STATE OF MICHIGAN

COURT OF APPEALS

SALLY A. WILLIAMS and EVAN HERBERT WILLIAMS, Plaintiffs-Appellants, v MASTER CRAFT CARPET SERVICE, INC., Defendant-Appellee.	UNPUBLISHED September 14, 2001 No. 220496 Oakland Circuit Court LC No. 97-544018-NO

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition, and we affirm.

I. Facts and Proceedings

In September 1996, Botsford General Hospital of Farmington Hills hired Master Craft Carpet Service, Inc. to install carpet in the hospital's Unit Three North. Frederic Eberline, a carpet layer and a former employee of Master Craft, supervised the installation at Botsford through his company, E & E Flooring. Eberline, d/b/a E & E Flooring, had installed carpet at Botsford on prior occasions and Master Craft's president, Daniel Ulfig, testified that he and Eberline negotiated payment after the completion of each job, based on the per-yard cost of carpet installation.

On September 18, 1996, the second night of installation, Eberline and the other installers used duct tape to mark off their work area in Unit Three North and verbally cautioned passersby and personnel at the nearby nurse's station about the potential hazards near the work area. Plaintiff, on duty that night as an oncology nurse, learned about the carpet installation prior to her shift and, that night, she saw a carpet installer in the hallway, loosening old carpet for removal. Throughout the evening, plaintiff used different hallways to avoid the work areas while attending to her patients and checking in at the nurse's station. However, on one occasion and, plaintiff asserts, at the encouragement of one of the installers, plaintiff walked under the tape blocking a work area in the hallway and took long steps over some glue and onto a nearby carpet. Twenty to thirty minutes later, plaintiff again stepped on the floor in that part of the hallway, but slipped and fell on fresh glue recently applied to the floor.

Plaintiff filed her complaint on January 23, 1997, and alleged that Master Craft breached a duty to maintain a safe work area at the hospital. In its answer and affirmative defenses, Master Craft admitted that it installed carpet at the hospital on the day in question. Master Craft also raised the affirmative defense that any injuries suffered by plaintiff were the result of her own failure to exercise reasonable care and that "[a]ny and all injuries or damages claimed are solely due to the actions or inactions of others over whom Defendant had neither responsibility nor control, and such actions or inactions constitute intervening, superseding cause not foreseeable to Defendant."

Following the depositions of Eberline and Ulfig, plaintiff filed a complaint against Eberline, d/b/a E & E Flooring, raising the same claims it raised against Master Craft. Thereafter, Master Craft filed a motion for summary disposition and contended that it owed no duty to plaintiff to maintain the safety of the work site because Eberline is an independent contractor, not an employee of Master Craft. In response, plaintiff argued that Master Craft's answer to the complaint and answers to interrogatories indicated that an employee of Master Craft performed the work on the night plaintiff sustained her injuries and that Master Craft was estopped from asserting the affirmative defense that an independent contractor performed the work.

The trial court granted Master Craft's motion and ruled that (1) Eberline acted as an independent contractor on September 18, 1996, (2) Master Craft did not maintain control of the work site, and (3) the installation did not constitute an ultrahazardous activity.[1]

II. Master Craft is Not Precluded from Presenting Facts Regarding E & E Flooring's Status as an Independent Contractor

Plaintiff contends that Master Craft was bound by its admissions that a Master Craft employee performed the carpet installation on the night of the incident. We disagree.

Pursuant to plaintiff's discovery request, Master Craft submitted answers to interrogatories, drafted by Daniel Ulfig. Plaintiff asked Master Craft to identify "each and every employee, agent or servant of the Defendant, who was in any way involved with the Plaintiff's employer, at the time of the above described accident." In response, Ulfig stated that "the defendants workers on the scene were Fred Everline [sic]." To a request to identify "each and every one of Defendant's agent,[sic] servants or employees who were responsible for safety," Ulfig stated, "No one was specifically assigned to safety. All employees are aware of the accepted standards for installing carpeting." When asked to name "the Defendant's employee(s) who was in charge of the carpentry [sic] project at the hospital," Master Craft named "Dan Ulfig, president of Master Craft." Further, when asked which of "the Defendant, its agents or employees, or some other person, firm or corporation in the Defendant's behalf," was working at the time of the incident, Ulfig named Master Craft Carpet Service, Inc.

"The interpretation and application of court rules and statutes presents a question of law" which we review de novo. *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999).

[1] The trial court dismissed plaintiff's claim against Eberline, d/b/a E & E Flooring on the same day.

MCR 2.111(C) provides: "As to each allegation on which the adverse party relies, a responsive pleading must (1) state an explicit admission or denial; (2) plead no contest; or (3) state that the pleader lacks knowledge or information sufficient to form a belief as to the truth of an allegation, which has the effect of a denial."

While parties are bound by *factual* statements made in pleadings and interrogatories, MCR 2.111(C) does not apply to statements by parties regarding questions of law. *Atkinson v City of Detroit*, 222 Mich App 7, 11-12; 564 NW2d 473 (1997). The terms "employee" and "independent contractor" are legal terms. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72-73; 600 NW2d 348 (1999). Master Craft's president, Daniel Ulfig, who answered the interrogatories on Master Craft's behalf, is a layman who cannot be presumed to be qualified to properly apply legal terms to the facts surrounding Eberline's employment status. *Wright v Wright*, 134 Mich App 800, 804-805; 351 NW2d 868 (1984). Furthermore, the questions, and therefore the answers, were broad in their construction and are subject to multiple interpretations. Therefore, Master Craft was not barred from presenting evidence that Eberline was an independent contractor. *Id*. Moreover, and more importantly, both Eberline and Ulfig testified unequivocally under oath and under cross-examination that Eberline is an independent contractor and their sworn testimony remains unrebutted.

Plaintiff also argues that Master Craft was barred from asserting the affirmative defense that an independent contractor performed the carpet installation. Again, we disagree. Master Craft raised this affirmative defense in its responsive pleadings by stating that any injuries or damages were "due to the actions or inactions of others over whom Defendant had neither responsibility nor control." Moreover, the trial court properly exercised its discretion in using the aforementioned affirmative defense, along with the unrebutted testimony of Eberline and Ulfig to rule that Master Craft preserved the defense that E & E Flooring is an independent contractor.

III. Master Craft is Not Liable for E & E Flooring's Alleged Negligence

A. Sufficient Evidence Showed that E & E Flooring is an Independent Contractor

Next, plaintiff argues that genuine issues of material fact remain regarding whether Master Craft owed a duty of care to plaintiff. We disagree.[2]

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[2] We review an order granting or denying a motion for summary disposition de novo. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 162; 577 NW2d 206 (1998). "When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and documentary evidence in the light most favorable to the nonmoving party." *Solomon v Royal Maccabees Life Ins Co*, 243 Mich App 375, 379; 622 NW2d 101 (2000). A trial court properly grants a motion under this rule if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*. Moreover, to establish a prima facie case of negligence, the plaintiff must prove:

> (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the

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First, ample evidence established that Eberline d/b/a E & E Flooring is an independent contractor. "An independent contractor is defined as 'one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished.'" *Candelaria, supra*, at 73, quoting *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992). To determine the liability of a general contractor for an independent contractor's negligence, "an employer's retained control is relevant to the issue whether there was in fact a contractee-contractor relationship." *Id*. "If the employer of a person or business ostensibly labeled an 'independent contractor' retains control over the method of the work, there is in fact no contractee-contractor relationship, and the employer may be vicariously liable under the principles of master and servant." *Id*.

Here, when cross-examined by plaintiff's counsel during his deposition, Master Craft president, Daniel Ulfig testified unequivocally and repeatedly that Eberline, d/b/a E & E Flooring is an independent contractor, not an employee and that he was paid by the job, not by the hour as were employee installers of Master Craft.[3] Ulfig also testified that Eberline has his own company, E & E Flooring, and that E & E Flooring was given the contract to do the Botsford job. Ulfig testified that, long ago, Eberline was an employee of Master Craft but, for some time, has worked as an independent contractor for many different people. Further, Master Craft contracted with E & E Flooring to do the Botsford job without any specific direction how to do the job. Moreover, Eberline of E & E Flooring was the only supervisor on the job; Master Craft neither directed nor supervised the job and had no one on the job site. E & E Flooring had installed carpet at Botsford Hospital three or four times previously as an independent contractor.

Further, documentation presented to the trial court is fully consistent with the unrebutted testimony of Ulfig and Eberline that E & E Flooring acted as an independent contractor. Specifically, E & E Flooring's records reveal that it invoiced Master Craft for the Botsford Hospital job and Master Craft's tax records show that it paid E & E Flooring as an independent contractor and issued the company an IRS Form 1099.

Eberline provided the only supervision on the job site and plaintiff presented no evidence that Master Craft supervised any of the Botsford work. That Master Craft contracted with Botsford for the carpet and supplied some of the materials has no bearing on the legal question whether E & E Flooring functioned as an independent contractor or employee. Clearly, the trial court had overwhelming testimonial and documentary evidence that compelled the conclusion that Eberline, d/b/a E & E Flooring is an independent contractor, not an employee. Moreover, as stated above, there is no testimonial or documentary evidence to the contrary.

B. Master Craft is Not Responsible for the Negligence of an Independent Contractor

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plaintiff's damages; and (4) that the plaintiff suffered damages. [*Jenks v Brown*, 219 Mich App 415, 417; 557 NW2d 114 (1996).]

[3] Master Craft had approximately twenty employees, all of whom were paid by the hour.

Generally, "when an owner or general contractor hires an independent contractor to perform a job, the owner or general contractor may not be held liable in negligence to third parties or employees of the independent contractor." *Candelaria, supra*, at 72. There are two exceptions to this rule, neither of which applies here.

The doctrine of "retained control" applies not only to the determination of an employer's vicarious liability, it also may impose direct liability on a landowner or general contractor under certain circumstances. *Candelaria, supra*, at 73. Under this theory, "the owner or general contractor's retention of supervisory control provides the basis for the imposition of an independent duty on the part of the owner or general contractor to exercise its retained control with reasonable care." *Id*. However, the doctrine applies only in those situations involving 'common work areas.' *Id*. at 74. A common work area is a work site at which multiple subcontractors work or will eventually work under the supervision of the general contractor. *Id*. at 75. In a common work area, therefore, a general contractor may be "'held responsible for its *own* negligence in failing to implement reasonable safety precautions,' where its 'retained and exercised' control over a project was sufficient to create a corresponding duty to implement such precautions." *Id*. at 74, quoting *Funk v General Motors Corp*, 392 Mich 91, 108; 220 NW2d 641 (1974), overruled in part on another grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982). As our Supreme Court observed in *Funk*:

> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas. [*Funk, supra*, at 104.]

Here, however, plaintiff presented no evidence that multiple subcontractors worked or were expected to work at the installation site at Botsford's Unit Three North. Accordingly, Master Craft had no duty to implement safety standards and precautions in the work area to protect multiple subcontractors and Master Craft cannot be held directly liable for plaintiff's injuries under the doctrine of retained control.

Similarly, the other exception, the inherently dangerous activity doctrine, does not apply here. Under this theory, "an employer is liable for harm resulting from work 'necessarily involving 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. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 525; 542 NW2d 912 (1995), quoting *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985) (citations omitted). Under such circumstances, a general contractor owes a continuing duty to third parties only if the "special risk of danger" is "recognizable in advance …." *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 406; 516 NW2d 502 (1994). Moreover:

> [L]iability should not be imposed where the activity involved was not unusual, the risk was not unique, 'reasonable safeguards against injury could readily have been provided by well-recognized safety measures,' and the employer selected a responsible, experienced contractor. *Rasmussen v Louisville*

Ladder Co, Inc, 211 Mich App 541, 549; 536 NW2d 221 (1995), quoting *Funk, supra*, at 110.

Obviously, carpet installation does not constitute an inherently dangerous activity. While the installation process may involve a slight risk that someone might trip on tools, carpet rolls, carpet cuttings or adhesive, the process, by its nature, does not involve danger to others as long as the installers exercise ordinary care. Moreover, the activity does not involve a peculiar risk of physical harm or a special danger requiring a high degree of care; the installation of carpet is a routine task which carries only a minimal, ordinary risk even when the activity occurs in a hospital.

In sum, neither the "retained control" exception nor the "inherently dangerous activity" exception applies and, therefore, Master Craft may not be held directly or vicariously liable to plaintiff for the alleged negligence of an independent contractor, Eberline d/b/a E & E Flooring. Accordingly, the trial court correctly granted Master Craft's motion for summary disposition.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder