STATE OF MICHIGAN

COURT OF APPEALS

LARRY MARTEL and JUDY MARTEL,

Plaintiffs-Appellants,

v

J.M. OLSON COMPANY, INC.,

Defendant/Third-Party Plaintiff-Appellee,

and

RAINBOW CONSTRUCTION COMPANY,

Third-Party Defendant.

UNPUBLISHED
December 20, 2005

No. 263670
Oakland Circuit Court
LC No. 2003-048547-NO

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiffs, Larry Martel and Judy Martel, appeal as of right an order granting summary disposition in favor of defendant, J.M. Olson Company, Inc. On appeal, plaintiffs argue that their negligence suit was improperly dismissed because defendant breached a voluntarily assumed duty to enforce safety regulations at the worksite where Larry Martel ("Martel") was injured. Because the record does not show that defendant voluntarily assumed a duty to Martel beyond defendant's normal supervisory role as a general contractor, we disagree and affirm.

Martel was an employee of third-party defendant, Rainbow Construction Company ("Rainbow"). Rainbow was a subcontractor of defendant at the construction site for the Fox Run Village retirement home in Novi, Michigan. Martel was injured at the Fox Run site when a saw he was using to cut concrete storm sewer pipes "kicked back" and struck him in the face. Plaintiffs allege that Martel's injuries were caused because he was working without proper safety equipment; although Martel was wearing safety goggles, he was not using a full face guard. Plaintiffs further allege that a full face shield was required both by Occupational Safety and Health Administration ("OSHA") regulations and by defendant's own safety policy.

We review a trial court's decision on a motion for summary disposition de novo. *Graves v American Acceptance Mtg Corp (On Rehearing)*, 469 Mich 608, 613; 677 NW2d 829 (2004). The trial court did not indicate whether it granted defendant's motion based on MCR 2.116(C)(8)

or (C)(10). However, because the court considered evidence outside the pleadings, we review under the standard for subsection (C)(10). *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). A summary disposition motion pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Generally, whether a duty exists is a question of law for the court to decide. *Harts v Farmers Ins Exchange*, 461 Mich 1, 6; 597 NW2d 47 (1999); *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998).

As a general rule, a property owner or general contractor may not be held liable for the negligence of independent subcontractors and their employees. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48-49; 684 NW2d 320 (2004). The basic exception to this rule is the common work area exception enunciated in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds, *Hardy v Monsato Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982). *Ormsby*, *supra* at 49. The exception requires a plaintiff to prove 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*, *supra* at 104.]

Plaintiffs do not challenge the trial court's ruling that the common work area exception does not apply here; rather, they contend that a general contractor may still be liable to a subcontractor's employee under the separate common law theory that one party may voluntarily assume a duty to another and, therefore, become liable for negligence if the duty is not undertaken with reasonable care. *Zychowski v A J Marshall Co, Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998). Michigan case law does not outline the exact elements to prove the voluntary assumption of a duty. However, generally, when evaluating whether a duty should be imposed a court may consider the foreseeability of the risk of harm as well as other more important factors concerning whether the law or society would conclude that the parties' relationship warrants a duty. *Buczkowski v McKay*, 441 Mich 96, 101-102; 490 NW2d 330 (1992). Here, plaintiffs have presented little argument or evidence to suggest that defendant should be charged with a duty which falls outside the *Funk/Ormsby* exception.

Plaintiffs focus on the actions and statements of Mike Zatroch, who was defendant's superintendent responsible for site work at Fox Run, and of Patrick Moore, who was defendant's

Director of Environment Health and Safety. In his deposition, Zatroch stated: "As a superintendent, I assume a responsibility to make sure that things are being performed safely." Plaintiffs also cite a portion of the following exchange from Zatroch's deposition:

> *Q*. Did anybody at Olson Corporation at any time ever inform you that it was the responsibility of Olson to follow certain governmental safety rules and regulations like MIOSHA or OSHA?
>
> *A*. We're required to comply with MIOSHA and OSHA Standards.
>
> *Q*. Meaning, when you say 'we' are you referring to Olson?
>
> *A*. We as builders, we as Olson. . . . Anybody that does construction.

Further, plaintiffs refer to defendant's creation of internal safety guidelines, which list full face shields as "[a]dditional personal protective equipment that *may be required*." (Emphasis added.) They claim that defendant "clearly created a safety program [by which] the full face shield *was required*" (emphasis added) and which Zatroch voluntarily assumed a responsibility to enforce.

Plaintiffs also claim that Moore admitted that defendant was responsible for enforcing OSHA and MIOSHA regulations. They cite portions of Moore's deposition testimony in which he agrees that defendant's contract with the landowner required defendant to "take reasonable precautions and care with [defendant's] employees and employees of the subcontractors." Moore also agreed that a particular contract provision "indicates that the contractor shall comply, and give notices, with applicable laws, which would include MIOSHA and OSHA" on the Fox Run site.

The evidence does not establish that defendant assumed a heightened duty to monitor a subcontractor's employees on a day-to-day basis. The testimony, safety provision and contract language do not specifically suggest that defendant intended to enforce the safety program or "reasonable precautions" itself by monitoring the individual employees of subcontractors under all circumstances. Further, it would be consistent with the normal responsibilities of a general contractor under the *Funk/Ormsby* rule if defendant intended to require its subcontractors to enforce the precautions when the subcontractor's employees were not working in a common work area. In fact, the president of Rainbow, Daniel Nawrot, testified that Rainbow, not defendant, "was responsible for the safety of its employees" and for "provid[ing] appropriate safety measures to its employees."

We also conclude that the statements and actions of defendant's agents did not create a foreseeable risk of harm to Martel. Plaintiffs do not cite evidence, for instance, that Martel or Rainbow expected defendant to monitor Martel (the evidence noted above was in fact the opposite) and, therefore, that Martel could be put at risk by defendant's lack of direct monitoring. Compare, for example, *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 200-201, 205-206; 544 NW2d 727 (1996), where this Court found that the defendant drug store assumed a duty to a pharmacy client who suffered a stroke as a result of ingesting incompatible drugs which were filled at the defendant's pharmacy. This Court concluded that the defendant voluntarily assumed a duty to use due care in administering a prescription monitoring system because the defendant "implemented the . . . system and then advertised that [the] system would detect harmful drug

interactions for its customers." *Id.* at 205-206. Here, plaintiffs have shown no such evidence of a foreseeable safety risk caused by reliance on defendant's general safety policies.

Case law concerning the duties of general contractors also supports a finding that the instant facts do not warrant imposing a duty on the part of defendant. Extensive discussions in cases such as *Funk* and *Ormsby* generally limit the liability of general contractors to the common work area exception. Although we do not reach the question whether a general contractor may ever voluntarily assume a heightened duty under such cases, the cases reflect the courts' careful consideration of which duties the law or society has concluded a general contractor should owe a subcontractor's employees. Under the facts of the instant case, we generally agree with defendant that it arguably nullifies the intent of these cases – and in fact may counterproductively punish general contractors who voice commitments to safety – to find that a duty may be created in a general contractor when that contractor merely makes broad statements regarding safety concerns or implements safety policies. Accordingly, we opine that the record, even when viewed in a light most favorable to plaintiffs, does not provide evidence to warrant the conclusion that defendant, as a matter of law, voluntarily assumed a duty to Martel beyond the normal duties required by the common work area doctrine.[1]

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[1] In light of this conclusion, we need not address the issue whether OSHA regulations or defendant's safety policy required the use of a full face shield for the type of work Martel was performing when he was injured.