STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND J. PAVIA and KAREN PRICE,

Plaintiffs-Appellants,

V

ELLIS-DON MICHIGAN, INC.,

Defendant/Cross-Plaintiff/Appellee,

and

GOYETTE MECHANICAL COMPANY,

Defendant/Cross-Defendant/Third-Party Plaintiff/Appellee,

and

BIERLEIN DEMOLITION CONTRACTORS, a/k/a BIERLEIN COMPANIES, INC., and SOUTHEASTERN MICHIGAN MASONRY CONTRACTORS, a/k/a BAKER-HOPP, INC.,

Defendants-Appellees,

and

PIPE COVERING, INC.,

Third-Party Defendant/Appellee.

UNPUBLISHED
November 27, 2001

No. 224327
Washtenaw Circuit Court
LC No. 97-004336-NO

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff[1] Raymond Pavia appeals as of right from the trial court's order granting summary disposition to all defendants in this case involving an accident at a construction site at the University of Michigan. We affirm.

[1] Plaintiff Karen Price is Raymond Pavia's wife. Her claims are purely derivative.

I. Basic Facts

In 1995, the University of Michigan was in the midst of a massive renovation of the C.C. Little Building. Despite the disruption inherent in a project that took two years and thirteen phases, the departments of paleontology and pharmacy continued to occupy the building during the renovation. Barricades labeled "danger, construction" and "construction area" kept students and university employees from straying too far from the safe areas of the building and into the path of the potentially dangerous work being done there.

Ellis-Don Michigan, Inc., the University of Michigan's general contractor for the project, entered into subcontracts with other contractors to carry out the renovation. One of those subcontractors, defendant Goyette Mechanical Co., was the "prime" mechanical contractor. Goyette, in turn, subcontracted insulation work to Pipe Covering, Inc. Pipe Covering, Inc. was Pavia's employer. Ellis-Don subcontracted the demolition work for the project to defendant Bierlein Demolition Contractors and subcontracted the masonry work to defendant Southeastern Michigan Masonry Contractors.

According to Pavia's deposition testimony, he was at the project site in July 1995 and was walking toward the mechanical room carrying a box of fiberglass insulation with one hand over his shoulder, when he moved to the left side of the hallway to avoid wheelbarrows and a mortar tray. Suddenly, he stumbled over an object he did not see. Although he was able to keep his balance well enough not to fall to the floor, Pavia seriously injured his knee. Pavia continued working despite his injury. Though Pavia did not specifically recall on which date this accident occurred, he thought that it had happened approximately two weeks before he first sought medical attention for his knee.

After finally going to the hospital, Pavia returned to the work site and saw what he believed had tripped him. He described the obstacle as a protrusion in the middle of the hallway. He believed that it was a remnant of an old wall Bierlein left or fresh mortar Southeastern had spilled. Although no one saw Pavia stumble, co-workers described this obstacle. One coworker described it as "some sort of something sticking out of the floor in the corridor," "about an inch and a half." Another coworker described a high spot in the floor outside the second floor entrance to the mechanical room, which he (the coworker) thought was a sill left over from an old closet. A third coworker claimed to have stepped on or walked around the object several times. According to this third coworker, the workers at the site knew about this condition and spoke about it occasionally in their break room. None of the coworkers had reported the condition to anyone in charge of the site and none of them knew of anyone else who had reported it.

II. Procedural History

In November 1997, Pavia sued Ellis-Don. His complaint alleged negligence, premises liability, and failure to maintain a safe workplace. His theory[2] was, in part, that Ellis-Don had

[2] Because this appeal requires us to address Pavia's multiple theories of liability, we address them with more specificity in subsequent sections of this opinion.

retained control of the worksite and that the activities that occurred there were inherently dangerous. Pavia subsequently amended his complaint to add Goyette, Bierlein, and Southeastern as defendants.

Following discovery, defendants filed individual motions for summary disposition under MCR 2.116(C)(8) and (10). After the hearing on defendants' motions for summary disposition, the trial court concluded that the condition of the hallway leading to the mechanical room was not "readily observable" and thus did not create the "high degree of risk" necessary to impose liability under a theory of retained control. The trial court reasoned that the hazard in this case was an ordinary "pedestrian" hazard. The trial court also dismissed Pavia's claims against defendants Bierlein and Southeastern on the ground that one subcontractor owes no duty to the employee of another subcontractor.

At a second hearing on the motions for summary disposition, the trial court noted that the undisputed evidence showed that the University of Michigan, the building's owner, continued to occupy the building during the renovation. As a result, the trial court concluded, Ellis-Don would not be liable for maintaining the premise. The trial court also ruled that any violations of the Michigan Occupational Safety and Health Act[3] (MIOSHA) could not create a duty of care when no duty already existed. The trial court also indicated that it had not seen or heard anything to change its earlier decision granting summary disposition to Bierlein and Southeastern. Therefore, the trial court dismissed Pavia's claims as a whole. Though the order dismissing these claims does not specify which court rule the trial court used to grant summary disposition to defendants, it is fairly apparent from the way the trial court looked to the evidence on the record that this was summary disposition under MCR 2.116(C)(10). Pavia now contends that summary disposition was inappropriate.

III. Standard Of Review

We review de novo whether the trial court erred when it granted defendants' motions for summary disposition.[4]

IV. Legal Standard For Summary Disposition

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim.[5] When deciding a motion for summary disposition under MCR 2.116(C)(10), "the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial.[6] The nonmoving party

[3] MCL 408.1001 *et seq*.

[4] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[5] *Id*.

[6] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); see also MCR 2.116(G)(5).

cannot simply rest on allegations or denials, but must present evidence showing that a material issue of fact is in dispute requiring resolution at trial.[7] Summary disposition is appropriate if the documentary evidence establishes "that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law."[8]

V. Premises Liability

Pavia first argues there was a material fact in dispute concerning whether Ellis-Don had possession and control of the part of the building being renovated. Whether an individual or entity is responsible for an injury that occurs on property does not depend solely on whether that individual or entity has legal title to the property.[9] Rather, "[p]remises liability is conditioned upon the presence of both possession and control over the land."[10] A "possessor" is:

> "(a) a person who is in occupation of the land with intent to control it or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."[11]

As proof of this possession and control, Pavia points to Ellis-Don's contract with the University of Michigan and the deposition testimony, both regarding the way the work site was segregated from the occupied parts of the building. However, the undisputed evidence in the record demonstrated that the University of Michigan, which owned the C.C. Little Building, never gave control of the property to Ellis-Don through this purposeful segregation. Rather, it allowed Ellis-Don and its subcontractors to work in the building only as was necessary to perform the renovations. Though Ellis-Don, through its subcontractors, occupied the building, this was not occupation with the intent to control. That the University of Michigan directed Ellis-Don to segregate the areas of the building under construction from the areas of the building open to the public only underscores that, even in the context of these complex renovations, the University maintained control over the building.[12]

The case Pavia claims supports his possession and control theory, *Orel v Uni-Rak Sales Co*,[13] is inapposite. *Orel* evidently involved a property owner,[14] while Ellis-Don does not own

[7] *Smith v Globe Life Ins Co*, 460 Mich 446, 455, n 2; 597 NW2d 28 (1999), citing MCR 2.116(G)(4).

[8] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[9] *Merritt v Nickelson*, 407 Mich 544, 552-553; 287 NW2d 178 (1980).

[10] *Id*.

[11] *Id*. at 552, quoting 2 Restatement Torts 2d, § 328 E, p 170.

[12] See *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653; 575 NW2d 745 (1998).

[13] *Orel v Uni-Rak Sales Co*, 454 Mich 564; 563 NW2d 241 (1997).

the building where Pavia sustained his injury. In *Orel*, the contractor, subcontractors, and their employees also had completely taken over a discrete property unit, the burned plant and its adjacent parking lot, surrounded by a fence.[15] Here, though Ellis-Don attempted to keep non-workers out of the construction zone, students and university employees also occupied the building.

Even viewed in the light most favorable to Pavia, the record evidence does not create a question of fact concerning whether Ellis-Don possessed and controlled the building; it did not. Thus, Ellis-Don did not owe Pavia a duty of care as "possessor" of the property nor did it, obviously, owe Pavia a duty of care under its contract with the University.

VI. Retained Control

Pavia contends he presented a prima facie case that Ellis-Don and Goyette were liable under the retained control exception to the usual rule of non-liability of a general contractor to a subcontractor's employee.[16] For liability to attach under the retained control doctrine, there must be evidence of:

> 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.[17]

We can accept that there was a common work area in the building and Ellis-Don was a general contractor. However, the retained control doctrine does not apply to Goyette because it was not a general contractor.[18] Pavia also failed to present evidence that Ellis-Don exercised the level of supervision or direction necessary to be subject to liability under the doctrine.[19] General oversight of the contract work and maintenance of a safety program is insufficient to establish a retained control.[20]

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[14] *Id*. at 565.

[15] *Id*. at 565-566.

[16] See *Candelaria v B C General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999).

[17] *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996).

[18] See *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641(1974).

[19] See *id*. at 101, 105; see also *Candelaria, supra* at 73-76.

[20] See *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994).

Nor did this alleged hazard "create a high degree of risk to a significant number of workmen."[21] The hazard was easily visible and avoidable to people exercising ordinary and reasonable caution while walking. But the condition was insufficiently remarkable to allow any of Pavia's co-workers to describe it accurately or consistently, even assuming that they were each describing the same thing. The condition also failed to impress Pavia or any of his fellow workers or supervisors to the point that they would notify supervisors or the general contractor that it existed. Thus, although observable, the object did not create a high degree of risk necessary to invoke the retained control doctrine. Viewed in the most favorable light to Pavia, this evidence does not create a factual dispute concerning whether the retained control doctrine applied.

VII. MIOSHA

Pavia argues Ellis-Don, as the general contractor, and Goyette, as the prime mechanical contractor, owed him a duty of care under MIOSHA regulations to keep the work area free of hazards. Pavia further argues violations of MIOSHA regulations are evidence that defendants breached this duty, and therefore, the trial court erred by dismissing his negligence complaint.

In MCL 408.1002(2), MIOSHA clearly provides that it does not create new common-law or statutory duties for employers or employees,[22] stating:

> Nothing in this act shall be construed to supersede or in any manner affect any workers' compensation law, or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

In *Douglas v Edgewater Park Co*,[23] the Michigan Supreme Court held that proving a violation of a safety regulation would not constitute negligence per se, but only evidence of negligence. Thus, it is clear that Pavia cannot use MIOSHA regulations to create or extend a duty for Ellis-Don when one does not already exist at common law.[24] Further, Pavia's expert cannot create a duty because that is the exclusive province of the courts.[25]

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[21] See *Funk, supra* at 104.

[22] Premises liability extends to employees of independent contractors. *Hughes v PMG Building, Inc*, 227 Mich App 1, 9; 574 NW2d 691 (1997).

[23] *Douglas v Edgewater Park Co*, 369 Mich 320, 328; 119 NW2d 567(1963).

[24] See, generally, *Zalut v Andersen & Associates*, 186 Mich App 229, 235-236; 463 NW2d 236 (1990); see also *Ghrist v Chrysler Corp*, 451 Mich 242, 250; 547 NW2d 272 (1996).

[25] See *Reeves v Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998).

VIII. Negligence

Pavia argues the trial court erred by dismissing his claim that the contractors in this case breached their common-law duty to perform their contracts with reasonable care to avoid injuring other workers. Pavia claims he presented sufficient evidence to raise a question of material fact that the object that caused him to stumble either was the result of negligent demolition by Bierlein or negligent masonry work by Southeastern and that he presented sufficient evidence of "but for" causation by establishing a logical sequence of cause and effect.

We agree that both Bierlein and Southeastern had a duty to perform their contracts with ordinary care.[26] However, Pavia produced only speculative evidence concerning what the obstacle in question was, how it got there, and who was responsible for its existence. Pavia could not describe what caused him to trip, a fact which he candidly admitted. Nor were there other eyewitnesses to the incident or a contemporaneous report of the incident, which might have triggered an investigation to determine the nature and origin of the condition. Pavia depends primarily on testimony from witnesses who claim to have seen, or also tripped over, something in the same area in which he claims to have stumbled. Even assuming that whomever was responsible for the hazard in the hallway had breached a duty of care, there is no evidence tying Bierlein and Southeastern to that breach of duty. Thus, irrespective of a common law duty of care, Pavia failed to establish the second element of a prima facie case of negligence, namely that the relevant defendants breached that duty.[27] In the absence of evidence that these defendants breached their duty of care, it is also impossible to conclude that they caused Pavia's injury.[28] Thus, the evidence was lacking on at least two elements of his prima facie case,[29] making summary disposition appropriate.[30]

Affirmed.

/s/ Harold Hood
/s/ William C. Whitbeck
/s/ Patrick M. Meter

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[26] See *Clark v Dalman,* 379 Mich 251, 262; 150 NW2d 255 (1967).

[27] See *Koester v VCA Animal Hosp*, 244 Mich App 173, 175; 624 NW2d 209 (2000) (Four elements make up a prima facie case of negligence: "(1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages.").

[28] See *Pete v Iron County*, 192 Mich App 687, 689; 481 NW2d 731 (1991).

[29] See *Koester*, *supra*; see also *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997).

[30] In light of our conclusion on this issue, we need not determine whether the open and obvious danger doctrine barred liability for any of the defendants in this case.