STATE OF MICHIGAN

COURT OF APPEALS

BLAIN SULIMAN,

Plaintiff-Appellant,

v

PONTIAC CEILING AND PARTITION COMPANY, L.L.C.,

and

GEORGE W. AUCH COMPANY,

Defendants-Appellees

and

ANN ARBOR CEILING AND PARTITION COMPANY,

Non-Participating Defendant.

UNPUBLISHED
July 27, 2004

No. 248121
Washtenaw Circuit Court
LC No. 01-001034-NO

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants. We affirm.

This case arises out of injuries sustained by plaintiff when he fell from a scaffold at the construction site of a new high school building. At the time of the accident, plaintiff was employed by Ann Arbor Ceiling and Partition Company, a subcontractor on the project. Defendant George W. Auch Company (hereinafter "Auch") was the general contractor on the project, and defendant Pontiac Ceiling and Partition Company, L.L.C. (hereinafter "Pontiac Ceiling") was another subcontractor on the project. On the morning of the accident, plaintiff and his co-employee Jerry Cooke were assigned to "put up top track," a form of ceiling work. Plaintiff's foreman, Timothy Spare, directed plaintiff to use Pontiac Ceiling's scaffold for the job. Plaintiff assumed that the scaffold was owned by Pontiac Ceiling because Spare indicated

that it belonged to Pontiac Ceiling, and because some of Pontiac Ceiling's tools were draped over it. Plaintiff stated that "it didn't matter to me whose [scaffold] I worked off of."

Plaintiff rolled the scaffold to their work area. Because the ceiling was so high, Cooke, the taller of the two men, worked on the scaffold all day while plaintiff rolled him from place to place and held the scaffold steady. According to plaintiff, the scaffold had been "rolling all day because there were no brakes" on it. Plaintiff indicated that "none of the four wheels had any locking device on them," and that they were "completely [worn] out." Plaintiff used a block of wood to keep the scaffold from rolling while Cooke worked on it. Plaintiff complained about the worn out brakes to his foreman two or three times, but his foreman indicated that there was not enough time to get a different platform off of which they could work. Plaintiff and Cooke continued working without incident, and had a "fantastic day," with excellent productivity. When they finished the job, they were directed by their foreman to relocate to a different floor. In preparation for the move, Cooke consolidated their cords and materials, and, unbeknownst to plaintiff, partially dismantled the scaffold by unscrewing the safety lock devices which secured the platform to the scaffold frame.

In the meantime, plaintiff and Cooke were directed by their foreman, who in turn had been directed by defendant Auch, to make corrections to an area on which they had worked several weeks earlier. Plaintiff admitted that it was not unusual to make changes to previous work. Plaintiff and Cooke rolled the scaffold to the previous work site. Because this part of the ceiling was lower, and because Cooke had been working on the scaffold all day, plaintiff told Cooke to "take a break," while he worked on the scaffold. When plaintiff climbed onto the scaffold, the opposite end came a few inches off the floor due to his weight, which was not unusual. When plaintiff stepped onto the platform of the scaffold, the scaffold simultaneously collapsed and rolled, two of its wheels dropping off the poured concrete floor into an approximately two foot deep drop off to the part of the floor that had not yet been poured.

Q. What's the last thing you remember before you fell, sir?

A. I remember – I remember – I thought it was rolling a little bit but it didn't seem extreme because it had been rolling all day.

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Q. What is the last thing you recall before falling? You recall that the scaffold was rolling.

A. I recall it seemed like it was rolling. I recall stepping out there and it just gave out.

Q. The platform?

A. The whole thing just blew apart like it was just in a movie or something, I mean.

Q. Okay. I got the picture. But did anything actually break, or did it just disassemble?

A. It disassembled. Yes.

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Q. And you were successful in standing up on the platform.

A. No. I don't know, I can't recall clearly, but I noticed the scaffold was rolling. And it rolled off the edge because we were right near some concrete.

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Q. When the . . . two wheels . . . dropped off the poured floor . . . what happened?

A. I don't know. It come apart way before then.

Q. When you say it, you're talking about the scaffold?

A. Yes. I stepped out on there. I felt it rolling. The whole thing went to the ground, and me with it.

Plaintiff sued defendant Pontiac Ceiling, alleging that it failed to properly inspect and maintain the scaffold, and that the scaffold was otherwise defective. Plaintiff alleged that as a result of Pontiac Ceiling's defective scaffold he fell and was injured. Plaintiff sued defendant Auch, alleging that as general contractor, Auch was responsible for the general safety of the work site, and that it was negligent in directing employees of subcontractor Ann Arbor Ceiling and Partition, including plaintiff, to work in an area that was not reasonably safe. Plaintiff alleged that he worked on portable scaffolding, and that Auch failed to provide a level surface on which he could work, and failed to provide locking mechanisms to prevent the scaffold from rolling. Plaintiff alleged that because of Auch's negligence, the scaffold rolled off the uneven surface, resulting in the scaffold's collapse and plaintiff's subsequent injuries.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), on the basis that plaintiff failed to state a claim on which relief could be granted and that there were no genuine issues of material fact, thereby entitling them to judgment as a matter of law. Defendant Pontiac Ceiling argued that it was entitled to summary disposition pursuant to MCR 2.116(C)(8), because plaintiff did not allege that it owed him a legal duty, and further, no such duty exists. Defendant Pontiac Ceiling argued that, in the alternative, it was entitled to summary disposition pursuant to MCR 2.116(C)(10), because there was no factual dispute that the scaffold collapsed because plaintiff's co-employee partially disassembled the scaffold just before the accident, which caused the scaffold to collapse.

Defendant Auch argued that it was entitled to summary disposition pursuant to MCR 2.116(C)(8) and (10) because plaintiff's complaint did not allege any danger in a common work area under the general contractor's supervisory authority which was related to the accident. Defendant Auch argued that there was no genuine issue of material fact that the scaffold collapsed because plaintiff's co-employee improperly assembled and used the scaffold. Defendant Auch argued that, as a general contractor, it did not owe plaintiff a duty under such

circumstances. Defendant Auch also argued that it did not owe a duty to warn or protect plaintiff against the open and obvious known dangers associated with using a scaffold.

At the hearing on defendants' motion for summary disposition, the trial court requested supplemental briefs on the issue of proximate causation. In granting defendants' motion for summary disposition, the trial court characterized the facts of the case as follows:

> Plaintiff was injured on the job when a portable scaffolding he was using suddenly collapsed causing Plaintiff to fall to the concrete floor. Plaintiff testified that the scaffolding had been rolling all day because the wheel brakes were not working. However, the accident occurred when the scaffolding, according to Plaintiff's description, suddenly collapsed and "blew apart." It is undisputed that Plaintiff's co-worker had removed the locking pins which would have prevented the scaffolding from collapsing. Plaintiff and Defendants were unaware of the fact that Plaintiff's co-worker had removed the pins.

The trial court determined, as a matter of law, "that the intervening act of removing the locking pins from the scaffolding was not reasonably foreseeable," and that "because removal of the pins caused the scaffolding to collapse, and Plaintiff's fall was a direct result of the collapse of the scaffolding, the intervening act of removing the pins was a super[s]eding cause of Plaintiff's injury." Plaintiff appeals as of right.

We review rulings on motions for summary disposition de novo. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002). A motion "under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002). "The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating such a motion, a court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

We agree with plaintiff that the trial court erred in granting summary disposition in favor of defendants on the basis that plaintiff's co-employee's act of removing the safety pins from the scaffold was not reasonably foreseeable and constituted an intervening act that was a superseding cause of plaintiff's injuries, thereby relieving defendants of any liability.[1]

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[1] Our Supreme Court has explained that "[a] superseding cause is one that intervenes to prevent a defendant from being liable for harm to a plaintiff that the defendant's antecedent negligence is a
(continued…)

However, as we explain below, defendants were not negligent because they owed no duty to plaintiff under the circumstances of this case, and we need not reach the issue of causation. We may affirm a trial court's ruling when it reaches the right result, but for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001). We affirm the trial court's grant of summary disposition in favor of defendants on the basis that defendants did not owe plaintiff a duty, and therefore could not be held liable in negligence.

"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." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). "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." *Id*. "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." *Id*.

Defendant Auch was the general contractor of the construction site where plaintiff was injured. "Ordinarily, a general contractor is not liable for a subcontractor's negligence." *Hughes*, *supra* at 5. However, there are three exceptions to this general rule of nonliability: (1) retained control; (2) common work area; and (3) inherently dangerous work. *Ghaffari v Turner Constr Co*, 259 Mich App 608, 615-617; 676 NW2d 259 (2003); see also *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 173; 660 NW2d 730 (2003), lv gtd 469 Mich 947; 671 NW2d 55 (2003).

Under the retained control exception, a general contractor may be held liable for an injury caused by a subcontractor "where the general contractor retains control over the work of the negligent subcontractor." *Ghaffari*, *supra* at 615. "Thus, where an employer retains less control than that of a master, but enough supervisory control, the law may impose a duty to exercise this control with reasonable care to prevent the work from causing injury." *Ormsby*, *supra* at 174. "But having control over general oversight and safety standards alone is insufficient to constitute retained control." *Ghaffari*, *supra* at 616. Instead, "[t]here must be a high degree of actual control; general oversight or monitoring is insufficient." *Phillips v Mazda Motor Mfg Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994). "At a minimum, for a[] . . . general contractor to be held directly liable in negligence, its retention of control must have had some *actual effect* on the manner or environment in which the work was performed." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 76; 600 NW2d 348 (1999) (emphasis in original).

(…continued)

substantial factor in bringing about," and that "in order to be a superseding cause, thereby relieving a negligent defendant from liability, an intervening force must not have been reasonably foreseeable." *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 436-437, amended 440 Mich 1203; 487 NW2d 106 (1992). We are not persuaded that plaintiff's co-employee's act of removing the safety pins from the scaffold necessarily constituted a superseding cause that would operate to relieve defendants of liability. That is, we are not convinced that a reasonable fact finder could not conclude otherwise, i.e., that the scaffold might have rolled and collapsed even if plaintiff's co-employee had not removed the safety pins.

Here, while there was evidence that defendant Auch exercised general oversight and direction over its subcontractors, it did not demonstrate that defendant Auch exercised a high degree of actual control over how the individually subcontracted projects were performed. Therefore, the retained control exception to the general rule of nonliability for a general contractor does not apply.

Under the common work area exception, "a general contractor may be held liable if it failed to take 'reasonable steps within its supervisory and coordinating authority' to guard against 'readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen.'" *Hughes*, *supra* at 5-6, quoting *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982). This Court explained:

> Thus, for there to be liability, 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 several subcontractors, and (3) a readily observable, avoidable danger in that work area (4) that creates a high risk to a significant number of workers. [*Id*. at 6.]

Even assuming that there was sufficient evidence to establish the first two of these elements, the lack of functional brakes on the scaffold did not constitute "a readily observable, avoidable danger . . . that create[d] a high risk to a significant number of workers." *Id*. Accordingly, the common work area exception to the general rule of nonliability for a general contractor is inapplicable.

Finally, a contractor may be held liable for a subcontractor's negligence "where the work is an 'inherently dangerous' activity." *Ghaffari*, *supra* at 616, quoting *Ormsby*, *supra* at 175. But "liability 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 *Szymanski v K Mart Corp*, 196 Mich App 427, 431-432; 493 NW2d 460 (1992), vacated and remanded on other grounds 442 Mich 912; 503 NW2d 449 (1993), quoting *Funk*, *supra* at 110. Here, there is absolutely no indication that plaintiff's work on the scaffold was an inherently dangerous activity, as is necessary for this exception to apply.

In sum, plaintiff failed to establish any exception to the general rule of nonliability for a general contractor. We affirm the trial court's grant of summary disposition in favor of defendant Auch. *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 146; 530 NW2d 510 (1995).

Defendant Pontiac Ceiling was a subcontractor working at the construction site where plaintiff was injured. While plaintiff alleged that Pontiac Ceiling owned the scaffold from which he fell, failed to properly inspect and maintain the scaffold, and that the scaffold was defective, plaintiff did not allege that Pontiac Ceiling owed him any duty that would render it liable in negligence.

We conclude there was no such duty. Initially, we note that the exceptions which can impose a duty on a general contractor, just discussed, do not apply where "the employee of one subcontractor seeks to recover from another subcontractor." *Hughes*, *supra* at 12. See also *Funk*, *supra* at 104, n 6. Further, a claim similar to plaintiff's was rejected in *Klovski v Martin Fireproofing Corp*, 363 Mich 1; 108 NW2d 887 (1961). The plaintiff subcontractor on a construction project was injured when he borrowed the defendant co-subcontractor's ladder to climb up to the roof. *Id*. at 2-3. The plaintiff sued the defendant co-subcontractor on the theory that he was an "invitee or licensee at the time and place of his injury." *Id*. at 3. The trial court granted the defendant's motion for a directed verdict, and our Supreme Court affirmed that decision, finding that "before we can have one legally in the position of invitee or licensee we must have an invitation, or a license." *Id*. at 3-4, 6. Our Supreme Court agreed with the trial court's determination that there was "no basis upon which to conclude that [the defendant] owed any duty to the plaintiff," and that there was no evidence "that [the] defendant knew or should have known that [the] plaintiff or others like [the] plaintiff had so used its ladder, might so use it, or were so using it." *Id*. at 4-5. Our Supreme Court concluded that "there was no duty upon [the] defendant [], one of the [] subcontractors, to make the premises safe for all who might work there." *Id*. at 5-6.

Similarly, in the instant case, there was no evidence that defendant Pontiac Ceiling was even aware that plaintiff borrowed its scaffold, and Pontiac Ceiling, as a co-subcontractor, owed no duty to plaintiff. Because plaintiff did not allege and defendant Pontiac Ceiling did not owe plaintiff any duty, we affirm the trial court's grant of summary disposition in favor of defendant Pontiac Ceiling on this basis.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra