

STATE OF MICHIGAN
COURT OF APPEALS

RETHA EARLENE LEVI and KATHLEEN
KANE, as Co-Personal Representatives of the
ESTATE OF ALVIN R. LEVI, Deceased,

UNPUBLISHED
April 5, 2002

Plaintiffs-Appellees/Cross-
Appellants,

v

CRANE AND EQUIPMENT RENTALS, INC.,

No. 224273
Oakland Circuit Court
LC No. 95-493216-NO

Defendant-Appellant/
Cross-Appellee.

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

In this wrongful death action, defendant appeals as of right from the judgment on a jury verdict for plaintiffs, and plaintiffs cross-appeal. Defendant maintains that the trial court erred in submitting to the jury plaintiffs' claims that defendant breached a duty to provide a qualified and competent operator with its rental crane and that defendant supplied a defective "choker."¹ On cross-appeal, plaintiffs maintain that the trial court's grant of summary disposition in favor of defendant on plaintiffs' claim of respondeat superior liability was error. We affirm.

Plaintiffs' decedent, Alvin Levi, was employed as a carpenter by Usztan Construction Company (Usztan Construction).² Levi was working within the crane boom's radius when the choker used to attach a steel beam to the crane snapped, causing the beam that the crane had lifted to fall. The falling beam struck and killed Levi.

Peculiar to this case is the status of Andrew Usztan (Usztan). Usztan is the president of Usztan Construction and president, sole officer, and sole stockholder of defendant. Defendant owned the crane involved in the incident. Usztan himself was operating the crane when the fatal incident occurred, and he claimed that he was working for Usztan Construction at that time.

¹ As used in this case, the term "choker" refers to a wire rope used to secure a steel beam to a crane's hoist-line and hook.

² Apparently Levi was hired through a leasing company.

In their complaint, plaintiffs alleged that defendant³ was negligent in various ways, including failing to ensure that persons involved with operating the crane were trained, experienced, and competent, and failing to ensure that the choker was proper and reasonably safe and fit for the specific lift involved. Plaintiffs also alleged that defendant had respondeat superior liability for the acts of its crane operator.⁴ Before trial, defendant moved for summary disposition. The trial court denied the motion as to the negligence count, but granted summary disposition on the respondeat superior claim because the evidence showed that defendant had “no employees and that [Usztan] was working as an employee of Usztan [Construction].” Plaintiffs subsequently filed a motion for reconsideration, which the trial court denied.

At the time of trial, the case was reassigned to a different circuit court judge than the one who handled the pretrial proceedings, including defendant’s motion for summary disposition. Before jury selection, defendant moved to preclude plaintiffs from arguing that defendant was liable for providing an incompetent operator on the ground that the trial court had previously ruled that defendant could not be liable in respondeat superior. The judge assigned to preside over the trial denied defendant’s motion. The trial proceeded, and plaintiffs presented two theories of negligence to the jury; that defendant failed to provide a competent operator for the crane, and that defendant supplied a defective choker. The jury found for plaintiffs and, ultimately, judgment in the amount of \$1,467,493.24 was entered in favor of plaintiffs. Thereafter, defendant filed this appeal and plaintiffs cross-appealed.

On appeal, defendant argues that the trial court erred in submitting to the jury plaintiffs’ claim of negligence in failing to provide a competent crane operator because it had no legal duty to provide a competent operator for its crane, nor did defendant assume such a duty. The existence of a legal duty is a question of law that this Court reviews de novo. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999). In general, whether a duty exists is a question of law for the trial court to decide. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999); *Zychowski v A J Marshall Co, Inc*, 233 Mich App 229, 230; 590 NW2d 301 (1998). However, “the jury decides the question of duty only in the sense that it determines whether the proofs establish the elements of a relationship which the court has already concluded give rise to a duty as a matter of law.” *Smith v Allendale Mutual Ins Co*, 410 Mich 685, 714-715; 303 NW2d 702 (1981); *Braun v York Properties, Inc*, 230 Mich App 138, 141-142; 583 NW2d 503 (1998).

We first address defendant’s argument that, in the context of plaintiff’s theory of liability that defendant breached its duty to provide a competent crane operator with its crane, a duty

³ Plaintiffs also filed suit against Vanco Steel Corporation. Usztan Construction contracted with Vanco for the fabrication and erection of steel beams. One of the beams that Vanco fabricated struck Levi. Vanco’s employees were on site and involved in the beam lift operation. Before trial, Vanco Steel settled with plaintiffs and was dismissed from the case.

⁴ Plaintiffs also alleged that defendant was liable in no-fault for the operation of the crane (under the civil liability act of the Michigan Vehicle Code, MCL 257.401 *et. seq.*). That issue was litigated separately through declaratory judgment proceedings with the no-fault liability carrier contesting liability on this theory. Ultimately, plaintiffs and defendant prevailed against the insurance company.

could arise if defendant assumed the duty by actually providing an operator.⁵ Defendant's argument implicitly concedes the legal principle that one who assumes a duty can be held liable for negligent performance of that duty.⁶ Thus, the question that must be answered in order to resolve defendant's claim is factual, not legal. As such, it was for the jury to decide whether the facts presented demonstrated that defendant had assumed a duty. *Smith, supra; Braun, supra*. The record demonstrates that there was sufficient evidence from which the jury could conclude that defendant had assumed the duty to provide a competent crane operator. The evidence at trial showed that it is a custom and practice of the crane rental industry to provide an operator for a rented crane, that defendant had routinely conformed to this practice when renting its crane, as evidenced by its billings, and that Vanco Steel was back-charged for a crane and operator at the incident construction site. We find no error in the trial court's submitting this negligence claim to the jury. Having found no error, we need not address defendant's argument with regard to "no independent legal duty."

Next, defendant argues that the trial court erred in submitting to the jury plaintiffs' claim that defendant negligently provided a defective choker when the evidence of defendant's ownership was wholly speculative and conjectural. This argument, in essence, challenges the trial court's denial of defendant's motion for directed verdict.

We review de novo the trial court's decision on a motion for a directed verdict. *Derbabian v Mariner's Pointe Associates*, ___ Mich App ___; ___ NW2d ___ (2002). We review all evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, we must view the evidence in the light most favorable to the nonmoving party and grant the nonmoving party every reasonable inference and resolve any conflict in the evidence in the favor of the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). Further, we recognize the unique opportunity of the jury and the trial judge to observe witnesses and the factfinder's responsibility to determine the credibility and weight of the testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). If reasonable jurors honestly could have reached different conclusions, this Court may not substitute its judgment for that of the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

⁵ Defendant further argues that because the circuit judge's pretrial ruling granting summary disposition on the respondeat superior claim found that Usztan was acting as an employee of Usztan Construction and not defendant at the time of the incident, the judge at trial "clearly erred as a matter of law in submitting the same issue to the jury under the guise of [defendant's] independent duty to provide a competent operator." Defendant's argument overlooks the fact that the motion for summary disposition on the issue of negligence was denied at the same time. Although, arguably, these issues are factually intermingled, they are separate claims and must be analyzed separately.

⁶ In negligence law, voluntary assumption of a duty is an applicable concept. *Zine v Chrysler Corp*, 236 Mich App 261, 277; 600 NW2d 384 (1999). "Once a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Zychowski, supra* at 231; see also *Terrell v LBJ Electronics*, 188 Mich App 717, 720; 470 NW2d 98 (1991) ("[W]hen a person voluntarily assumes the performance of a duty, he is required to perform that duty carefully.").

In support of its argument, defendant cites *Skinner v Square D Co*, 445 Mich 153; 516 NW2d 475 (1994), and its progeny. Defendant's reliance on these cases is misplaced, in our opinion, because the issue in dispute regarding the choker was ownership, not causation. In the present case, there was no dispute that a defective choker failed, allowing a steel beam to fall, and that the falling beam struck and killed Levi. The disputed issue at trial was who owned, and therefore provided, the defective choker. The two options were defendant or the steel fabricator. This issue was disputed at trial, with witnesses offering testimony on both sides, from which a reasonable fact-finder could conclude either way. The issue was one of credibility that was appropriately directed to the jury to resolve. *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975); *Zeeland, supra*; *Clery v Sherwood*, 151 Mich App 55, 64; 390 NW2d 682 (1986) (It is for the jury to compare and weigh the evidence and decide the credibility of the witnesses.). Consequently, we find no error in the trial court submitting this issue to the jury.

Our resolution of these issues makes it unnecessary for us to address defendant's final claim that if either of plaintiffs' theories of liability was improperly submitted to the jury, then the verdict must be vacated and the case remanded for new trial or plaintiffs' cross-appeal challenging the trial court's grant of summary disposition on their claim of respondeat superior liability.⁷

Affirmed.

/s/ William B. Murphy

/s/ Janet T. Neff

/s/ Joel P. Hoekstra

⁷ Plaintiffs only seek relief from the trial court's grant of summary disposition concerning respondeat superior if defendant succeeds on one of its requests for relief, which it did not.