STATE OF MICHIGAN

COURT OF APPEALS

BRIAN FAUROT,

Plaintiff-Appellant,

v

SCOTT MILLER, d/b/a JD SAWMILL, INC., d/b/a JD LOGGING,

Defendant/Cross-Defendant-Appellee,

and

EUGENE W. COOK, Trustee of the EUGENE W. COOK Trust,

Defendant/Cross-Plaintiff-Appellee.

UNPUBLISHED
May 15, 2007

No. 265476
Ionia Circuit Court
LC No. 01-021794-NO

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

PER CURIAM.

Plaintiff Brian Faurot appeals as of right from the final order of the Ionia Circuit Court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Defendant Scott Miller owns JD Sawmill, Inc, a logging operation. On April 5, 2000, JD Sawmill and defendant Eugene Cook entered a contract in which JD Sawmill agreed to purchase timber located on Cook's property for $5,800. According to the contract, the trees that Cook sold to JD Sawmill were marked. JD Sawmill was responsible for cutting and removing the trees from Cook's property, and pursuant to the terms of the contract, JD Sawmill agents were permitted to enter Cook's property for this purpose. The contract terms specified that JD Sawmill would pay Cook $580 at the time that the contract was signed and the balance of the purchase price before cutting and removal of the trees began.

Miller arranged to have his employees at JD Sawmill haul the cut timber from Cook's property to the sawmill. However, he subcontracted the work of felling the trees and preparing the timber for transport to Louis "Rocky" Heiss, the owner of Roc's Logging. Miller did not

give Heiss particular instructions concerning removal of the trees, but left the decisions regarding where to start harvesting trees and how to fell the trees to him.

Apparently, Roc's Logging did not have any employees. Instead, Heiss would hire individuals to assist with projects as needed. Plaintiff's friend, Karl Hunter, worked for Heiss and recommended that Heiss hire plaintiff to work on a logging crew. Although plaintiff told Heiss that he had limited experience felling smaller trees and no experience felling the much larger trees handled by Heiss, Heiss agreed to hire plaintiff to work on Cook's property.[1]

Apparently, plaintiff and Heiss never entered a written agreement formalizing their employment relationship. Plaintiff claimed that after his first day of work, Heiss paid him a small amount to cover the cost of gas and as an advance on his work and that he gave him a gas card to use and told him to keep track of his gas expenditures. He produced a receipt indicating that Heiss had paid for gas for plaintiff's truck. Apparently, this receipt is the only documentation of plaintiff's employment by Heiss provided to the trial court.

Plaintiff began working for Heiss on September 12, 2000. Plaintiff, Hunter, and Heiss traveled together to the Cook property and began felling trees. Apparently, plaintiff's job was to "top" the trees, meaning that he cut the branches off each tree that had been felled to facilitate removing and transporting it for further processing.[2] Plaintiff claimed that Heiss planned to give him on-the-job training that morning, but it is unclear to what extent plaintiff was trained. Plaintiff, Hunter, and Heiss worked on the site all day without incident.

Inclement weather prevented Heiss, Hunter, and plaintiff from again working on the Cook property until September 18, 2000. On that day, Heiss, Hunter, and plaintiff traveled to the Cook property and worked without incident until about noon. Miller and his father arrived at the site about the time that plaintiff, Heiss, and Hunter were sitting near the landing finishing their lunches.[3] As Heiss, Miller, and Miller's father talked, Hunter and plaintiff reentered the wooded area to continue felling trees.

Hunter and plaintiff began felling a large hickory tree at the accident site. Hunter's chainsaw became stuck in the trunk of the hickory tree, and he asked plaintiff if he could use his saw to continue cutting the tree. Plaintiff gave Hunter his chainsaw and held the handle of Hunter's saw as Hunter continued to cut down the tree. Plaintiff planned to pull the saw from

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[1] Heiss claimed that he hired plaintiff as a subcontractor, not as an employee. His expectation was that plaintiff would purchase workers' compensation insurance before starting. Further, Heiss claimed that plaintiff's work on the site was gratuitous, that he was present on the site as a volunteer, that he was not working for Roc's Logging when he was there, and that he spent most of his time on the site standing and watching.

[2] Heiss agreed that plaintiff assisted in topping the trees.

[3] The landing is the clearing where cut logs were stacked to await transport. Miller noted that he and his father came to Cook's property to determine if the logging operation was closer to the river than Department of Natural Regulations permitted and if a load of logs was ready to be shipped to the sawmill.

the trunk. When Hunter sawed through the trunk with plaintiff's saw, the blade of Hunter's saw loosened from the trunk and plaintiff was able to remove it. As plaintiff removed Hunter's chainsaw from the trunk of the hickory tree, the tree twisted and fell. The bottom of the trunk hit him in his back, breaking it and paralyzing the lower half of his body. Plaintiff is now a paraplegic. Heiss and Roc's Logging are not parties to this appeal.

Most of plaintiff's claims of error center on his argument that the trial court incorrectly applied our Supreme Court's holding in *DeShambo v Anderson*, 471 Mich 27; 684 NW2d 332 (2004), to the facts of this case. "It has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." *Id.* at 31. However, Michigan courts have developed exceptions to this general rule, including the "inherently dangerous activity" doctrine. *Id.* The inherently dangerous activity doctrine was developed "to protect innocent third parties injured as a result of an inherently dangerous undertaking." *Id.* at 28. When a plaintiff is not an innocent third party, but is involved in the performance of the dangerous work, this doctrine does not apply. *Id.*

First, plaintiff argues that *DeShambo* is inapplicable to this case because *DeShambo* only extends immunity to landowners when employees of independent contractors performing dangerous work on their land are injured, and does not extend immunity to contractors hired by landowners who subcontract inherently dangerous work to "third-party" contractors. We disagree. We review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10) to determine whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In *DeShambo*, our Supreme Court was faced with the question "whether the inherently dangerous activity doctrine has been properly extended to impose liability on landowners for injuries to employees of independent contractors performing dangerous work." *DeShambo*, *supra* at 28. The *DeShambo* Court did not address the question of who could be held liable under the inherently dangerous activity doctrine. Instead, the *DeShambo* Court referred only to the landowners when discussing the defendants in that case because the plaintiff had dismissed his claims against the general contractor. *Id.* at 29 n 1. When describing the inherently dangerous activity doctrine, however, the *DeShambo* Court indicated that this doctrine was not applicable only to landowners. Instead, the *DeShambo* Court noted that the inherently dangerous activity doctrine "is founded on the existence of a duty on behalf of the landowner, or employer of an independent contractor . . . ." *Id.* at 34.

In *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985), our Supreme Court noted that the inherently dangerous activity doctrine imposes liability on an *employer* for the negligence of an independent subcontractor or his employees if the activities in question "reasonably can be foreseen as dangerous to third parties." The parties do not dispute that JD Sawmill owned the trees that were being felled, had the right to be on Cook's property to cut down the trees, and employed Heiss as an independent subcontractor to fell the trees. Accordingly, JD Sawmill was an employer of an independent subcontractor (namely, Heiss). The fact that JD Sawmill did not own the land on which the accident occurred neither precludes it from being subject to the inherently dangerous activity doctrine nor prevents it from being subject to the limitations on the application of the inherently dangerous activity doctrine that are identified in *DeShambo*.

Next, plaintiff argues that the *DeShambo* Court only extended immunity from liability in circumstances in which the employee of a subcontractor was injured when performing dangerous work. *DeShambo* is inapplicable to this case, plaintiff argues, because he was not an employee of a subcontractor. Instead, plaintiff claims that he was either an independent subcontractor of Heiss or an innocent third party at the time he was injured. We disagree.

Again, we review de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10). *Spiek*, *supra* at 337. To successfully oppose a motion under MCR 2.116(C)(10), the non-moving party may not rely on mere allegations or denials, but must set forth evidence of specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In evaluating the motion, the trial court must consider the pleadings, affidavits, depositions, admissions, and other evidence that the parties submitted in the light most favorable to the party opposing the motion. *Id.* The trial court may only consider "the substantively admissible evidence actually proffered in opposition to the motion," and may not deny the party's motion on "the mere possibility that the claim might be supported by evidence produced at trial." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). If the evidence offered fails to establish a genuine factual issue, the moving party is entitled to judgment as a matter of law. *Quinto*, *supra* at 362.

Although the injured plaintiff in *DeShambo* was the employee of a subcontractor hired by the defendants, the *DeShambo* Court did not find that was the pertinent distinction in that case. As stated above, the *DeShambo* Court noted that the purpose of the inherently dangerous activity doctrine "is to protect innocent third parties injured as a result of an inherently dangerous undertaking," and 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." *DeShambo*, *supra* at 28. The *DeShambo* Court further clarified, "[T]he inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity." *Id.* at 38. Despite the parties' disagreements regarding whether plaintiff was an employee or an independent subcontractor of Heiss, the *DeShambo* Court's holding precludes a defendant from being found liable for a plaintiff's injuries if the plaintiff was not an innocent third party, but was injured in the course of his active involvement in the performance of dangerous work.

Plaintiff asserted repeatedly before the trial court that felling trees is inherently dangerous work. However, plaintiff failed to present evidence indicating that he was not involved in felling trees at the time he was injured and, therefore, was not actively involved in the performance of this dangerous work. The parties do not dispute that none of the defendants employed plaintiff at any time. Plaintiff admitted in his deposition that Heiss hired him to assist in his logging operation and that he, Hunter, and Heiss were at the Cook property on September 18, 2000, to fell trees. Plaintiff was not a mere bystander to the action, but was actively involved in the logging process, sawing branches off the felled trees in preparation for transport. Plaintiff and Hunter, the only direct witnesses to plaintiff's accident, agree that plaintiff was assisting Hunter in felling a tree at the time of the accident (specifically, by attempting to remove a chainsaw stuck in the trunk of the tree as Hunter used another chainsaw to continue cutting the trunk), and that plaintiff was paralyzed when the falling tree struck his back. Although Heiss claimed in his deposition that plaintiff was "standing, watching, basically," Heiss also noted that plaintiff assisted in sawing branches off felled trees. On the basis of the information provided in the trial

court record, it is undisputed that plaintiff was not an "innocent third party" at the time of the accident, but was actively involved in felling a tree when he was injured. Despite plaintiff's disputed status as an employee or an independent subcontractor of Heiss at the time of the accident, plaintiff was actively involved in the dangerous activity that caused his injury. Accordingly, defendants are not liable for his injuries under the inherently dangerous activity doctrine.

Plaintiff also claims that because *DeShambo* abrogates 30 years of precedent, in the interest of fairness and justice it should only apply prospectively. We disagree.

"[T]he general rule is that judicial decisions are given full retroactive effect." *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). In the civil context, the threshold question in determining whether a decision should or should not be given full retroactive effect is "whether the decision clearly established a new principle of law." *Id*.

In *DeShambo*, our Supreme Court concluded that this Court in *Vannoy v City of Warren*, 15 Mich App 158; 166 NW2d 486 (1968), and a plurality of our Supreme Court in *McDonough v Gen Motors Corp*, 388 Mich 430; 201 NW2d 609 (1972), "improperly extended the inherently dangerous activity doctrine to include employees of independent contractors." *DeShambo*, *supra* at 40. The *DeShambo* Court noted that our Supreme Court's longstanding precedent before *McDonough* made clear that the inherently dangerous activity doctrine is limited to third parties. *Id.* *DeShambo* did not establish a new principle of law, but corrected this overextension of the inherently dangerous activity doctrine. Accordingly, the trial court in this case properly gave our Supreme Court's holding in *DeShambo* full retroactive effect.

Finally, plaintiff claims that the trial court erred when it held that plaintiff could not hold Miller and JD Sawmill liable for his injuries under the "common work area doctrine." We disagree. Again, we review de novo the trial court's order regarding a motion for summary disposition. *Spiek, supra* at 337.

"[A]t common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). However, an exception to this general rule of liability, known as the "common work area doctrine," exists. *Id.* at 53-54. Under the common work area doctrine, a general contractor or property owner may only be held liable for the negligence of an independent subcontractor if the following circumstances exist:

> (1) [T]he defendant, either the property owner or general 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 54.]

A plaintiff must satisfy all elements of the common work area doctrine before a general contractor or a property owner may be found negligent under this theory of liability.[4] *Id.* at 59.

The trial court determined that plaintiff failed to establish that Miller and JD Sawmill were liable under the common work area doctrine because they were not general contractors and because plaintiff's accident did not occur in a common work area. We decline to address the merits of the trial court's conclusion that Miller and JD Sawmill were not general contractors because the trial court properly concluded that the accident did not create a high degree of risk to a significant number of workmen in a common work area and, for this reason, Miller and JD Sawmill were not liable for plaintiff's injuries under the common work area doctrine.

In *Ormsby*, our Supreme Court agreed with the following discussion by this Court in *Hughes v PMG Building, Inc*, 227 Mich App 1; 574 NW2d 691 (1997), regarding the identity of a common work area:

> "This Court has previously suggested that the Court's use of the phrase 'common work area' in *Funk* [*v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974)] suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will 'render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.' *Funk, supra* at 104 (citations omitted)." [*Ormsby*, *supra* at 58 n 9, quoting *Hughes, supra* at 8-9.]

In this case, the accident occurred in an isolated area during the performance of a unique project overseen by one subcontractor. Although JD Sawmill hired Roc's Logging to fell trees on Cook's property, defendants and their employees were not directly involved in this activity. In particular, Miller noted that the only work that JD Sawmill employees performed on Cook's property was loading timber on trucks for transport to the sawmill. The employees collected this timber at a landing site. However, Heiss and his workers cut the trees and hauled the timber to the landing site, which was 150 to 200 feet from the area where Heiss, Hunter, and plaintiff were felling trees. Further, the parties do not provide evidence that other subcontractors hired by JD Sawmill were in the vicinity where Heiss, Hunter, and plaintiff were cutting trees at any time.

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[4] Moreover, for a property owner to be held liable under this doctrine, a plaintiff must also establish that the property owner "has stepped into the shoes of the general contractor, thereby 'retaining control' over the . . . project[.]" *Ormsby, supra* at 60.

According to the evidence presented at trial, only Heiss, Hunter, and plaintiff worked at the accident site when these trees were being harvested. This accident did not occur in an area where "a significant number of workmen" were exposed to risk.

Further, this accident did not occur in a "common work area." Plaintiff argues that the accident site was a "common work area" because plaintiff and Hunter were subcontractors of Heiss, not his employees. According to plaintiff's logic, if he, Hunter, and Heiss were all independent subcontractors, then multiple subcontractors were at the accident site at one time and, accordingly, the accident site was a common work area. This, in turn, would mean that defendants would be liable for his injuries pursuant to the common work area doctrine.

However, we do not find plaintiff's logic consistent with the purpose of the common work area doctrine. Again, this doctrine constitutes "an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard." *Hughes*, *supra* at 8. The common work area doctrine applies "where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger . . . ." *Id.* For example, on a construction site, electricians, plumbers, carpenters, and other subcontractors often work independently in the same area. Although a subcontractor has supervisory control over its employees, each subcontractor often has no control over or knowledge of the work performed by other subcontractors and their employees in the same general area. In this situation, placing responsibility for job safety in the common work area on the general contractor centralizes this responsibility in one entity and makes it easier to coordinate the efforts needed to ensure that safety precautions are taken.

However, despite disputes regarding the respective statuses of plaintiff and Hunter as employees or independent subcontractors of Heiss, both plaintiff and Hunter were under the supervisory authority of Heiss. Heiss hired both men, provided their equipment, and oversaw their work. This was not a situation in which the coordination of numerous subcontractors was required, but a situation in which one contractor was hired to perform a unique task and hired others to work under him to complete the project. Because Heiss had control over the accident site, it was not a "common work area" over which defendants had supervisory and coordinating authority. Accordingly, Miller and JD Sawmill are not liable for plaintiff's injuries under the common work area doctrine. Pursuit of a cause of action against Heiss might have found more success.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Donald S. Owens

I concur in result only.

/s/ E. Thomas Fitzgerald