STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND C. WALEN

Plaintiff-Appellant,

v

MICHAEL BARNHART, PATRICIA STREETER, and CURTISS PULITZER,

Defendants,

and

BARNHART & MIRER, P.C.

Defendant-Appellee.

UNPUBLISHED
December 20, 1996

No. 189957
Jackson County
LC No. 95-71778-NM

Before: Sawyer, P.J., and Markman and H. A. Koselka,* JJ.

PER CURIAM.

Plaintiff Michael C. Walen appeals as of right from grants of summary disposition in favor of defendants Michael Barnhart, Patricia Streeter, Curtiss Pulitzer, and Barnhart & Mirer, P.C. Defendants Barnhart, Streeter and Barnhart & Mirer are lawyers who represented plaintiff and others in a class action lawsuit against the Michigan Department of Corrections for replacement of an old cell-locking system with a new one. Following a consent judgment, defendants were charged with monitoring compliance with the judgment by the Department. Plaintiff was subsequently injured by the new locking system when his hand became pinched within it. Plaintiff argues that the trial court erred in granting summary disposition to defendants because they breached their duty to ensure that the provisions of the consent judgment were carried out so as not to harm plaintiff. We affirm.

We review a trial court's grant of a motion for summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

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

The evidence and reasonable inferences therefrom must be reasonably construed in favor of the nonmoving party. *Skinner v Square D Co,* 445 Mich 153, 161-162; 516 NW2d 475 (1994). Whether defendants had the particular duties that plaintiff alleges is a question of law for the court. *Gazette v City of Pontiac*, 212 Mich App 162, 170; 536 NW2d 854 (1995). "In a negligence action, summary disposition is properly granted pursuant to MCR 2.116(C)(8) if it is determined as a matter of law that the defendant owed no duty to the plaintiff." *Id*. "The determination of whether a duty should be imposed upon a defendant is based on a balancing of the societal interest involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties." *Swartz v Huffmaster Alarms, Inc*, 145 Mich App 431, 434; 377 NW2d 393 (1985); *Babula v Richardson*, 212 Mich App 45, 49; 536 NW2d 834 (1995).

We believe that the trial court properly granted summary disposition to defendants. A review of the underlying consent judgment demonstrates that it is a highly comprehensive and detailed agreement, setting forth a variety of technical and other mandates concerning prison physical facilities in Michigan. Review of the judgment strongly supports defendants' claim that their responsibility was limited to ensuring that the Department complied with its obligations in a timely manner. Given the detailed requirements of the consent judgment, it would be far too burdensome to impose a duty on defendants to ensure that the Department's implementation of the judgment was flawless in every detail. Principal responsibility for enforcing and implementing the judgment rested with the Department not with defendants Further, the language of the judgment itself makes clear that it was the Department's responsibility, not defendants', to select and install the new locking system. Again, while defendants had a general duty to ensure compliance with the judgment, the focus of this duty was aimed at ensuring that compliance by the Department was timely not that it was flawless. Defendants lacked both the opportunity and the expertise to bear any greater duty.

Our decision is not altered by the exhibits which plaintiff advances. The exhibit which weighs heaviest in plaintiff's favor is a copy of a brief which defendants filed in the federal lawsuit seeking to enjoin the Department from further work on the lock project until installation could be performed safely. Allegedly, the brief demonstrates defendants' awareness that the installation was endangering inmates' health and safety. However, the dangers cited in the brief are not those which plaintiff alleges caused his pinching injury. Instead, the dangers cited are that the jackhammering involved in the installation was too loud, the welding was creating harmful fumes and the equipment and materials were blocking emergency exit routes. Thus, even assuming that defendants undertook some greater duty than merely ensuring timely compliance by the Department with the consent judgment, plaintiff has offered no evidence that would indicate that defendants were ever placed on notice concerning risk of the actual injury suffered by plaintiff.

Plaintiff next argues that the trial court erred in granting summary disposition to Pulitzer, the architect of the locking system, because he breached his duty to monitor safe execution of the consent judgment and plaintiff was injured as a result. We disagree. The trial court granted summary disposition to defendant Pulitzer, pursuant to MCR 2.116(C)(8), finding:

> [D]efendant did not have a legal duty to ensure that the electric door system was safely designed, properly installed, adjusted, maintained, operated, or to insure against unknown defects. The architect was not involved in the design or supervision of the building or the improvement. The architect did not design the door system.

We find that, in light of defendant Streeter's February 20, 1991 letter, the trial court arguably overstated the matter. From that letter it appears that Pulitzer was involved somewhat more with the installation of the locking system than what the trial court recognized. That letter states in part:

> We, on behalf of the plaintiffs [the inmates], indicated that our principal expert will be Curtis Pulitzer, but because of his fire safety expertise and recent tour of the facility, we also intend to involve Robert W. Powlitz. Our interest is in ascertaining, through our experts, what problems, if any, there are with the design and/or implementation of this system and what, if anything, will be done to correct any deficiencies… We advised you that Mr. Pulitzer had indicated to us that he may need to inspect the project as it is being installed at the facility and may need to test it.

At a minimum, then, it appears that defendant Pulitzer was involved in the supervision of the improvement and, giving plaintiff the benefit of the doubt, Pulitzer may well have undertaken the duties which plaintiff asserts that he did. However, assuming that this is so, the court nevertheless reached the correct result in granting summary disposition in favor of defendant Pulitzer. *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

Assuming that summary disposition was inappropriate under MCR 2.116(C)(8), the trial court's grant of summary disposition in favor of Pulitzer was nevertheless proper under (C)(10), *Brown v Drake-Willock Int'l*, 209 Mich App 136, 143; 530 NW2d 510 (1995), because there is no evidence that defendant Pulitzer knew about the particular danger that plaintiff alleges caused his injury. While the evidence reflects that Pulitzer was aware of certain problems with the new locking system, there is no evidence that he was aware or should have been aware of the specific problem which plaintiff alleges to have caused his injury. Proof of foreseeability and proximate cause on Pulitzer's part are absent.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant Barnhart because there was a factual dispute as to whether Barnhart's role was limited, as he contended, to monitoring the department's compliance with time limits or whether his role extended to monitoring the quality and the safety of the work being performed. In addition, plaintiff claims that the trial court erred in refusing to permit additional discovery which was necessary in order for plaintiff to respond to Barnhart's motion for summary disposition. We disagree. Plaintiff's argument that there is a genuine issue of material fact as to the extent of Barnhart's monitoring duties is of little moment because the trial court granted summary disposition pursuant to MCR 2.116(C)(8) based on the absence of duty. Therefore, assuming the existence of a genuine issue of material fact precluding summary disposition under (C)(10), neither that fact nor the grant of additional discovery would alter the propriety of summary disposition under (C)(8).

Affirmed.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka