STATE OF MICHIGAN

COURT OF APPEALS

CHAD SEARFOSS and NICOLE SEARFOSS, Plaintiffs-Appellees, v CHRISTMAN COMPANY, INC., and DOUGLAS STEEL COMPANY, INC., Defendants-Appellants.	UNPUBLISHED November 18, 2004 No. 249925 Ingham Circuit Court LC No. 01-093787-NO

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

PER CURIAM.

In this action based on negligence and breach of contract, defendants appeal by leave granted an order denying their motion for summary disposition. We reverse and remand.

The facts in this case are not in dispute. Plaintiff, Chad Searfoss, a pre-apprentice ironworker, was installing steel decking on a construction job for his employer, Citisteel Corporation. Plaintiff[1] and a coworker had laid a few sheets of decking when plaintiff decided to measure the sheets to make sure they were square before welding them into place. Plaintiff walked to the edge of the deck and fell approximately twenty-nine feet onto sand at the bottom of the building. Plaintiff suffered serious injuries but has no memory of how the accident occurred.

Citisteel was a subcontractor of defendant Douglas Steel Company which in turn was a subcontractor of defendant Christman Company, the general contractor for the job. Plaintiff filed suit against Christman and Douglas Steel alleging direct and vicarious negligence and breach of contract. Defendants argue that the trial court erred by denying their motion for summary disposition.

[1] Although both Chad Searfoss and his wife filed complaints, his wife's suit is derivative. Therefore we use the singular "plaintiff" throughout.

"Ordinarily, a general contractor is not liable for a subcontractor's negligence." *Schoenherr v Stuart Frankel Dev Co*, 260 Mich App 172, 177; 679 NW2d 147 (2003). But plaintiff contends that defendants are liable to him under several exceptions to this rule, including the failure to hire a careful contractor, the doctrine of respondeat superior, the doctrine of retained control, and the exception for injuries caused by inherently dangerous activities. Additionally, he asserts that as an employee of a subcontractor, he is a third party beneficiary of the contracts between Citisteel, Douglas Steel, and Christman.[2] Defendants argue that as a matter of law, none of the exceptions apply and, even if one did apply, plaintiff has failed to present sufficient evidence to overcome their motion for summary disposition under MCR 2.116(C)(10).

Motions for summary disposition are reviewed de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001). Under MCR 2.116(C)(8), a trial court properly grants a motion for summary disposition where the opposing party has failed to state a claim on which relief can be granted. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). Such motions test the legal sufficiency of a claim based solely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). But when reviewing a motion for summary disposition, under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). The motion will be granted "if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

I

Plaintiff first argues that defendants may be liable because they failed to employ careful contractors, and as a result, he was injured. But under *Reeves v Kmart Corp*, 229 Mich App 466, 475-476; 582 NW2d 841 (1998), general contractors have no duty to employ careful or competent contractors in Michigan. Because no duty exists, plaintiff fails to state a claim upon which relief may be granted. Thus, the trial court should have granted defendants summary disposition on this issue pursuant to MCR 2.116(C)(8).

II

[2] The only theory of liability that defendants briefed or argued extensively in their motion for summary disposition concerned whether they were engaged in an inherently dangerous activity. The trial court made no decisions regarding plaintiffs other theories of liability and defendants failed to preserve their arguments concerning these issues. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). But we may overlook preservation requirements where, as in the instant case, "the issue involves a question of law and the facts necessary for its resolution have been presented." *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

Plaintiff next contends that defendants are liable under the theory of respondeat superior. But plaintiff failed to present any evidence that either defendant retained sufficient control over the methods of work so that they could be found liable under this theory.

For an employer to be vicariously liable for the negligence of a subcontractor under the doctrine of respondeat superior, plaintiff must show that the employer "retains control over the method of the work, [so that] there is in fact no contractee-contractor relationship, and the employer may be vicariously liable under the principles of master and servant." *Candelaria v BC Gen Contrs, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999). 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." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992).

There was no express contract provision in the Christman – Douglas Steel contract that indicates any right of control over how Douglas Steel performed its work. The Douglas Steel – Citisteel contract specifically stated that Citisteel was responsible for all "labor and supervision necessary" for the installation of metal deck. There are some contingency clauses in the contract that give Douglas Steel some right of control, for example, to direct Citisteel to employ more workers or require overtime if the construction fell behind schedule. But this does not rise to the level of Douglas Steel controlling Citisteel's method of work.

Moreover, plaintiff testified that he received no supervision or direction from anyone except his supervisors at Citisteel and had no knowledge that either defendant gave direction to Citisteel. Thus, there is no evidence that either defendant exercised or retained the requisite day-to-day control or supervision of "specific work activities" and, as a result, "the rationale for imposing respondeat superior liability simply does not exist." *Hoffman v JDM Associates*, 213 Mich App 466, 473; 540 NW2d 689 (1995). Accordingly, defendants are entitled to summary disposition on this theory of liability pursuant to MCR 2.116(C)(10).

III

Plaintiff also asserts that the doctrine of retained control prevents the general rule protecting contractors from applying in the instant case. In *Ormsby v Capitol Welding Co*, 471 Mich 45; 684 NW2d 320 (2004), our Supreme Court recently clarified law regarding this doctrine and its interaction with the common work area doctrine.

In *Ormsby*, *supra*, 49-50, the plaintiff, who suffered an injury on a construction site, was employed by a subcontractor. His employer had been retained by a second subcontractor, Capital Welding, that had in turn been retained by the general contractor Monarch Building Services, Inc. *Id.*, at 50. The plaintiff brought suit against both Capital and Monarch, arguing the retained control exception applied. Our Supreme Court stated that the doctrine of retained control "is subordinate to the 'common work area doctrine' and is not in itself an exception to the general rule of nonliability." *Ormsby*, *supra*, 49. Rather, it allows the common work area doctrine to apply to the property owner as well as the general contractor if the owner has retained such control over the construction project that it has assumed the role of a general contractor. *Id.*

Therefore, the Court held that the doctrine of retained control "has no application to general contractors." *Id.*, at 56.

Regarding the common work area exception, the Court in *Ormsby* explained that in order to establish the liability under the common work area exception, a plaintiff must prove the following four elements:

> (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Id.*, at 57, citing *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974).]

But it found that under *Funk*, the doctrine only applies to property owners and general contractors. *Id.*, at 58. Based on this, the Court held that the trial court properly granted summary disposition to Capital, the intermediate subcontractor. *Id.* Concerning the claim against the general contractor, it held that this Court erred in reversing the trial court's order granting summary disposition to Monarch because the plaintiff had failed to show the existence of a question of material fact on each of the four elements of the common work area exception. *Id.*, at 59-60.

In the instant case, plaintiff did not assert that the common work area exception applied. Rather, he only alleged that defendants were liable under the retained control exception. Because this exception only works to extend the common work area exception to property owners and neither Douglas Steel nor Christman own the property where plaintiff's accident occurred, plaintiff has failed to state a claim upon which relief may be granted. *Ormsby*, *supra*, 56. But our Supreme Court did not decide *Ormsby* until after the trial court denied defendants' motion for summary disposition and we granted leave to appeal. Before *Ormsby*, the doctrine of retained control had been construed as a separate exception that applied to contractors. *Id.*, at 56. In light of these circumstances, we remand to the trial court to provide plaintiff with the opportunity to amend his pleadings and allege the common work area exception.

However, even after plaintiff amends his pleadings, we note that the common work area exception can only apply to Christman, the general contractor. It cannot extend liability to an intermediate subcontractor. *Ormsby*, *supra*, 58. Therefore, summary disposition under MCR 2.116(C)(8) is appropriate as to Douglas Steel. Furthermore, we take no position as to whether plaintiff will be able to establish a genuine issue of material fact on each of the elements of the exception once his pleadings have been amended.

IV

Plaintiffs also contend that defendants are liable because they were engaged in an inherently dangerous activity. In *DeShambo v Anderson*, 471 Mich 27, 28; 684 NW2d 332 (2004), our Supreme Court considered the exception imposing liability for injuries resulting from inherently dangerous work and found that this Court had "improperly extended the doctrine,

contrary to its original purpose," to include injuries to those involved in the performance of dangerous work." The doctrine was originally intended to "protect innocent third parties injured as a result of an inherently dangerous undertaking." Because of this, the Court held that "the inherently dangerous activity exception is limited to third parties and does not apply to employees of independent contractors injured while performing dangerous work." *Id.*, at 41. Because plaintiff, as an employee of a subcontractor, does not fall within the class of persons to which the inherently dangerous activity exception applies, both defendants are entitled to summary disposition as to this exception pursuant to MCR 2.116(C)(8).[3]

V

Finally, plaintiff asserts that defendants are liable to him because he is a third-party beneficiary of the contracts between Citisteel, Douglas Steel, and Christman. "Third-party beneficiary status requires an express promise to act for the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of contract." *Dynamic Construction Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995). In the instant case, nothing in the contracts between Christman and Douglas Steel or Douglas Steel and Citisteel can be construed as an express promise that either defendant would act to provide for plaintiff's safety. Thus, no genuine issue of material fact exists and defendants are entitled to summary disposition of this issue pursuant to MCR 2.116(C)(10).

In sum, we find that defendant Douglas Steel is entitled to summary disposition because it cannot be held liable under any relevant theory of liability. But in light of our Supreme Court's recent decision in *Ormsby*, we allow plaintiff to amend his pleadings to allege that the common work area exception applies and remand for further proceedings regarding his claim against Christman.

Reversed and remanded for entry of judgment in favor of Douglas Steel and further proceedings as to Christman consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

I concur in result only.

/s/ Jessica R. Cooper

---

[3] During oral arguments, plaintiff contended that the rule announced in *DeShambo* should be limited to prospective application and is therefore not applicable to the instant case. But in the civil context, the threshold question in determining whether a decision should not have retroactive application is "whether the decision clearly established a new principle of law." *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). Although *DeShambo* corrected the overextension of the inherently dangerous activity doctrine, we do not find that it clearly established a new principal of law and decline to limit its application.