STATE OF MICHIGAN

COURT OF APPEALS

GEORGE MADLEY and DOREEN MADLEY, Plaintiffs-Appellees,	UNPUBLISHED June 15, 2010
v	No. 292497 Macomb Circuit Court
CENTEX REAL ESTATE CORPORATION, Defendant-Appellant.	LC No. 08-000542-NZ

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying its motion for summary disposition and granting plaintiffs' motion to file a first amended complaint. We affirm in part and reverse in part.

This action arises from plaintiff George Madley's fall at defendant's construction site.[1] Defendant was the owner and general contractor of a residential housing development in Sterling Heights. Defendant did not perform any construction work itself; it hired several subcontractors to do all the necessary work, including subcontractor A. Buttazzoni & Sons to perform interior trim work in the homes. A. Buttazzoni & Sons in turn subcontracted the work to plaintiff, a trim carpenter. On October 30, 2007, plaintiff received a call from his employer, A. Buttazzoni & Sons, directing him to go to a particular house in the development to complete "shoe and hardware" installation (the final phase of construction involving completion of minor odds and ends such as installing shoe molding, door knobs, etc.). Plaintiff had been to the house a few weeks before to install a handrail along the stairs to the basement. On October 31, 2007, plaintiff arrived at the house at about 6:40 a.m.; no one else was present. It was dark inside the house, although there was some illumination from the rising sun and the streetlights. Plaintiff attempted to turn on the lights, but none of the several light switches that he tried turned them on. Plaintiff

[1] All references to "plaintiff" refer to George Madley. Count one of the complaint alleges negligence and it is brought by plaintiff alone. Count two is for loss of consortium and it is brought by plaintiff's wife, Doreen Madley. Doreen's derivative claim is not at issue on appeal.

concluded that the power was off, so he decided to go to the basement where the breaker was and turn on the power.

Plaintiff made his way to the basement door and faintly made out that there was some blue tape on the door. Plaintiff testified that, in his line of work, blue tape typically signaled to the carpenter that the item on which the tape was placed was not working properly and required his repair. Plaintiff opened and shut the door a few times in order to see if it was working properly. He did not notice anything wrong with the door, so he proceeded to the stairs. He took one step and fell straight down eight feet to the concrete basement floor. Unbeknownst to plaintiff, another subcontractor had removed the stairs to access and fix a crack in the foundation wall. As a result of the fall, plaintiff sustained a fractured right foot, a torn rotator cuff, and injury to his right hand. His injuries required surgery and ongoing medical care. He alleges that he is permanently disabled from performing carpentry work. Plaintiffs filed a two-count complaint against defendant alleging negligence and loss of consortium.

Defendant first argues that the trial court erred in denying its motion for summary disposition on plaintiff's common work area claim. We agree.

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). A motion brought 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).

Plaintiffs' complaint alleges a negligence claim pursuant to the common work area doctrine. To establish a claim under the common work area doctrine, a plaintiff must prove the following: "(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." *Ormsby*, 471 Mich at 57. Plaintiffs' complaint alleges: "Defendant Centex, as a general contractor, had a duty to assure that reasonable steps within its supervisory power and coordinating authority were taken to guard against readily observable, avoidable dangers in common work areas, which create a high degree of risk to a significant number of workers." Plaintiff further asserted that defendant breached its duty by removing the basement stairs, failing to have the power turned on, failing to barricade or lock the basement door, and failing to post signs that the stairs were removed. In their motion to amend, plaintiffs conceded that "[t]he complaint purports to state a claim for liability based on the 'common work area doctrine,' an exception to the common law rule that owners and general contractors were not normally liable for the negligent acts of a subcontractor."

As defendant aptly points out, plaintiffs have never disputed the fact that the hazard did not create a high degree of risk to a significant number of workmen. Plaintiff was the only person at the construction site at the time of the injury. Plaintiff was unaware of any other person even being scheduled to work on the house that day. According to plaintiff, the house was "almost 100 percent done" at the time that he arrived, but for installation of the doorknobs, which he was there to perform. The stairs were removed at some point in the three weeks before

the accident. The missing stairway undoubtedly presented a dangerous condition; however, there is no evidence that a significant number of workmen had been, or would be, exposed to the hazard. On these facts, plaintiff cannot demonstrate a common work area claim. Accordingly, the trial court erred in denying defendant's motion for summary disposition on the common work area claim.[2]

Defendant next argues that the trial court erred in granting plaintiffs' motion to file a first amended complaint. We disagree. This Court reviews for an abuse of discretion a trial court's decision regarding a motion to amend a complaint. *Tierney v University of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003).

MCR 2.118(A)(2) provides, in pertinent part: "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

Defendant first argues that allowing plaintiff to assert a premises liability claim is futile because the only way for plaintiff to recover under these circumstances is to prove a common work area claim, which plaintiff cannot do. Although "a landowner is [generally] not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure . . . an owner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 9; 574 NW2d 691 (1997) (internal citation omitted).

Caselaw is inconsistent regarding whether a premises liability claim is viable where a construction worker is injured on a construction site. In *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 537; 542 NW2d 912 (1995), this Court indicated that an injured construction worker could pursue a premises liability claim against the owner of the construction site where there was evidence that the owner knew or should have known of the dangerous condition. This Court reaffirmed that principle in *Hughes*. Additionally, our Supreme Court implicitly recognized that a construction worker's premises liability claim was viable in *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16, 19-20; 643 NW2d 212 (2002), where it analyzed the merits of the plaintiff's premises liability claim but ultimately denied the claim

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[2] This conclusion is not undermined by plaintiff's assertion that he need not satisfy the elements of the common work area doctrine as other theories of negligence provide for recovery, nor is it undermined by the trial court's decision to permit plaintiffs to assert additional theories of negligence in their amended complaint. Plaintiffs' proposed amendment, however, would do nothing to cure the defects in the common work area claim – the claim that, mistakenly or not, plaintiffs actually asserted in their original complaint.

because the hazard (ice on a roof) was open and obvious and lacked any special aspects rendering it unreasonably dangerous.

But, a ruling seemingly inconsistent with the aforementioned cases was recently issued in *Banaszak v Northwest Airlines, Inc*, 485 Mich 1034; 776 NW2d 910 (2010),[3] where the Court upheld the trial court's dismissal of the plaintiff's premises liability claim and stated that the defendant-landowner "did not have a duty to protect the plaintiff, an employee of an independent contractor hired to perform construction work on the owner's premises, from the construction site hazardous condition that caused the plaintiff's injury." *Banaszak*, 485 Mich 1034. In support of its conclusion, the Court cited *Perkoviq*, which involved a construction worker who was injured when he slipped on an icy roof at a job site. The *Perkoviq* Court held that because the icy roof was an open and obvious danger, the plaintiff's premises liability claim failed because there were no special aspects rendering it unreasonably dangerous. *Perkoviq*, 466 Mich at 16-20. The premises liability claim failed solely because the danger was open and obvious, not because premises liability claims are allegedly barred in the construction site injury context. The *Perkoviq* Court provided no statement that could reasonably be interpreted to mean that construction workers injured on the job are precluded from ever asserting premises liability claims. The *Perkoviq* opinion implicitly acknowledges that a premises owner owes invitees, including construction workers, a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitee will not discover or protect himself against. Because the relevant case law appears to be in conflict and acknowledging the long-standing rule that premises liability claims have been permitted in the context of a construction site accident, we decline to find that a premises liability claim under the facts of this case would be futile.[4]

Next, defendant contends that allowing plaintiff to assert a claim for breach of an assumed duty is futile because, again, the only way for plaintiff to recover is to prove a common work area claim. "A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform." *Zychowski v AJ Marshall Co, Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998). "Once a duty is voluntarily assumed, it must be performed with some degree of skill and care." *Id*. Defendant asserts that it was subcontractor WRW Carpentry that negligently removed the stairs and then failed to secure the doorway. But, defendant does not dispute plaintiff's contention that it was defendant who directed the subcontractor to remove the stairs. Defendant also admits that it placed tape on the door warning of the missing stairs and also placed a sign against the door that stated that the stairs were missing. That defendant took it upon itself to warn or protect others from the hazard presumably made it less likely that the

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[3] A Supreme Court order is binding precedent where the underlying rationale can be understood. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002).

[4] Contrary to defendant's assertions, the cases of *Ormsby*, *supra*, and *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 687 (2005), do not support its position. Those cases do not hold that premises liability claims are barred in the context of a construction site accident.

subcontractor that removed the stairs would take action itself to warn about the missing stairs or barricade the stairwell. Indeed, defendant hired a safety officer specifically for the purpose of daily overseeing the project from a safety standpoint and intervening to cure safety hazards created by subcontractors. We are persuaded that plaintiff's position that defendant assumed a duty to properly warn or barricade the stairwell is plausible.

Furthermore, an argument can be made that defendant breached its duty of due care when undertaking to warn about or protect from the hazard. Because defendant knew or should have known that the area of the missing stairs would present a high degree of risk to anyone working in the area, a genuine issue of fact exists whether under the conditions at the time of plaintiff's fall, the safety measures defendant took were adequate. On the day of his injury in October, defendant arrived at the work site at around 6:40 a.m., while it was still dark. The power was off in the house, so plaintiff experienced difficulty seeing. Given the lack of visibility, the tape on the door and the sign that was alleged to have been propped against the door did not constitute sufficiently adequate warnings of a danger as serious as a missing stairway. Additionally, the effectiveness and appropriateness of the tape as a *barrier* was undermined by plaintiff's testimony that in his industry, blue tape signified that the area needed his attention for repair. Also, reasonable measures existed that defendant could have readily undertaken to adequately guard against the danger, e.g., locking the basement door, blocking the door with a piece of wood nailed across the doorway, or ensuring that the electrical power was on, coupled with blocking the door. Significantly, defendant's own agents confirm the danger posed by the hazard and the inadequacy of the measures taken to warn or protect against it. Defendant's project superintendent, Tim Holmes, stated "due to the lack of light there was no possible way to see that the steps were removed from the basement." Defendant's safety officer, Matt Barton, admitted that the writing on the tape could not be read in the dark; there was no sign at the accident site when Barton inspected the scene after the accident; the door was "poorly" marked with blue tape; and, in standard practice, blue tape was not used to warn of a danger as serious as a missing stairway. Barton's corrective action consisted of counseling Holmes and another individual "on establishing proper barricades and warning signs." In sum, we cannot conclude, as a matter of law, that defendant did not breach an assumed duty to properly warn of or protect against the missing stairs. Accordingly, the trial court did not err in permitting plaintiffs to amend their complaint to add a negligence theory of breach of an assumed duty.

Finally, defendant asserts that it will suffer prejudice by allowing the amendment. The amended complaint does not assert new factual allegations. It adds two new theories of negligence (premises liability and breach of an assumed duty), and it omits the theory that was pleaded in the original complaint (common work area). Defendant's claim that it will suffer prejudice because witnesses have left the state is unsubstantiated. Defendant does not elaborate regarding the witnesses to whom it refers or what information the witnesses would provide. Likewise, defendant has not demonstrated prejudice concerning the indemnification issue. It does not provide any information regarding the identity of additional parties that might allegedly be responsible for indemnification, nor does it explain how plaintiffs' original complaint failed to provide defendant with notice that additional parties might be implicated. Should defendant believe that a non-party bears responsibility for plaintiffs' injuries, it is free to implead that party. In the event that the trial court denies defendant's attempt to join an additional party, defendant may seek recourse through an appeal. Therefore, we find defendant's prejudice argument to be unpersuasive.

We affirm in part and reverse in part. The trial court's decision to grant plaintiffs' motion to amend their complaint is affirmed, and the court's decision to deny defendant's motion for summary disposition on the common work area claim is reversed. We remand this case for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis