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MAPPING LEGAL SOLUTIONS FOR THE CONSTRUCTION INDUSTRY

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One Subcontractor's Duty to Another

By Michael D. Crow

On May 4, 2004, The Michigan Court of Appeals addressed the duty of one subcontractor to another. In *Johnson v. A & M Custom Built Homes, et al*, ___ Mich App ___ (2004), Plaintiff was permanently incapacitated after falling from a roof on a construction job. Plaintiff, an employee of subcontractor Wimsatt Building Materials, was delivering shingles when he slid off the roof after a toe board installed by another subcontractor, Olewnick, dislodged and failed to stop him. Plaintiff sued, among others, Olewnick, arguing Olewnick had a common law duty to install the toe boards in a non-negligent manner.

The Court of Appeals in *Johnson* reiterated the general rule of law that only the injured person's immediate employer, and not another subcontractor, is responsible for job safety. Nonetheless, the court held, "nothing in our State's jurisprudence absolves a subcontractor – or anyone on a construction job – of liability under the common law theory of active negligence." The law,

imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others.

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In holding a subcontractor has a duty to another subcontractor's employees, the court distinguished the case of *Hughes v. PMG Building, Inc.*, 227 Mich App 1 (1997). In *Hughes*, the Plaintiff, a roofing subcontractor, was injured when he stepped on a porch overhang another subcontractor, State Carpentry, was in the process of erecting. The overhang was tenuously attached to the roof only with nails. When the Plaintiff stepped onto the overhang, it tore from the roof and collapsed.

According to the Michigan Court of Appeals in *Johnson*, *Hughes* is distinguishable in two respects. First, the court in *Hughes* did not analyze whether the Defendant undertook an action that it then performed negligently to the Plaintiff's detriment, but instead refused to extend the common work area exception to a subcontractor while reaffirming the principle that one subcontractor has no duty to create a safe workplace for another. Second, even if an active negligence analysis had been used, nothing in the fact scenario set forth in *Hughes* suggests State Carpentry did anything wrong. In *Johnson*, however, Defendant performed the task of nailing in toe boards negligently.

The law is now clear. A subcontractor has a duty not to act negligently to the detriment of another subcontractor. These cases will be determined, in large part, by whether it was foreseeable that a subcontractor's conduct may create a risk of harm to another subcontractor's employees and whether the result of that conduct was foreseeable.

The holding in *Miller* will undoubtedly create factual questions in cases previously dismissed by Michigan courts as a matter of law.

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In concluding, the Michigan Court of Appeals in *Johnson* held,

as between two independent contractors who work on the same premises, either at the same time or one following the other, each owes to the employees of the other the same duty of exercising ordinary care as they owe to the public generally.

Consequently, the Michigan Court of Appeals overruled the trial court's grant of Olewnick's motion for summary disposition.

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