STATE OF MICHIGAN

COURT OF APPEALS

ANTON PERKOVIQ,

Plaintiff-Appellant,

v

DELCOR HOMES-LAKE SHORE POINTE, LTD.,

Defendant/Third-Party Plaintiff-Appellee,

v

KALAJ PAINTING,

Third-Party Defendant.

UNPUBLISHED
October 1, 1999

No. 210112
Livingston Circuit Court
LC No. 96014981

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's grant of summary disposition under MCR 2.116(C)(10) in favor of defendant Delcor Homes-Lake Shore Pointe, Ltd. We affirm in part and reverse in part.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id*. Giving the benefit of reasonable doubt to the nonmoving party, the court must determine whether a genuine issue of material fact exists. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995).

This case arises from injuries sustained by plaintiff when he was preparing to paint an upper exterior portion of a residential home under construction at the Lake Shore Pointe subdivision near Howell. Plaintiff, an employee of a subcontractor on the project, Kalaj Painting and Decorating, was

nailing two-by-fours onto the unfinished roof of the house when he slipped on some frost or ice and fell approximately twenty feet to the ground, sustaining serious injuries. In his complaint against defendant, the owner and general contractor in charge of the construction project, plaintiff alleged general contractor liability, premises liability and general negligence against defendant. After a hearing, the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10). In addition, the trial court denied plaintiff's motion to amend his complaint to allege a negligent selection/retention of a subcontractor.

Plaintiff first argues that the trial court erred when it granted summary disposition in favor of defendant based on its determination that there was no genuine issue of material fact as to whether defendant could be found liable under the theories of general contractor liability or general negligence. We disagree.

In *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997), this Court explained:

> Generally, negligence is conduct involving an unreasonable risk of harm. The requisite elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached or violated the legal duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages suffered. Whether a defendant owes any duty to a plaintiff to avoid negligent conduct in a particular circumstance is a question of law for the court to determine. In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk. [Citations omitted.]

Ordinarily, "a general contractor is not liable for a subcontractor's negligence." *Id*. In other words, "a general contractor is not liable for the injuries of a subcontractor's employee." *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996). However, a general contractor may be held liable for a subcontractor's negligence 1) when the general contractor retains control over the work involved, *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994); 2) where there are readily observable and avoidable dangers in common work areas which create a high degree of risk to a significant number of workers, *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on another ground *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982); or 3) where the work is inherently dangerous, *Phillips*, *supra* at 406. Plaintiff argues that any or all of the exceptions to the general rule are applicable in this case.

Plaintiff's argument that defendant, as general contractor, retained control over the work involved is without merit. A high degree of actual control must exist for the general contractor to be exposed to liability; general oversight or monitoring is insufficient. *Id.*, 408. There is no specific test to make this determination. *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 317; 507 NW2d 827 (1993). Giving the benefit of reasonable doubt to plaintiff, neither the contract provisions nor the acts of the parties, including defendant's superintendents' presence at the project site, scheduling

of the painting, and inspection of the work, are sufficient to invoke the retained control of the work exception to the general rule.

We also reject plaintiff's argument that evidence presented supports a determination that defendant failed in its duty, as required by *Funk, supra* at 104, "to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen."

For liability to exist under the common work area exception, there must be:

> 1) a general contractor with supervisory and coordinating authority over the job site, 2) a common work area shared by the employees of more than one subcontractor, and 3) a readily observable and avoidable danger in that common work area, 4) that creates a high degree of risk to a significant number of workers. [*Groncki, supra* at 662.]

Two or more subcontractors need not be actually working at the same time in the same place for the area to be considered a "common work area," they need only eventually work in the same area of the construction site. *Hughes, supra* at 6; *Erickson v Pure Oil Corp*, 72 Mich App 330, 337; 249 NW2d 411 (1976).

The first two elements of the test are satisfied here because defendant does not dispute that it was general contractor and plaintiff produced evidence that the roofs were a common work area accessed by employees of other subcontractors, including those involved with painting, bricklaying, siding, plumbing, chimney construction, roofing, carpentry, and electrical wiring. However, the evidence presented is insufficient to show that a genuine issue of material fact exists as to whether the danger in the work area involved a high degree of risk to a significant number of workers where the roof of the residential home was only twenty feet from the ground, it was icy/frosty based on the weather conditions that morning, and the number of workers is not significant. See *Hughes, supra* at 7-8.

Plaintiff's argument that defendant was engaged in inherently dangerous work is without merit. Michigan courts have allowed the exception for activities which reasonably can be foreseen as dangerous to third parties to apply to employees of the contractor performing such work. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985) To be inherently dangerous, the work must "'necessarily involv[e] danger to others, unless great care is used' to prevent injury, or where the work involves a 'peculiar risk' or 'special danger' which calls for 'special' or 'reasonable' precautions." *Id.*, 728. The special risk of danger must be recognizable in advance, at the time the work is contracted, in order to invoke the doctrine. *Phillips, supra*, 406.

Here, building residential homes is not an unusual or complex construction project. The dangerous condition arose from ice or frost on the roof because of the weather conditions, and not from an unusual risk or special danger inherent in the work that defendant should have known about at the inception of the contract. *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 549; 536 NW2d 221 (1995), rejected on other grounds, *Meagher v Wayne State University*, 222 Mich App 700; 565 NW2d 401 (1997). Moreover, plaintiff admits this injury may have been avoided with the

use of safety devices. See *Kubisz v Cadillac Gage Textron, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket No. 200326, decided August 3, 1999), slip op at 2. Accordingly, the circuit court properly granted summary disposition with regard to the inherently dangerous condition exception.

Because no genuine issue of material fact exists as to any of the exceptions to the general rule that general contractors are not responsible for the injuries of subcontractors' employees, we affirm the circuit court's grant of summary disposition in favor of defendant.

Next, plaintiff argues the trial court erred when it granted summary disposition in favor of defendant with regard to plaintiff's claim of premises liability because the evidence presented created a genuine issue of material fact as to whether the premises were safe for use by plaintiff.

An invitee is an individual on the premises for a purpose mutually beneficial to the invitee and the invitor. *Dobbek v Herman Gundlach, Inc*, 13 Mich App 549, 554; 164 NW2d 685 (1968). The invitor's legal duty is to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land that the landowner knows or should know the invitees will not discover, realize, or protect themselves against. *Bertrand, supra* at 609-610. A claim that the invitor has breached the duty to exercise reasonable care to protect invitees from unreasonable risks of harm has traditionally been premised on three theories: failure to warn, negligent maintenance, or defective physical structure. *Id.*

The invitor must inspect the premises to discover any possible dangerous conditions of which the invitor is not aware and take reasonable precautions to protect the invitees from dangers that are foreseeable from use. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 6; 535 NW2d 215 (1995). However, there is no duty to protect invitees where conditions arise from which an unreasonable risk cannot be anticipated, or from dangers that are so obvious and apparent that an invitee may be expected to discover them. *Id.* An owner of a premises "has a duty to exercise due care to protect the invitee from dangerous conditions," and if such conditions are hidden or latent, then he or she must warn the invitee of the dangers. *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 124-125; 492 NW2d 761 (1992). Even when the conditions are known or obvious to the invitee, the premises owner still may be required to use reasonable care to protect the invitee from the danger; however, "what constitutes reasonable care is a question for the jury, and there is no absolute duty to warn invitees of known or obvious dangers." *Id.* at 125. Invitors are not absolute insurers of the safety of their invitees. *Bertrand, supra* at 614. The invitor's duty is nondelegable. *Bradley v Burdick Hotel Co*, 306 Mich 600, 604; 11 NW2d 257 (1943); *McCord v US Gypsum Co*, 5 Mich App 126, 130; 145 NW2d 841 (1966).

Here, it is undisputed that defendant is both owner and developer/general contractor of the subdivision under construction, and as possessor of the land, defendant has the legal duty to protect its invitees. The danger of slipping off a roof appears to be open and obvious, especially where there is frost on the roof and plaintiff himself and his co-worker testified that they told defendant that the roof was icy; thus, the failure to warn theory fails to establish liability. Further, the evidence does not establish a defective physical structure; instead, it appears that there was frost or ice on the roof because of the weather conditions. Such conditions may make the situation unreasonably dangerous,

but the question arises as to whether defendant should expect that plaintiff, who paints for a living, will fail to protect himself against the danger. The evidence presented, including the contract and deposition testimony, is conflicting as to who was responsible for providing safety equipment and ensuring its use; either the general contractor, the subcontractor or both. A question exists as to whether defendant should have anticipated that the ice/frost on the roof would cause physical harm to a painter notwithstanding its known and obvious danger. Based on the evidence presented and giving the benefit of reasonable doubt to the nonmoving party, a genuine issue of material fact exists as to whether defendant could be liable under the theory of premises liability; thus, we reverse the trial court's grant of summary disposition in favor of defendant with regard to this theory of liability.

Finally, plaintiff argues that the circuit court erred when it denied plaintiff's motion to amend the pleadings to include a negligent selection/retention of subcontractor claim because defendant, as general contractor, had a duty to exercise reasonable care to select subcontractors with the requisite skill, competence, safety equipment and supervision for the proper performance of the work. It appears the trial court abused its discretion in denying plaintiff's motion because the trial court made its ruling based on delay without a showing by defendant of actual prejudice or concluding that plaintiff's delay in making his motion was in bad faith. *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997). However, this Court will not reverse when the trial court reaches the correct result for the wrong reason. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997). Here, allowing an amendment would be futile because plaintiff's allegations fail to state a claim. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). In Michigan, there is no duty to exercise care in the selection and retention of an independent contractor. *Reeves v Kmart Corp*, 229 Mich App 466, 475-476; 582 NW2d 841 (1998).

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald