STATE OF MICHIGAN

COURT OF APPEALS

RONALD DARCANGELO,

Plaintiff-Appellant,

v

WALBRIDGE ALDINGER CO., INC.,

Defendant-Appellee.

UNPUBLISHED
September 28, 2004

No. 247631
Wayne Circuit Court
LC No. 01-125861-NO

Before: Schuette, P.J., and Bandstra and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS

On October 5, 2000, plaintiff was working for Power Vac as a laborer and driver. Plaintiff was driving a Power Vac truck that was a sewer or vacuum truck. Plaintiff's contact at the jobsite was a foreman for defendant. Plaintiff's job entailed washing the roadways with a hose and then vacuuming the resulting debris out of the sewers and catch basins.

After setting up the truck, plaintiff was standing by the truck, cleaning a catch basin, when the permanent rubber tube with metal flanges that was attached to the truck, broke off the truck and hit plaintiff on the head. Plaintiff was bleeding profusely and defendant's foreman took him to the hospital. From this accident, plaintiff has dizzy spells, light-headedness, headaches, constant ringing in the ears, memory problems, and blackouts.

Plaintiff filed his complaint on July 30, 2001 and alleged that defendant breached its duty to provide safe working conditions in the common areas of the worksite, thereby injuring plaintiff. At the close of discovery, defendant filed a motion for summary disposition requesting that the trial court grant the motion pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10). Defendant argued that the motion should be granted because it had no duty to inspect the equipment brought onto the jobsite by Power Vac, nor was there any testimony to indicate that an inspection would have revealed a problem with the clamp that disconnected from the truck, thereby injuring plaintiff. In response to defendant's motion, plaintiff argued that defendant retained control over the work involved and that the injury occurred in a common work area, and therefore, defendant was liable for plaintiff's injuries.

On March 7, 2003, the court again heard arguments on defendant's motion for summary disposition. The court concluded defendant never retained control over plaintiff. The fact that defendant's foreman allowed plaintiff onto the jobsite and watched over him while he was working does not indicate that he had supervisory control over plaintiff. The court stated that plaintiff was in a common area when the accident occurred, but there was no readily observable danger. The court indicated that plaintiff's employer owned and operated the machine and that defendant was under no obligation to examine it for defects. There was no indication that defendant was responsible for ensuring that plaintiff wore a hardhat, and defendant's foreman's assertion that he should have told plaintiff to wear a hardhat did not make defendant liable. The court granted defendant's motion and entered an order granting summary disposition in favor of defendant. Plaintiff now appeals as of right.

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in its application of the law in granting summary disposition. We disagree.

A. Standard of Review

Questions of law are reviewed de novo. *Rakestraw v Gen Dynamics Land Sys*, 469 Mich 220, 236; 666 NW2d 199 (2003).

B. Analysis

In general, "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 v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). In *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 173; 660 NW2d 730 (2003), overruled *Ormsby v Capital Welding, Inc*, ___ Mich ___; ___ NW2d ___; 2004 LEXIS 1559 (Docket No. 123287, decided July 23, 2004) this Court stated that there were three exceptions to this general rule: (1) situations where the general contractor retains control of the work to be performed by the independent contractor; (2) circumstances where the injury arose from a readily observable and avoidable danger in a common work area that created a high degree of risk to a significant number of workers; and (3) where the work that the independent contractor performs is inherently dangerous.

Defendant, citing *Candelaria, supra*, 236 Mich App 72, argued that exceptions one and two were two factors of a single exception to the general rule. In this case, the trial court indicated that although it would grant plaintiff the fact that the accident happened in a common work area, defendant never retained any supervisory control over the independent contractor.

The Michigan Supreme Court recently addressed the scope of the "common work area doctrine" and the "retained control doctrine" and their relationship. See *Ormsby, supra*, ___ Mich ___; ___ NW2d ___; 2004 LEXIS 1559 (Docket No. 123287, decided July 23, 2004). The Supreme Court stated, in part:

> In this case, the Court of Appeals reversed the trial court's grant of summary disposition for both defendants, holding that these doctrines are two distinct and

> separate exceptions to the general rule of nonliability of property owners and general contractors concerning the negligence of independent subcontractors and their employees. We disagree with the Court of Appeals and clarify today that these two doctrines are not two distinct and separate exceptions, rather only one – the "common work area doctrine" – is an exception to the general rule of nonliability for the negligent acts of independent subcontractors and their employees. Thus, only when the *Funk*[1] four-part "common work area" test is satisfied may an injured employee of an independent subcontractor sue the general contractor for that contractor's alleged negligence.
>
> Further, the "retained control doctrine" is a doctrine subordinate to the "common work area doctrine" and is not itself an exception to the general rule of nonliability. [*Id.,* slip op, pp 3-4 (footnote added).]

The trial court erred in applying both the "common work area" doctrine and the "retained control doctrine" to defendant. Defendant was not the property owner, and therefore, the retained control doctrine would not apply. *Ormsby, supra*, slip op, pp 3-4. However, despite this error, the trial court reached the correct conclusion. We will not reverse the trial court when it reaches the right conclusion for the wrong reason. *Zimmerman v Owens*, 221 Mich App 259, 264; 561 NW2d 475 (1997).

III. COMMON WORK AREA

Plaintiff argues that there is a genuine issue of fact concerning his right to recover under a common work area theory. We disagree.

A. Standard of Review

A trial court's decision on a motion for summary disposition is reviewed de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Mino v Clio School District*, 255 Mich App 60, 67; 661 NW2d 586 (2003). In deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). We must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Review is limited solely to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

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[1] *Funk v Gen Motors Corp*, 392 Mich 91, 104-105; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

B. Analysis

In *Funk, supra*, 392 Mich 104, the Michigan Supreme Court set out four elements, that must each independently be met, for imposing liability on a general contractor under the "common work area" doctrine. The factors for recovery have since been reiterated:

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

The first factor, a general contractor with supervisory control over the job site, is one having less than that of a master, but enough power to direct the order of work to be done, or to forbid the work being completed in a manner that is likely to be dangerous to the worker or others. *Ormsby, supra*, 255 Mich App 174, citing *Plummer v Bechtel Constr Co*, 440 Mich 646, 660 n 17; 489 NW2d 66 (1992) (Levin, J.), quoting 2 Restatement Torts 2d, § 414, comment a, p 387. Supervisory control also exists when the general contractor reserves to itself the direction, inspection, assistance and other actions that do or may authorize some measure of authority or dominion over the way the work is to be done. *Signs v Detroit Edison Co*, 93 Mich App 626, 639; 287 NW2d 292 (1979), citing *McDonough v General Motors Corp*, 388 Mich 430, 444; 201 NW2d 609 (1972).

In this case, defendant first argued that there was no evidence that it was the general contractor. However, Williams, who worked at the Midfield Project at Metro Airport stated that defendant was the general contractor of the project.

Defendant also argued that there was no evidence that it had supervisory authority over the job site. However, plaintiff stated that while on the jobsite, all of his work was directed by defendant's foreman. Power Vac, plaintiff's employer and subcontractor of defendant, had told plaintiff to see defendant's foreman for direction and supervision. Defendant's foreman would coordinate the work from Power Vac with the work of defendant's employees or other subcontractors. Plaintiff always followed the direction of defendant's foreman who controlled what work was going to be done, when it would be done, and where it would be done. Defendant's foreman inspected every catch basin after plaintiff worked on it. Defendant's foreman seldom left the area of plaintiff's work site and appeared to be concerned only with what plaintiff and other Power Vac employees were. When viewed in a light most favorable to plaintiff, we believe that there is a question of fact for the jury regarding whether defendant was a general contractor with supervisory control over the jobsite.

The second element of the "common work area" theory is whether the injury happened in a common work area that was shared by more than one contractor. A work area is considered to be "common" if the employees of two or more subcontractors will eventually work in it. *Ormsby, supra*, 255 Mich App 188; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994). The trial court in this case found that there was a question of fact concerning whether the injury occurred in a common work area. Plaintiff stated that defendant's employees "were always in the area where we were working. . . . [Defendant's] employees and other subcontractors were working overhead and driving by all day long."

Further, many different building trades worked in this area, and it was the main access route for the construction project. In *Bohnert v Carrington Homes*, a case decided *sub nom* in *Groncki, supra,* 453 Mich 664, the Court stated that evidence that the work area was the main driveway into a construction site created a question of fact for the jury regarding the "common work area" factor. Therefore, because it was a main access route and there is evidence that more than one contractor may have shared the area, we believe that the trial court did not err in finding the evidence on this factor created a question of fact for the jury.

The third element of the "common work area" theory is whether there was a readily observable danger in the common work area. The trial court stated that there was no "readily observable danger" because there was no observable problem with the clamp that broke and defendant was under no obligation to inspect Power Vac's equipment, including the clamp that broke. Plaintiff argues that the readily observable danger was the fact that workers on the job site, such as plaintiff, were not wearing hardhats. However, there was no evidence indicating that there was a readily observable danger regarding the metal flange that fell off of the truck, injuring plaintiff. Plaintiff stated that there was no indication that the clamp holding the metal flange was going to break. Plaintiff also stated that defendant's foreman did not touch, operate, inspect, or tell him how to operate the truck that the metal flange broke off of. Plaintiff did not think that defendant's foreman did anything to cause the clamp to break, nor did he know it was going to break. The clamp breaking was not a readily observable danger.

Plaintiff argues that the readily observable danger was defendant's failure to instruct him to wear a hardhat in compliance with MIOSHA standards. MIOSHA provides:

> (1) An employer shall assume that each affected employee shall be provided with, and shall wear head protection equipment and accessories when the employee is required to be present in areas where a hazard exists from falling or flying objects. . . . [Mich Admin Code R 408.13370.]

In *Ghaffari v Turner Construction Co*, 259 Mich App 608; 676 NW2d 259 (2003), the plaintiff was on a construction site when he slipped and fell on copper pipes which were on the ground in violation of MIOSHA regulations. The plaintiff argued that the MIOSHA regulation placed a duty on the defendant. *Ghaffari, supra*, 259 Mich App 612. This Court disagreed, stating that although violation of a MIOSHA regulation could be used as "evidence of negligence," it does not impose a statutory duty on an employer. *Id*. at 613. This Court found that the grant of summary disposition in favor of the defendant was appropriate *Id*. at 617.

In this case, the MIOSHA regulation requiring plaintiff to wear a hardhat did not establish a duty for defendant, even if defendant could be found to have supervisory control over plaintiff. *Ghaffari, supra*, 259 Mich App 613. Even if defendant was responsible to enforce the MIOSHA hardhat regulation, the fact that it was not enforced could, at most, be used as "evidence of negligence." *Id*. Therefore we believe that the trial court did not err in finding the evidence on this factor did not create a question of fact for the jury, and properly ruled that there was no readily observable and avoidable danger.

The fourth element of the "common work area" theory is whether the "readily observable danger" created a "high degree of risk to a significant number of workers." The trial court did not find a readily observable danger, and therefore, made no finding on this factor. Plaintiff

argues that the violation of the MIOSHA hardhat regulation created a high degree of risk to a significant number of workers.

Even if defendant was responsible for enforcing the MIOSHA hardhat regulation and the lack of enforcement was a readily observable danger, we believe that there is no question of fact for the jury whether the failure to comply with this regulation created a high degree of risk to a significant number of workers. In *Groncki, supra,* 453 Mich 664, the Court found that the fact that most workers on a job site, along with their equipment, used the driveway where the injury from the overhead power line occurred was sufficient to establish a question of fact as to whether a significant number of workers were at risk. However, unlike a power line overhanging a main driveway, here plaintiff was injured when a metal flange broke off of a truck owned and maintained by his employer, a subcontractor, and hit him on the head. There was no evidence that workers of any other contractor used the truck or worked within close range of the truck. The fact that other workers passed by the truck that the metal flange broke off of is insufficient to establish that the truck was a common work area that contained a readily observable and avoidable risk to a significant number of workers. *Hughes v PMG Bldg*, 227 Mich App 1, 7; 574 NW2d 691 (1997).

In sum, there may have been a question of fact regarding whether defendant was a general contractor with supervisory control and whether plaintiff was injured in a common work area, however, we conclude that there is no factual support that there was a readily observable danger or that a danger created a high degree of risk to a significant number of workers. Because all four elements must be met for a general contractor to be liable, the court rightly determined the threshold issue as a matter of law.

IV. RETAINED CONTROL

Plaintiff next argues that there is a genuine issue of fact concerning his right to recover under a retained control theory. We disagree.

Ormsby, supra, clarifies that the retained control doctrine is subordinate to the common work area doctrine. *Ormsby* states that the retained control doctrine "simply stands for the proposition that when the *Funk* 'common work area doctrine' would apply, and the property owner has sufficiently 'retained control' over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor." *Ormsby, supra*, slip op p 4. The retained control doctrine applies only to define property owners' liability under the common work area doctrine, thus, it is not applicable to defendant, because it was not the property owner.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Patrick M. Meter