

STATE OF MICHIGAN
COURT OF APPEALS

VICKI MORAN, Personal Representative of the
Estate of JOHN MORAN, Deceased,

UNPUBLISHED
April 13, 2006

Plaintiff-Appellant,

v

VAC-ALL SERVICES, INC.,

No. 258770
Wayne Circuit Court
LC No. 03-323259-NO

Defendant-Appellee.

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition in this wrongful death case. We reverse.

Plaintiff's decedent, John Moran, an employee of Detroit Diesel Corporation, was working on the roof of his employer's building when he stepped through an open hatch and fell 22 feet to his death. Plaintiff brought this action against defendant Vac-All Services, Inc., a cleaning contractor, alleging that its employees negligently left the hatch open when they were performing cleaning work on a rooftop cooling tower. Defendant denied either using or opening the hatch, but claimed that it could not be liable in any event because it was undisputed that after it completed its work, Detroit Diesel's own employees used the open hatch to carry out a pipe replacement job for the company's fire protection system. Moran was part of the pipefitting crew. The circuit court determined that in light of the undisputed evidence that Detroit Diesel's workers used the open hatch after defendant completed its work, defendant was not a cause of the accident and therefore granted defendant's motion for summary disposition.

The standard for reviewing a motion for summary disposition under MCR 2.116(C)(10) is set forth in *O'Donnell v Garasic*, 259 Mich App 569, 572-573; 676 NW2d 213 (2003):

A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed 'in the light most favorable to the party opposing the motion. Summary disposition is proper under MCR 2.116(C)(10) if

the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. [Internal quotations and citations omitted.]

A prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Fultz v Union–Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. *Id.* A duty of care may arise generally by operation of law under application of the basic rule of common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his action as not to unreasonably endanger the person or property of others. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). If factual questions exist regarding what characteristics giving rise to a duty are present, the issue must be submitted to the factfinder. *Id.* at 602.

In this case, the question of duty turns on whether defendant's employees used and opened the hatch. If they did so, it would give rise to an obligation to use due care so as not to unreasonably endanger others. Reviewing the record, we conclude, as did the circuit court, that there is an issue of fact regarding whether defendant's employees opened the hatch. Although defendant's employees denied opening the hatch, there was evidence that the hatch was already open when Detroit Diesel's employees arrived to begin their own project, which was after defendant's employees finished their cleaning task. Moreover, there was evidence that defendant's truck-mounted equipment was located near the area where Moran fell, as well as conflicting evidence whether hoses found near the hatch belonged to defendant. Viewed in a light most favorable to plaintiff, there was a genuine issue of material fact whether defendant's employees used and opened the hatch, thereby giving rise to an obligation to use due care so as not to unreasonably endanger others.

Proof of causation requires both cause in fact and legal, or proximate, cause. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct. *Id.* Proximate cause normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences. *Id.* Proximate cause is that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury, without which such injury would not have occurred. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). An intervening cause, one which actively operates to produce the harm after the negligence of the defendant, can relieve a defendant from liability. *Meek v Dep't of Transportation*, 240 Mich App 105, 120; 610 NW2d 250 (2000). An intervening cause is not a superseding cause if it was reasonably foreseeable. *Id.* Where the defendant's negligence consists of enhancing the likelihood that the intervening cause will occur, or consists of a failure

to protect the plaintiff against the very risk that occurs, the intervening cause is reasonably foreseeable. *Id.*¹

The circuit court granted summary disposition on the basis of causation, noting:

But if someone from Vac-All left the hatch open, is that same someone responsible for the hatch's being open at the time of decedent's fall. This brings us to [defendant's] second argument.

The second argument is a causation argument: nothing Vac-All did with respect to the hatch mattered in the end because other parties came onto the area in the meanwhile and adjusted the hatch. Even if Vac-All had left the hatch untouched, other parties would have opened it subsequently to do their own work, thus making the state of the hatch when Vac-All vacated the premises irrelevant to the deceased's death. The fault for Mr. Moran's death, if any, lies with these later parties, who were employees of Detroit Diesel.

This argument is persuasive.

Plaintiff counter-argues from superseding cause, but the argument is not based on this doctrine. In cases of superseding cause, the original actor's conduct is still a causal contributing factor to the injury; indeed, that is precisely the problem that animates the doctrine: although the first actor caused the injury in question and is thus responsible for it in a but-for sense, we seek to absolve him because something outside the class of risks pertaining to the first actor's activities intervened such that it seems unfair to hold the actor responsible. Causation, not

¹ See also Restatement Torts, 2d, § 447, which provides:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

absence thereof, is the problem in superseding-cause cases. *See Restatement (Second) of Torts* sec. 440 (“A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another *which his antecedent negligence is a substantial factor in bringing about.*”) (emphasis added).

Superficially, this is a superseding cause case, one actor’s negligence was followed by another. But the instant situation differs, crucially: here, the first act’s power to affect the course of events was nil, because whether or not Vac-All’s employees left the hatch open on the Saturday preceding Moran’s death, the hatch would be re-opened the subsequent days such that it was the decision these days to open or close that determined whether the hatch was open at the time of the accident. Using the *Restatement’s* language, Vac-All’s antecedent negligence was not a substantial factor in bring [sic] about the harm; it did not “increase[] the risk” to the decedent of falling through the hole, *id.* sec. 323(a).

While we have no quarrel with the court’s statement of the law, we nevertheless disagree with its determination regarding causation, because there is no evidence in the record to support the circuit court’s predicate factual findings that “nothing Vac-All did with respect to the hatch mattered in the end because other parties came onto the area in the meanwhile and adjusted the hatch. Even if Vac-All had left the hatch untouched, other parties would have opened it subsequently to do their own work, thus making the state of the hatch when Vac-All vacated the premises irrelevant to the deceased’s death.”

There is no evidence in the record that Detroit Diesel employees present at the plant at the time in question would have opened or closed the hatch at issue. On the date of decedent’s fall and the days preceding it, the Detroit Diesel plant was shut down, and decedent was one of five or six pipefitters asked to work. The testimony of Harvey Coniam, the skilled trades supervisor who assigned decedent and the other pipefitters their duties on the days preceding decedent’s death and the day of his death, was that only Detroit Diesel millwrights were permitted to open and close the roof hatches such as the one decedent fell through, Detroit Diesel being a union shop. The record evidence supports that Vac-All, which had worked for Detroit Diesel previously, knew of Detroit Diesel’s custom and practice of having only millwrights remove and replace the hatch covers. The evidence submitted below supports that Vac-All did not follow Detroit Diesel’s policy that it had to notify a foreman upon its arrival at the plant and request that any hatch cover be opened and closed by a millwright. Thus, a reasonable jury could conclude that Vac-All both opened the hatch in question and left the hatch open on leaving the Detroit Diesel plant. A reasonable jury could also conclude that the equipment shown in photographs of the pertinent roof area was Vac-All’s, and that the Detroit Diesel pipefitters, including decedent, who were working during the plant shutdown could reasonably have assumed that Vac-All needed the hatch open to remove its equipment. In any event, the pipefitters (and lone welder) working on the crew of which decedent was a part had no authority to open or close hatches at Detroit Diesel, and there was absolutely no testimony that had Vac-All notified the proper Detroit Diesel personnel as required, Detroit Diesel personnel would have reopened the hatch and left it open. For these reasons, we disagree with the circuit court’s determination that defendant was entitled to summary disposition on the basis of causation.

Defendant also argues that it cannot be liable because the danger posed by the open hatch was open and obvious. We disagree. The action against defendant is for ordinary negligence, not premises liability. This Court recently held that the open and obvious danger doctrine does not apply to actions for ordinary negligence. *Laier v Kitchen*, 266 Mich App 482, 490, 500 (Neff, J), 502 (Hoekstra, J); 702 NW2d 199 (2005).

Accordingly, the circuit court improperly granted defendant's motion for summary disposition.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis