

STATE OF MICHIGAN  
COURT OF APPEALS

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JOHN MATTHEW SZYMANSKI,

Plaintiff-Appellee,

v

K MART CORPORATION,

Defendant-Appellant..

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UNPUBLISHED

May 3, 1996

No. 178768

LC No. 87-326989-NO

Before: MacKenzie, P.J., and Cavanagh and T.L. Ludington\*, JJ.

PER CURIAM.

Defendant appeals as of right from an order reinstating a jury verdict in favor of plaintiff. We reverse.

This is the third time this case has been before this Court. The underlying facts are as follows:

Plaintiff John M. Szymanski, an employee of Cadillac Window Cleaning Company, was injured when he fell from a scaffold suspended approximately forty feet above the ground while washing windows at defendant Kmart Corporation's world headquarters. Plaintiff and the two other men on the scaffold with him were not wearing safety belts or safety lines. Plaintiff subsequently brought suit against defendant, and after a jury trial, was awarded \$1,306,250 in damages. [*Szymanski v Kmart Corp*, 196 Mich App 427, 428; 493 NW2d 460 (1992), vacated 442 Mich 912 (1993). ("*Szymanski I*").]

Defendant appealed and this Court reversed in *Szymanski I*. The panel recognized the general rule that the employer of an independent contractor is not liable for the independent contractor's negligence, except if the employer retained control or an inherently dangerous activity was involved. The *Szymanski I* panel found insufficient evidence to apply either exception, and thus held that a

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

directed verdict should have been granted in favor of defendant. The panel also rejected plaintiff's argument that the jury verdict nevertheless should have been upheld because the jury found defendant to be independently negligent. The panel concluded that the jury was not instructed on a negligence theory, and the theory was not presented in opening or closing argument.

Plaintiff sought leave to appeal, and on May 25, 1993, the Supreme Court entered an order that stated:

In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for further consideration in light of this order. MCR 7.302(F)(1). The Court of Appeals held that the verdict could not be sustained on a theory of independent negligence, in part, because the jury "was only instructed with regard to the issues of control and inherently dangerous activity." 196 Mich App 427, 432 (1992). In fact, the jury was also instructed on negligence. The Court is to reconsider the issue on this basis. Jurisdiction is not retained. [442 Mich 912; 503 NW2d 449 (1993)].

On remand, this Court again reversed the jury verdict. *Szymanski v K Mart Corp (On Remand)*, 202 Mich App 348; 509 NW2d 801 (1993). The panel concluded that the jury could only reach the issue of negligence if either the retained control or inherently dangerous activity exception applied, and then adhered to its previous ruling that the evidence did not support the application of either exception. 202 Mich App 348. Plaintiff's application for leave to appeal in the Supreme Court was denied. 445 Mich 928 (1994).

Plaintiff subsequently filed in the trial court a motion for entry of the judgment on the jury verdict, arguing that the jury verdict and the trial court's rulings were the controlling law of the case because the Supreme Court's May 25, 1993 order reversed the *Szymanski I* panel's reversal. Defendant filed a cross-motion for entry of judgment on directed verdict. The trial court granted plaintiff's motion and entered an order reinstating the jury verdict.

Defendant argues that the trial court erred in interpreting the Supreme Court's May 25, 1993 order as overturning the *Szymanski I* panel but merely vacated it with orders to reconsider the appeal in light of the Court's instructions. *Hill v Ford Motor Co*, 183 Mich App 208; 454 NW2d 125 (1989). Because the Supreme Court's order did not make a determination as to the merits of the issues involved in the case, *id.*, the order did not establish the law of the case. Instead, this Court's decision on remand from the Supreme Court, rendered after reconsidering the case in light of the Supreme Court order, established the law of the case and the trial court was bound by that decision.

When this Court reconsidered the case in light of whether the jury verdict could be sustained on a theory of defendant's negligence, we again concluded that an independent negligence theory was not presented to the jury. In so doing, we adhered to our previous holding, that neither the retained control nor the inherently dangerous activity exception applied under the circumstances of this case. Consequently, the opinion in *Szymanski (On Remand)* became the law of the case, and the trial court was bound by that decision. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995). The trial court's entry of an order reinstating the jury verdict contrary to that order was improper.

Reversed.

/s/ Barbara B. MacKenzie

/s/ Mark J. Cavanagh

/s/ Thomas L. Ludington