SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
Resident Judge

Kent County Courthouse
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Dover, Delaware 19901
Telephone (302) 739-5332

Heard: August 5, 2005
Decided: August 12, 2005

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Re: *Orville H. Learned v. Ronald M. Coffin General Contractors, Inc.*
C.A. No. 03C-03-042

Dear Counsel:

This is the decision of the Court regarding Defendant Ronald M. Coffin General Contractors, Inc.'s motion for summary judgment that was orally presented before this Court on August 5, 2005. For the reasons set forth below, Defendant's motion will be *denied*.

Superior Court Civil Rule 56(c) provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law."[1] On a motion for summary judgment the Court examines the record to determine whether any material issues of fact exist. Summary judgment will only be granted when, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[2] Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.[3]

A prerequisite to any negligence action is the existence of a legally cognizable duty. A plaintiff must be able to demonstrate that the defendant had a legal obligation to protect the plaintiff from the risk of harm that caused his injuries.[4] Whether a legally cognizable duty existed is a question of law whose determination traditionally has been reserved for the court.[5] The assessment of whether a legal duty existed between a general contractor and the employee of a subcontractor involves a fact-intensive analysis incorporating premises liability law with construction law and has led to discordant conclusions. Several decisions have held that general contractors do not ordinarily owe a duty to the employees of subcontractors while other decisions have concluded that, subject to exceptions, general contractors owe a duty to maintain the premises in a safe condition and warn of dangers of which it has or had reason to know.[6]

Defendant contends that a general contractor ordinarily owes no duty to the subcontractors' employees. In fact, Defendant contends that a general contractor can be

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[1] Super. Ct. Civ. R. 56.

[2] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

[3] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[4] *Bryant v. Delmarva Power & Light Co.*, 1995 WL 653987, at *2 (Del. Super.).

[5] *Id.*

[6] Compare *Kilgore v. R.J. Kroener, Inc.*, 2002 WL 480944 (Del. Super.) and *Bryant v. Delmarva Power & Light Co.*, 1995 WL 653987, at *4 (Del. Super.) with *Emory, Hill, McConnell & Assocs., Inc. v. Snyder*, 614 A.2d 1275 (Del. 1992) (ORDER) and *Clemmons v. Whiting-Turner Contracting Company v. Casey Electric, Inc.*, 2000 WL 33113924 (Del. Super.).

liable for injuries sustained by a subcontractor's employee only if the general contractor retained active control over the work site. Because Defendant had already passed control over the work site onto the subcontractor when the injury occurred, Defendant contends that no legal duty existed and it therefore cannot be held liable as a matter of law.

Upon extensive review of the applicable case law, this Court finds *Emory, Hill, McConnell & Assocs., Inc. v. Snyder*[7] to be most factually comparative, precedential and issue dispositive. The Supreme Court of Delaware in *Emory* held that a general contractor ordinarily has a duty to its subcontractors and their employees to make safe and to warn of dangers of which it knew or had reason to know.[8] The Court, however, did recognize that the doctrine of active control may alleviate a general contractor of its general duty to make safe and warn.[9] Specifically, the Court held:

> The doctrine of active control will exempt a general contractor of its duty to make safe or warn where the general contractor exercised no active control over the subcontractor's work and the danger which caused the injury is of the type inherent in the work being done by the subcontractor.[10]

Because the injury sustained by the plaintiff did not result from a risk inherent to his work, the Court concluded that the doctrine of active control did not apply and the general contractor therefore was not relieved of its general duty to make safe and warn.[11]

Similarly, in the case *sub judice*, this Court is unpersuaded that the injury sustained by Plaintiff resulted from a dangerous risk inherent to his occupation. It is undeniable that many inherent risks are associated with the profession of drywalling. However, a drywaller should not be deemed to have assumed all risks encountered simply because his profession by nature is inherently dangerous. The risk in this case may be unusual. If factually supported, an unmarked and unprotected open elevator shaft presents risks that are not

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[7] 614 A.2d 1275 (Del. 1992) (ORDER).

[8] *Id.* at *4.

[9] *Id.* at *5.

[10] *Id.*

[11] *Id.*

inherent to the profession of drywalling. Because the injury resulted from a risk that was not inherent to Plaintiff's occupation, the doctrine of active control does not apply and Defendant is not relieved of its general duty to maintain the premises in a safe condition and warn of dangers of which it knew or had reason to know.

Thus, Defendant's motion for summary judgment is hereby *denied*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Order Distribution