

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY FAYZ,

Plaintiff-Appellant,

v

MICHIGAN BUILDING CLEANING AND
MAINTENANCE INC, FARHA GROUP NO 1
INC, FARHA GROUP NO 2 INC, FARHA
GROUP NO 3 INC, FARHA GROUP NO 4 INC,
FARHA GROUP NO 5 INC, FARHA GROUP
NO 6 INC, FARHA GROUP NO 7 INC, TERRY
FARHA, YASSER FARHA, and AHMED
FARHA,

Defendants-Appellees.

UNPUBLISHED
November 13, 2014

No. 318361
Wayne Circuit Court
LC No. 10-009183-NO

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

In this negligence action following a motor vehicle accident, Gregory Fayz appeals as of right the trial court's order granting summary disposition in favor of Michigan Building Cleaning and Maintenance Inc. (hereinafter "Michigan Building"); Farha Group No. 1 Inc., Farha Group No. 2 Inc., Farha Group No. 3 Inc., Farha Group No. 4 Inc., Farha Group No. 5 Inc., Farha Group No. 6 Inc., and Farha Group No. 7 Inc. (hereinafter "Farha Group Nos. 1 through 7"); and Terry Farha,¹ Yasser Farha, and Ahmed Farha (hereinafter "the Farhas").² We affirm.

I. STATEMENT OF FACTS

Fayz began cleaning for Michigan Building as a subcontractor in 1990 after being referred to its owner, Yasser, by Yasser's nephew Andy. Once he began working for Michigan Building, Fayz met Terry, who is also Yasser's nephew.³ Fayz was incarcerated between 2001

¹ Terry is also known as Tarek.

² MCR 2.116(C)(10).

³ Ahmed Farha is Terry's father and owns the Farha Group Nos. 1 through 7 with Yasser.

and March 2003, and approximately a week after his release, he returned to subcontracting for Michigan Building. Fayz was also a subcontractor for various Subway restaurants and would perform work for them occasionally.

On July 1, 2008, Fayz went to see a doctor because he was not sleeping well, he would periodically get tired, and he was slow to react while driving. The doctor recommended that Fayz drink coffee or pull over if he got tired while driving, and suggested that he try sleeping on his side and undergo a sleep study. After the sleep study, which was performed by a different doctor, Fayz was diagnosed with moderate sleep apnea and was prescribed a CPAP⁴ machine. Fayz's driving was not restricted by either physician.

Before seeing a doctor, Fayz had been involved in approximately four automobile accidents as a result of his slow reaction time due to drowsiness. During one of the accidents, Fayz hit a guardrail on the freeway; during another, he struck the front quarter panel of a man's vehicle; and during a third, he rear-ended someone. There was a fourth instance where a van Terry loaned Fayz was returned scratched because Fayz ran into a fence in a parking lot. Fayz, however, is not sure exactly how the damage occurred. None of the accidents resulted in injury to Fayz. Fayz advised the first doctor that he consulted with of the accidents.

Before consulting with a doctor, Fayz spoke with Terry about his tiredness and his repeated car accidents and Terry recommended that he see a doctor. Fayz also informed Terry of his diagnosis with sleep apnea and requested time off to gain control of his condition. Terry, however, did not allow him the time off.

To prevent Fayz from dozing off while driving and injuring himself or others, Sheryl Lyons, Fayz's fiancé, tried to make sure that she was in the car with him whenever he was driving. Sheryl and her son, Richard Coffel, would also occasionally call Fayz's name if he started to doze off while driving, and Sheryl would, at times, nudge Fayz so he would not fall asleep. Fayz, however, continued to drive on many occasions without anyone else in the car.

In the time leading up to the accident, Fayz would clean the Willow Run Airport six days a week with Sheryl and Richard's assistance, as it was a three-person job. On the date of the accident, August 7, 2008, Fayz drove himself and Sheryl to his mother's house in Dearborn, which was 20 minutes away from his home, in order to care for Fayz's mother, who was bedridden. They arrived at Fayz's mother's house at approximately 9:00 a.m. They left Dearborn to return to Fayz's home at approximately 1:00 p.m. While at home that afternoon, Terry called Fayz and during that conversation Fayz informed Terry that he had left the keys to the Willow Run Airport at his mother's house. Fayz was scheduled to clean the Willow Run Airport that day. Therefore, Terry asked Fayz to call him when the keys were retrieved and everything was "okay." At about 3:00 p.m., Fayz, Sheryl, and Richard left the house to return to Fayz's mother's house, picked up the keys, and Fayz drove the three of them to the Willow Run

⁴ CPAP – Continuous positive airway pressure.

Airport. Fayz, Sheryl, and Richard arrived at the airport at 4:00 p.m., but rested in the car before they began cleaning at approximately 5:30 p.m.⁵ They finished cleaning at around 8:30 p.m.

As Fayz pulled up to his house from the Willow Run Airport at 8:40 p.m., he asked Sheryl to call Terry to inform him that they had possession of the keys and finished cleaning the building. After she spoke with Terry, Sheryl handed the phone to Fayz. Terry informed Fayz that he needed to go to the Willow Run Airport, pick up a machine, and take it to a Subway restaurant in Canton to scrub the floor. Then Fayz was told to return to the Willow Run Airport to clean the stairwell because it had not been cleaned properly. Fayz informed Terry that he had just finished cleaning the Willow Run Airport and was tired and hungry. Fayz also told Terry that Sheryl would be unable to return with him. Terry responded that if Fayz did not complete the tasks, then his job was “done.”

After ending his conversation with Terry, Fayz told Sheryl what Terry instructed him to do and informed her that he likely would not be home until around midnight. Sheryl did not go with Fayz to perform the remaining work because, while she wanted to, she was tired and Fayz told her to get some sleep. Also, Sheryl planned to cook dinner and Fayz wanted to eat when he returned home. Fayz did not go inside, but immediately left to complete the tasks.

The drive from Fayz’s home to the Willow Run Airport was 10 minutes; then it was another 10 minutes from the Willow Run Airport to the Subway restaurant in Canton. During the drive, Fayz fell asleep, and at 8:53 p.m., was in an accident, resulting in serious injury to himself.

II. PROCEDURAL HISTORY

On August 10, 2010, Fayz filed a complaint against Michigan Building for intentional tort, gross negligence, and willful and wanton misconduct. The complaint alleged that Michigan Building was Fayz’s employer. The complaint asserted that Michigan Building violated its duty to avoid intentionally exposing Fayz to personal injury when it ordered that Fayz complete work that remained at Willow Run Airport, despite having knowledge that Fayz suffered from sleep apnea with narcolepsy and that completion of the project would require him to drive.⁶

On October 16, 2012, a first amended complaint was filed after the court denied motions for summary disposition without prejudice brought by Michigan Building, the Farha Group Nos. 1 through 7, and the Farhas, and granted Fayz leave to amend his complaint. In relevant part, the first amended complaint added the Farha Group Nos. 1 through 7,⁷ the Farhas, and the Farha

⁵ Fayz, Sheryl, and Richard were not permitted to start cleaning the Willow Run Airport until 5:30 p.m.

⁶ None of the documents attached to the motions for summary disposition or their responses discuss a diagnosis of narcolepsy, only sleep apnea.

⁷ The Farha Group Nos. 1 through 7 each represent a different Subway restaurant.

Group, LLC⁸ as defendants. The first amended complaint removed the allegation that Michigan Building was Fayz's employer and instead asserted that Fayz was an independent contractor hired by Michigan Building and the Farha Group Nos. 1 through 7. The first amended complaint raised allegations of negligence and gross negligence against all defendants based on the same facts as the original complaint.

The Farha Group Nos. 1 through 7 and the Farhas answered the first amended complaint and raised affirmative defenses on October 25, 2012. On May 20, 2013, Michigan Building filed a motion for summary disposition based on the law of independent contractors.⁹ Michigan Building asserted that Fayz's suit for negligence was barred based on the rule against general contractor liability, and that neither the common work area exception or the inherently dangerous activity exception to that rule applied. Michigan Building additionally argued that Fayz's allegation of negligence failed because Michigan Building did not owe him a duty as there was no special relationship between the parties and Fayz's decision to drive alone and his subsequently falling asleep were unforeseeable. It further argued that finding a breach of a duty in this case weighed heavily against public policy.

The Farha Group Nos. 1 through 7 and the Farhas concurred and joined in Michigan Building's motion for summary disposition based on the law of independent contractors on May 24, 2013. On that same date, the Farha Group Nos. 1 through 7 and the Farhas also filed a renewed motion for summary disposition.¹⁰ The renewed motion for summary disposition asserted that Fayz was not an employee or an independent contractor of the Subway restaurants at the time of the accident, there was no duty owed to Fayz regarding his travel to and from work, the risk of harm to Fayz was unforeseeable, and the Farha Group Nos. 1 through 7 and the Farhas were not a proximate cause of Fayz's damages.

Fayz responded separately to the motions for summary disposition filed by the Farha Group Nos. 1 through 7 and the Farhas, as well as by Michigan Building, on June 24, 2013. Fayz's responses argued, in pertinent part, that there was a duty owed to him as an independent contractor and that the risk of injury to him was foreseeable.

The trial court issued its opinion and order regarding the motions for summary disposition on July 26, 2013. The trial court found that a duty was not owed to Fayz because his injuries were unforeseeable. The court noted that Fayz had never fallen asleep while behind the wheel and even Fayz did not foresee the possibility of falling asleep while driving on the date in question. The court also found that Fayz had control over the "means, method, and manner of travel to the worksite." As such, the court concluded that Fayz failed to establish that he was entitled to recovery for his negligence claim and granted summary disposition in favor of

⁸ The Farha Group, LLC was dismissed without prejudice pursuant to a stipulated order entered on January 31, 2013.

⁹ MCR 2.116(C)(8), (10).

¹⁰ *Id.* The original motion for summary disposition filed by the Farha Group Nos. 1 through 7 and the Farhas was filed on July 6, 2012.

Michigan Building, the Farha Group Nos. 1 through 7, and the Farhas.¹¹ Fayz filed a motion for reconsideration on August 19, 2013, which was denied by the trial court. This appeal followed.

III. STANDARD OF REVIEW

Although Michigan Building, the Farha Group Nos. 1 through 7, and the Farhas moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), the trial court granted summary disposition pursuant to MCR 2.116(C)(10). We review a trial court's decision to grant summary disposition de novo.¹²

A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."^{13]}

IV. ANALYSIS

Fayz contends that the trial court erred in granting the motions for summary disposition because a common law duty of care was owed to him. We disagree. "To establish a prima facie case of negligence, a plaintiff must show (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant's breach of the duty caused the plaintiff injuries, and (4) that the plaintiff suffered damages."¹⁴ Unless a legal duty is established, Fayz's claims for negligence and gross negligence must fail,¹⁵ and whether a legal duty exists is a question of law for the trial court.¹⁶ Generally, there is no duty to protect another.¹⁷ "A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property."¹⁸ Here, Fayz does not assert that a duty is owed to him by statute or contract. Rather, his assertion is that a common law duty exists.

Factors relevant to the determination whether a legal duty exists include the "the relationship of the parties, the foreseeability of the harm, the burden on the

¹¹ MCR 2.116(C)(10).

¹² *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013).

¹³ *Id.* at 377 (citations omitted).

¹⁴ *Lelito v Monroe*, 273 Mich App 416, 418-419; 729 NW2d 564 (2006).

¹⁵ See *Smith v Jones*, 246 Mich App 270, 274; 632 NW2d 509 (2001).

¹⁶ *Id.* (citation omitted).

¹⁷ *Hill v Sears, Roebuck and Co*, 492 Mich 651, 660; 822 NW2d 190 (2012) (citation omitted).

¹⁸ *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009).

defendant, and the nature of the risk presented.” We have recognized, however, that “[t]he most important factor to be considered [in this analysis] is the relationship of the parties” and also that there can be no duty imposed when the harm is not foreseeable. In other words, “[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable.” If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors.^[19]

More specifically, a duty may arise if “a special relationship exists between a plaintiff and a defendant.”²⁰ “The determination whether a duty-imposing special relationship exists in a particular case involves ascertaining whether the plaintiff entrusted himself to the control and protection of the defendant, with a consequent loss of control to protect himself.”²¹ “The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.”²²

In the instant case, it is undisputed that on the night of the accident, Fayz was an independent contractor for Michigan Building. In addition, he was asked to perform services for a Subway restaurant owned by one of the Farha Group numbers.²³ Even assuming that Fayz’s contention that he was an independent contractor of all named defendants is true, his argument that a duty was owed to him must fail. Fayz was injured while driving to a job-site. He was not working at Willow Run Airport or the Subway restaurant in Canton at the time of the accident. Although he was instructed to perform additional work by Terry that evening or risk losing his job, the method of transportation to the job-site was neither provided nor mandated by Michigan Building, the Farha Group Nos. 1 through 7, or any of the Farhas. Thus, the record does not support that Fayz “entrusted himself to the control and protection of the defendant[s], with a consequent loss of control to protect himself.”²⁴ Nor, does the evidence suggest that Michigan Building, the Farha Group Nos. 1 through 7, and the Farhas were “best able to provide [Fayz with] a place of safety.”²⁵ Accordingly, the requisite special relationship did not exist to warrant imposing a legal duty on them.

¹⁹ *Hill*, 492 Mich at 661 (citations omitted; alterations in original).

²⁰ *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).

²¹ *Murdock v Higgins*, 208 Mich App 210, 215; 527 NW2d 1 (1994), aff’d 454 Mich 46 (1997).

²² *Williams*, 429 Mich at 499.

²³ This Court would note that which Farha Group number owned the Subway restaurant in Canton is unclear from the record.

²⁴ *Murdock*, 208 Mich App at 215.

²⁵ *Williams*, 429 Mich at 499.

The fact pattern of the instant case is comparable to that of *Madley v The Evening News Ass'n*,²⁶ in which this Court made a similar ruling. In *Madley*, a 12-year-old newspaper delivery boy, who was an independent contractor, was injured by a motorist while delivering newspapers on his bicycle in Detroit.²⁷ The delivery boy claimed that the newspaper breached a duty of care owed to him by failing to provide him with “a safe place to work including, but not limited to, the areas immediately adjacent to the work area which [was] used by the newsboys in the discharge of their duties.”²⁸ The Court found that there was no special relationship between the newspaper and the independent contractor to warrant imposing a duty.²⁹ The Court further found that policy considerations would not justify judicially creating a special relationship, in relevant part, because it is not “plausible to believe that creation of a special relationship is necessary to enable the newscarriers adequately and safely to perform their jobs” because most 12-year-old children “can appreciate the dangers of crossing a busy street[.]”³⁰ Here, as in *Madley*, the policy considerations would not justify creating a special relationship because a special relationship is not required to enable an independent contractor to safely travel to and from his work-site, and most adults know the dangers of operating a motor vehicle while tired.³¹

Assuming arguendo that there was a special relationship, the record evidence fails demonstrate that the harm was foreseeable.³² As explained above, Fayz’s accident occurred after Terry instructed him to pick up a machine from the Willow Run Airport and take it to Canton to clean the floor at the Subway restaurant. Fayz was told to then return to the Willow Run Airport to clean the stairwell for a second time. The record evidence supports that, before the accident, Fayz had been to his mother’s house and also worked for at least three hours cleaning the Willow Run Airport. Fayz was tired and had bouts of nodding off while driving in the past, all of which Terry was aware. The record evidence, however, also supports that the drive between Fayz’s home and the Willow Run Airport was only 10 minutes, and while Sheryl made a point to regularly drive with Fayz so he would not fall asleep, he drove on many occasions without her. Fayz also had taken at least one nap earlier that day. Moreover, Fayz did not expect to or foresee falling asleep during the drive to the Willow Run Airport, and he testified that, if he had, he would have pulled over to rest, which he had done in the past. In fact, before the day of the

²⁶ 167 Mich App 338; 421 NW2d 682 (1988).

²⁷ *Id.* at 340.

²⁸ *Id.* (quotation marks omitted; alteration in original).

²⁹ *Id.* at 341-342. The *Madley* Court found that the relationship between the newspaper and the delivery boy did not contain “characteristics such as confidence, treatment and control as were present in cases describing a physician-patient or psychiatrist-patient relationship.” *Id.* at 341. Nor did the relationship contain “characteristics of a victim-rescuer relationship” or “[o]ther characteristics found in the special relationships described in additional cases.” *Id.* at 342.

³⁰ *Id.*

³¹ *Cf. id.*

³² See *Hill*, 492 Mich at 661.

accident, Fayz had never fallen asleep unexpectedly while driving. As such, we find that, under the circumstances of this case, the harm to Fayz was unforeseeable. Accordingly, the trial court did not err in granting summary disposition in favor of Michigan Building, the Farha Group Nos. 1 through 7, and the Farhas because no duty existed.³³

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot

³³ MCR 2.116(C)(10).