STATE OF MICHIGAN

COURT OF APPEALS

FRANCESCO PIRAINE and CARMELLA PIRAINE,

Plaintiffs-Appellees,

v

BDP DEVELOPERS, GIUSEPPE PERSICONI, ADINE PERSICONI, PIETRO BRAVO, ANNA BRAVO, SAVERINO DEMARCO, and GIUSEPPINA DEMARCO,

Defendants-Appellants/Cross-Appellees,

and

BRAVO CONSTRUCTION CO., INC.,

Defendant/Cross-Appellant.

UNPUBLISHED
May 11, 2001

No. 215031
Wayne Circuit Court
LC No. 95-533813-CZ

FRANCESCO PIRAINE and CARMELLA PIRAINE,

Plaintiffs-Appellees,

v

BRAVO CONSTRUCTION CO., INC.,

Defendant-Appellant,

and

BDP DEVELOPERS, GIUSEPPE PERSICONI, ADINE PERSICONI, PIETRO BRAVO, ANNA BRAVO, SAVERINO DEMARCO, and

No. 218567
Wayne Circuit Court
LC No. 95-533813-CZ

GIUSEPPINA DEMARCO,

Defendants.

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

This is a personal injury action arising out of a November 5, 1993, construction accident. On that date, plaintiff Francesco Piraine[1] who was employed as a block mason by Persiconi Construction, Inc., was thrown from scaffolding when the wall on which he was laying cement block collapsed.

These consolidated cases concern the interlocking relationships between the landowners and the contractors of this construction project. The landowner is BDP Developers (BDP), a partnership. BDP takes its initials from the last names of its partners: Pietro and Anna *B*ravo, Saverino and Giuseppina *D*eMarco, and Giuseppe and Adine *P*ersiconi. In regard to this construction project, the landowner, BDP Developers, hired their own. Specifically, BDP Developers hired Persiconi Construction, Inc., for which Giuseppe Persiconi is the president and majority stockholder, as the masonry contractor for the contract and hired Bravo Construction Co., Inc., for which Pietro Bravo is the president and majority stockholder as the finish cement contractor. In addition, on December 19, 1993, *six weeks after this November 5, 1993, construction accident,* BDP Developers signed a written contract hiring Persiconi Construction, Inc., as the general contractor. It is noteworthy that the contract was signed twice by Giuseppe Persiconi[2]: once in his capacity as a BDP Developers partner, and second as president of Persiconi Construction, Inc.

In their amended complaint, plaintiffs allege that landowner, BDP Developers, acted as their own contractor at the time of plaintiff's injury and that the landowner, BDP, through its partners, retained control over the day-to-day construction site activities. Plaintiffs' amended complaint alleges in part: "[a]t said time and place, Defendants BDP and the Partners and each and every one of them individually were the owners of the property, in control of the work, and acting as their own general contractor on the project." Asserting that the landowner retained control over the construction project and its day-to-day operations, plaintiffs allege that defendant BDP was negligent in failing to maintain proper safety measures at the site and that BDP's negligence was a proximate cause of plaintiff's injury.

In regard to defendant Bravo Construction, plaintiffs claimed that at the time the wall collapsed, Pietro Bravo, president of Bravo Construction, was operating a bulldozer in close

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[1] Carmella Piraine, wife of Francesco Piraine, is also a plaintiff and seeks damages for loss of consortium.

[2] Giuseppe Persiconi is also known as Joe Persiconi.

proximity to the wall. Plaintiffs alleged that Bravo negligently operated the bulldozer too close to the wall and that vibration from the bulldozer caused the wall to collapse. On three separate occasions, the lower court denied motions for summary disposition brought by landowner BDP Developers and contractor Bravo Construction. On leave to appeal granted, defendants BDP and Bravo Construction argue that the trial court erred in denying their motions for summary disposition. We disagree and affirm.

Docket No. 215031

Generally, when an owner hires an independent contractor to perform work, the owner is not liable in negligence to either third parties or the independent contractor's employees. *Funk v GMC*, 392 Mich 91; 220 NW2d 641 (1974); *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). Rather, the law places immediate responsibility for job safety on the independent contractor. *Id*. However, there are situations where the owner can be held liable for either his negligence or the negligence of the independent contractor. *Id.* An owner or general contractor may be liable where he retains and exercises control over a project, such that there is a corresponding duty on the owner or general contractor to be held responsible for reasonable safety measures. *Id*. at 73-74.

In the lower court and on appeal, defendant BDP Developers claim that there is no evidence that landowner BDP retained control over the construction project and therefore summary disposition should be granted in their favor. In rejecting defendant's motion for summary disposition, the Honorable John A. Murphy ruled in part:

> B.D.P.'s potential for liability here arises from a straightforward application of the theory of retained control, from the question of fact that surrounds Giuseppe Persiconi's activities on the site, in particular, the question concerning in what capacity he worked on the site.

We agree with the trial court that a genuine issue of material fact exists regarding in what capacity Giuseppe Persiconi was acting at the time of the accident. At the time of plaintiff's injury, it is undisputed that Persiconi was supervising the construction of the wall and the day-to-day activities at the entire construction site. Further, as of November 5, 1993, there was no written contract hiring Persiconi Construction, Inc., as general contractor for the project. Because there was no written contract hiring Persiconi Construction as the general contractor, we conclude that a reasonable trier of fact could infer that the landowner, BDP Developers, was acting as its own contractor at the time of plaintiff's accident. In addition, on the building permit application submitted to the City of Troy, Giuseppe Persiconi represented that the owner *and builder* of the project were one and the same, "Joe Persiconi." The separate corporate entity, Persiconi Construction, Inc., was not represented as being the general contractor of the BDP project.

Defendant BDP Developers relies greatly on an alleged admission by plaintiff regarding Persiconi's status at the construction site. However, this reliance is misplaced because the issue whether Persiconi was acting in his capacity as a partner for BDP or as the president of Persiconi Construction, Inc., is a mixed question of fact and law outside the personal knowledge of plaintiff. MRE 701; *Temborius v Slatkin*, 157 Mich App 587, 602; 403 NW2d 821 (1986);

People v Borney, 110 Mich App 490, 496-497; 313 NW2d 329 (1981). The cross-examination of plaintiff regarding Persiconi's legal capacity at the site called for pure speculation that is neither controlling nor admissible. *Id.* In addition, Persiconi's nonfactual conclusion contained in his affidavit is not dispositive. *Temborius, supra*. Viewing the facts, not the parties' legal conclusions, in a light most favorable to the nonmoving party, we hold that a genuine issue of material fact exists regarding Giuseppe Persiconi's legal capacity at the time of plaintiff's accident. For this reason, plaintiffs' retained control theory remains viable at that juncture and the lower court properly denied BDP's motion for summary disposition. *Funk, supra; Candelaria, supra*.

Next, BDP argues that the trial court erred when it denied BDP's motion for summary disposition because if Persiconi's control over the site is imputed to BDP, then Persiconi Construction's immunity from suit, as plaintiff's employer, also carries over to BDP and plaintiff 's claim is barred. We disagree.

> [W]hether a business entity is a particular worker's "employer," as that term is used in the [Worker's Disability Compensation Act], is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference. . . . Only where evidence of a putative employer's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide. [*Clark v United Technologies Automotive, Inc*, 459 Mich 681, 693-694; 594 NW2d 447 (1999) (citations omitted).]

See also *Howard v Dundee Mfg Co, Inc*, 196 Mich App 38, 40; 492 NW2d 478 (1992).

BDP contends that the issue of its immunity from suit under the exclusive remedy provision of the WDCA is controlled by this Court's opinion in *Maki v Copper Range Co*, 121 Mich App 518; 328 NW2d 430 (1982). We agree with the trial court's conclusion that *Maki* is not applicable to this issue. A review of the pleadings and the trial court's orders lead to the conclusion that plaintiff is not attempting to pierce the corporate veil, but rather, argues that BDP and Persiconi Construction are separate entities. Accordingly, the current case is distinguishable on the facts.

BDP also maintains that the trial court erred in relying on the Supreme Court's plurality opinion in *Bitar v Wakim*, 456 Mich 428; 572 NW2d 191 (1998), which overruled this Court's opinion at 211 Mich App 617; 536 NW2d 583 (1995). BDP argues that the *Bitar* plurality opinion should not have been relied on by the trial court because it does not have precedential value. While it is true that the opinion is not binding on this Court, see *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 248-249; 570 NW2d 304 (1997), the trial court's conclusion, that the exclusive remedy provision of the WDCA does not bar plaintiff 's claim against BDP, is supported by the Supreme Court's opinion in *Clark, supra* at 681. Pursuant to *Clark*, the economic realities test is used to determine "whether an employment relationship exists for purposes of the exclusive remedy provision, and thus whether an individual or entity is the 'employer' of a given employee." *Id.* at 687-688. When applying the economic realities test, the courts should consider the totality of the circumstances, including "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline,

and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal . . . No one factor is controlling." *Id.* at 688-689.

We conclude that the evidence in the current case does not support the conclusion that BDP was plaintiff's employer. Plaintiff was an employee of Persiconi Construction and Persiconi Construction supervised the job. Persiconi Construction determined the work plaintiff was to perform and the order of the work. There is no evidence regarding the payment of plaintiff's wages or whether BDP had the right to fire or discipline plaintiff. Of the four factors to be considered by the courts, only the fourth factor, the performance of plaintiff's duties as an integral part of the employer's business, favors a finding that BDP was plaintiff's employer. BDP was formed for the purpose of constructing the building, Persiconi Construction was building the walls of the building, and plaintiff was laying the cement block for the walls. Considering the totality of the circumstances and the four factors listed above, the evidence is reasonably susceptible to only one inference, which is that BDP was not plaintiff's employer within the meaning of the exclusive remedy provision of the WDCA. Therefore, BDP is a third party, not plaintiff's employer, and the exclusive remedy provision of the WDCA does not bar plaintiff's suit against BDP as owner of the construction site. However, even if the evidence could lead to the conflicting inference that BDP was plaintiff's employer, the trial court properly denied summary disposition because the question would be one for the trier of fact. See *Clark, supra* at 693-694. The exclusive remedy provision of the WDCA does not bar plaintiff's claim against BDP.

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Defendant Bravo Construction, Co., Inc., also appeals by leave granted the denial of its motion for summary disposition. The issue in this appeal is straightforward. Defendant argues that there is no evidence from which a reasonable jury could conclude that vibration from the Bravo Construction bulldozer was a proximate cause of the collapse of the wall. In his deposition, plaintiffs' expert, George Bowden, testified that the vibration from the Bravo bulldozer was likely a substantial contributing factor to the wall's collapse. Defendant Bravo argues that it is pure speculation to claim vibration from a bulldozer could cause the collapse of a newly constructed masonry wall. Defendant argues that plaintiffs' expert's vibration theory is novel and not scientifically recognized and therefore should be excluded by operation of MRE 702. We disagree.

We conclude that Bowden's testimony was admissible under MRE 702 because it was based on recognized scientific and common knowledge. Bowden's theory that strong vibrations could affect the stability of the fresh mortar wall thereby triggering its collapse was neither a novel nor an untested theory. See, generally, *People v Haywood*, 209 Mich App 217, 221-224; 530 NW2d 497 (1995). As noted by plaintiff in his appellate brief, Mr. Bowden's vibration theory is based on common knowledge and easily understood principles of physics:

> [Plaintiff's theory of] causation is also easily within the knowledge of an ordinary, reasonable person who could easily conclude that vibration on a fresh anything (i.e., cake, soufflé) would cause collapse, including a cement block wall, if the vibration was significant and the timing of the vibration occurs prior to the liquid becoming solid.

> It is a question for the Jury to determine the facts, e.g., the degree of the freshness of the mortar, the source of the vibration, and the severity of the vibration on the construction project in the progress and whether the vibration contributed to the collapse?
>
> The Jury, as lay people of average intelligence and common sense, certainly understands the concept that the vibration of objects, whether in the process of contraction or completed, can have a negative effect thereon.

Finally, Bravo Construction argues that the trial court erred in denying its motion for summary disposition because Bravo Construction as subcontractor allegedly did not have a duty to warn plaintiff of the hazards it created on the job site. Although the duty to warn is an issue of law, *Moning v Alfono*, 400 Mich 425; 436-439; 254 NW2d 759 (1977); *Duvall v Goldin*, 139 Mich App 342, 347-349; 362 NW2d 275 (1984), we conclude that at this juncture resolution of the issue would be premature pending further factual development.

The lower court's orders denying summary disposition are affirmed and the matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy