steelcase by defendant Kolene Corporation (Kolene). Kolene had hired RTC Envirofab (RTC) to install the tanks into the pit, which in turn, subcontracted with Robinson to place the tanks into the pit.

[1] According to the second amended complaint, plaintiff's injuries included attendant swelling, infection, discomfort and limited range of motion in his heel, foot, ankle and leg.

The barricade surrounding the pit consisted of angle irons (stanchions) welded to the top metal frame of the pit with a single cable strung three feet high through the angle irons.[2] Due to the limited overhead clearance at the site, the Robinson crew had to remove part of the barricade before it could place the tanks into the pit.[3] Most of these stanchions were removed by the crew's foreman wiggling them until the weld broke at the spot the angle irons attached to the top of the pit frame. However, one of the stanchions proved resistant to this approach and as a result, the foreman directed a crewman to obtain a cutting torch. Despite being aware of this direction, plaintiff, who weighed over 300 pounds and measured over six feet tall, walked toward the stanchion, grabbed the top of it with his hands and without stopping his forward momentum, causing the stanchion to break. Plaintiff's forward momentum caused him to fall into the pit.[4] During his deposition, plaintiff acknowledged that he was aware his conduct created a risk that he could fall into the pit.

Plaintiff's complaint alleged that (1) Steelcase and Kolene were liable on a theory of retained control for not using reasonable care to ensure a safe work site and not properly supervising subcontractors, (2) Steelcase was liable on a premises liability theory for failing to maintain the premises in a reasonably safe condition, and (3) that Kent was liable for negligence. The trial court granted defendants summary disposition on the basis of the open and obvious doctrine.[5]

II. Standard of Review

This Court's review of a trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, *Spiek, supra*, and in deciding a such a motion, the trial court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Where the documentary evidence fails to establish a material issue of disputed fact, and the moving party is entitled to judgment as a matter of law, summary disposition is appropriate. *Quinto v Cross & Peters Co*; 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(C)(10), (G)(4).

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[2] Deposition testimony differed as to whether the barricade complied with the Michigan Occupational Safety and Health Act (MIOSHA) (MIOSHA required that the barricade be able to withstand 200 pounds of lateral pressure at mid-point between two stanchions).

[3] Steelcase was aware that because of structural limitations the barricade would need to be removed during installation.

[4] While a factual issue exists as to whether plaintiff was told to stop, it is undisputed that plaintiff was not asked or told to attempt to break the stanchion. It is also undisputed that plaintiff knew the foreman was in the process of obtaining a cutting torch.

[5] The trial court also noted that plaintiff's retained control theory against Steelcase failed because "while Steelcase did exercise some control, it was primarily for the benefit of parties other than plaintiff and his employees."

III. Analysis

To establish a prima facie case of negligence, whether it be based on premises liability, retained control, or simple negligence, a plaintiff must demonstrate that the defendant's breach of its duty of due care was the proximate cause of the plaintiff's injury. See *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998), citing *Richardson v Michigan Humane Society*, 221 Mich App 526, 528; 561 NW2d 873 (1997). To prove proximate cause a plaintiff must establish both cause in fact and legal cause. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994); *Reeves*, *supra*. "The cause in fact element generally requires [a] showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred" *Skinner*, *supra* at 163, citing Prosser & Keeton, Torts (5th ed), § 41, p 266; *Reeves*, *supra*, whereas legal cause involves the foreseeability of the actions leading up to a plaintiff's injury and whether a particular defendant should be held legally responsible for those actions. *Skinner*, *supra*, citing *Monig v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977); *Reeves*, *supra*. While normally the issue of causation is for the jury, if there is no reasonable issue of material fact, the trial court may decide the issue itself. *Reeves*, *surpa* at 480, citing *Halbrook v Honda Motor Co*, *Ltd*, 224 Mich App 437, 446; 569 NW2d 836 (1997).

Here, while it was foreseeable that plaintiff could be hurt if he fell into the concrete pit, it was not foreseeable that plaintiff would independently put himself at risk, particularly after observing the difficulty his foreman had attempting to remove the stanchion, and knowing that a crewman had been instructed to get a cutting torch to remove the stanchion. Thus, we find that the cause in fact of plaintiff's injury was his own independent attempt to remove the stanchion by his own momentum and force, an action defendants in no way sought or could have prevented. See *Skinner*, *supra* at 162-163, 174-175; *Reeves*, *supra*. In addition, because plaintiff's actions were not foreseeable to defendants, plaintiff has failed to establish a genuine issue of fact regarding the legal cause of plaintiff's injury. *Skinner*, *supra* at 163; *Reeves*, *supra*. Since plaintiff's injury was the result of his own unforeseeable actions, there is insufficient evidence that defendants' actions were the proximate cause of plaintiff's injury, and plaintiff fails to establish a prima facie case of negligence, *Skinner*, *supra*; *Reeves*, *supra*. Accordingly, defendants were entitled to summary disposition.

In light of our resolution, we need not decide whether the trial court correctly determined that the open and obvious doctrine applied in the instant case. *Kosmyna v Botsford*, 238 Mich 694, 701; 607 NW2d 134 (1999), quoting Messen*ger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998) ("When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.").

Affirmed.

/s/ Janet T. Neff
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder