STATE OF MICHIGAN

COURT OF APPEALS

THOMAS GARLICK, Plaintiff-Appellant,	UNPUBLISHED June 8, 2001
v GREAT LAKES STEEL CORPORATION and MID AMERICAN GUNITE COMPANY, Defendants-Appellees.	No. 215932 Wayne Circuit Court LC No. 95-505109-NO

THOMAS GARLICK, Plaintiff-Appellant,	
v GREAT LAKES STEEL CORPORATION and MID AMERICAN GUNITE COMPANY, Defendants-Appellees.	No. 217649 Wayne Circuit Court LC No. 95-505109-NO

Before: Talbot, P.J., and Doctoroff and White, JJ.

PER CURIAM.

In this personal injury action, plaintiff appeals as of right from the trial court's entry of judgment on a jury verdict of no cause of action for defendants. Plaintiff also appeals on leave granted the trial court's award of costs to defendant Great Lakes Steel Corporation.[1] We affirm.

Plaintiff was a boilermaker employed by Monarch Welding and Engineering, Inc., (hereinafter "Monarch"), an independent contractor hired by defendant Great Lakes Steel Corporation (hereinafter "GLS") to rebuild one of GLS's waste heat boilers at its steel-making facility. GLS also hired defendant Mid American Gunite Company (hereinafter "MAG"), an

[1] These appeals were consolidated.

independent contractor. MAG was responsible for cleaning the inside of the waste heat boiler. The procedure for rebuilding the waste heat boiler required the boiler to be cleaned by MAG before the Monarch boilermakers entered the boiler to begin the rebuild. While working inside the waste heat boiler, plaintiff was hit by a piece of falling debris, or "slag." The slag was about the size of a tennis ball, and it struck plaintiff in his lower back.

Plaintiff initiated this personal injury action alleging that GLS and MAG were negligent in failing to maintain the premises in a reasonably safe condition and in failing to take precautions to prevent unreasonable risk of injury. Plaintiff further claimed that the boiler rebuild was an inherently dangerous activity and that therefore GLS's duty to provide a safe work area was nondelegable. Plaintiff sought compensation for his injury which necessitated medical treatment and resulted in disability, pain and suffering, and mental and emotional distress. The jury returned a verdict of no cause of action in favor of defendants.

I

Plaintiff first argues that the trial court erroneously denied his motion for judgment notwithstanding the verdict (JNOV) on the issue whether the boiler rebuild was an inherently dangerous activity. This Court reviews a trial court's decision with regard to a motion for JNOV de novo. *Morinelli v Provident Life and Acc Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). A motion for JNOV should be granted only when, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party, there are no issues of material fact with regard to which reasonable minds could differ. *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999). "If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Morinelli*, *supra* at 260-261. We conclude that the trial court properly denied plaintiff's motion for JNOV on the issue of whether the boiler rebuild is an inherently dangerous activity.

"The inherently dangerous activity doctrine is an exception to the general rule that an employer of an independent contractor is not liable for the contractor's negligence or the negligence of his employees." *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633; 601 NW2d 160 (1999), quoting *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985), citing 2 Restatement Torts, 2d, § 409, p 370; 41 Am Jur 2d, Independent Contractors, § 41, p 805). The *Kubisz* Court explained:

> Under the doctrine, liability may be imposed when "the work contracted for is likely to create a peculiar risk of physical harm or if the work involves a special danger inherent in or normal to the work that the employer reasonably should have known about at the inception of the contract." The risk or danger must be recognizable in advance, i.e., at the time the contract is made. The Court in *Bosak* emphasized that liability should not be imposed where a new risk is created in the performance of the work and the risk was not reasonably contemplated at the time of the contract. [*Kubisz*, *supra* at 633-634, quoting *Szymanski v K Mart Corp*, 196 Mich App 427, 431; 493 NW2d 460 (1992), vacated and remanded on other grounds 442 Mich 912 (1993) (citations omitted).]

In *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 271; 480 NW2d 330 (1991), this Court held that "the inherently dangerous activity doctrine presents a claim of active negligence." This Court explained:

> . . . [W]e believe that an essential element of the doctrine is the failure of the principal to see that all appropriate precautions are taken by the one to perform the inherently dangerous task. The doctrine, in short, says that the principal is negligent, and hence liable, because it has allowed the independent contractor to be negligent in performing the job. There is a nondelegable duty to see that the work is done with the requisite degree of care; when the contractor fails in fulfilling its duty of care, the principal has breached its own precautionary duty. [*Oberle*, *supra* at 270, quoting *Witucke v Presque*[2] *Isle Bank*, 68 Mich App 599, 610; 243 NW2d 907 (1976) (footnote added).]

In the case at bar, the evidence showed that one of the reasons for MAG cleaning the boiler is to prevent injury by falling slag during the rebuild. Eddie Long testified that after MAG finishes its cleaning, someone from Monarch inspects the boiler to ensure its safety for the boilermakers. The evidence supported a finding that plaintiff's injury did not result from a danger "inherent" in the boiler rebuild. Indeed, it was a hazard that was guarded against by having the boiler cleaned before the boilermakers begin their work. Further, there was testimony that the boilermakers generally take precautions to guard against that type of accident. The flaps on the sides of the floats can be flipped such that they reduce the space between the float and the boiler wall. Also, it is common for the boilermakers to place a fire-retardant blanket around the perimeter of the float to protect workers on lower levels. Plaintiff admitted that if these precautions had been taken, the accident would not have occurred.

Notably, although plaintiff presented testimony from several boilermakers describing their work as "dangerous," as this Court observed in *Kulp v Verndale Products, Inc (On Remand)*, 193 Mich App 524; 484 NW2d 699 (1992), "it is arguable that *any* construction job calls for great care to avoid injuries. Yet liability will not be imposed upon an employer for every construction job." *Id.* at 530 (emphasis added). See also *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 549; 536 NW2d 221 (1995). Plaintiff admitted that the equipment that makes boilermaking an inherently dangerous activity according to plaintiff's expert witness are items which are commonly seen and used on a daily basis in plaintiff's job, such as scaffolding, ladders, oxygen tanks, oxygen lines, electrical lines, welding leads, and ladders. Plaintiff's expert witness, David Brayton, was the only witness who described the work as *inherently* dangerous. However, it was the province of the jury to accept or reject this testimony. We find no error in the trial court's denial of plaintiff's motion for JNOV.

II

Plaintiff next claims that the trial court erred in directing a verdict for GLS on plaintiff's theory of recovery based on retained control. Plaintiff argues that the evidence established that

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[2] In the *Oberle* opinion, "Presque" is misspelled as "Preseque." *Oberle*, *supra* at 270.

GLS controlled many aspects of the builder rebuild, including the scheduling of the boilermakers' work, and coordinated and oversaw the entire project. Plaintiff maintains the evidence created a question of fact for the jury regarding whether GLS retained control of the boiler rebuild project, and therefore owed additional duties to plaintiff. We disagree.

"This Court reviews de novo the trial court's decision on a motion for a directed verdict. When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, and make all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Kubisz, supra* at 634-635 (citations omitted).

One "exception to the general rule of nonliability for the negligence of an independent contractor is 'where the [employer] . . . effectively retains control over the work involved.'" *Kubisz, supra* at 636, quoting *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994) (citation omitted). According to the retained control doctrine, "the owner or general contractor's retention of supervisory control provides the basis for the imposition of an independent duty on the part of the owner or general contractor to exercise its retained control with reasonable care." *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999). In determining the applicability of the retained control doctrine, "[t]he focus is not on the legal status of the relationship between the owner or general contractor and the independent contractor, but rather on the manner in which the owner or general contractor acts or fails to act in relation to the safety of the injured party." *Id.* at 73-74. A general contractor may be held liable for its own negligence in failing to take reasonable precautions where its retained and exercised control over a project was sufficient to create a corresponding duty to implement such precautions. *Candelaria, supra* at 74. "At a minimum, for an owner or general contractor to be held directly liable in negligence, its retention of control must have had some actual effect on the manner or environment in which the work was performed." *Id.* at 76.

"The doctrine of retained control applies only in those situations involving 'common work areas.'" *Candelaria, supra* at 75. "In order to have a 'common work area,' there need not be multiple subcontractors working on the same site at the same time. All that is required is that the employees of two or more subcontractors eventually work in the same area." *Id.* at 75. See, e.g., *Hughes v PMG Building, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997).

In the instant case, the evidence showed that both MAG and Monarch employees worked inside the waste heat boiler, albeit at different times, thereby satisfying the common work area element of the retained control doctrine. However, we conclude that the evidence did not create a question of fact whether GLS retained sufficient control to impose liability on GLS based upon the retained control doctrine. Monarch controlled the aspects of the work environment of its employees. Monarch set the beginning time, quitting time, and the lunch time. Monarch was responsible for inspecting the boiler after the cleaning and before the boilermakers entered the boiler. Only Monarch employees were inside the boiler during the rebuild. GLS entrusted Monarch to take the appropriate safety precautions. Importantly, both Long and Arthur Gould testified that after MAG finishes its cleaning, the decision to go into the boiler and begin the rebuild is made by Monarch. Fred Guyor testified that GLS does not supervise, control, inspect, or approve the work of its independent contractors. The evidence regarding the oversight

exercised by the GLS coordinators does not rise to the level of "retained control." We conclude that the trial court properly directed a verdict for GLS on this issue.

III

Plaintiff next argues that he was deprived of a fair trial due to several errors of the trial court. Specifically, plaintiff claims that the court erred in admitting a videotape into evidence, in failing to give a clarifying jury instruction regarding an inherently dangerous activity, and in refusing to instruct the jury on a common work area theory of liability. Plaintiff moved for a new trial on this basis, and the trial court denied the motion. "A new trial may be granted whenever the substantial rights of all or some of the parties are materially affected by an irregularity that denied the moving party a fair trial. MCR 2.611(A)(1)(a). The trial court's decision on a motion for a new trial will not be reversed absent a clear abuse of discretion." *Poirier v Grand Blanc Tp (After Remand)*, 192 Mich App 539, 547; 481 NW2d 762 (1992).

At the close of plaintiff's proofs and over plaintiff's objection, the trial court admitted into evidence a videotape depicting plaintiff engaging in various physical activities without the use of a cane. The videotape showed plaintiff entering and exiting a truck, washing his truck at a car wash, assisting his friend in loading farm equipment onto the truck, and driving for over an hour. In the videotape plaintiff was never shown using his cane or having any physical difficulties ambulating. Plaintiff objected to the admission of the videotape on the grounds that it was an unfair surprise and unfairly prejudicial. The videotape was not disclosed prior to trial, and therefore plaintiff was unable to prepare to refute the evidence by calling persons seen on the tape, or conducting additional discovery regarding the existence of additional tapes.

"The admission of rebuttal evidence rests largely in the discretion of the trial court." *Lopez v General Motors Corp*, 224 Mich App 618, 637; 569 NW2d 861 (1997), citing *Gaffka v Grand Trunk W R Co*, 306 Mich 246, 250-251; 10 NW2d 844 (1943). Plaintiff testified that he used a cane almost all of the time, and that he always used it when he went out. Plaintiff testified that he is unable to get out of a car without using the cane, and that if he did not use the cane, he would fall down. Therefore, it was plaintiff's testimony that made the videotape relevant as rebuttal evidence. This Court confronted a similar fact scenario in *Butt v Giammariner*, 173 Mich App 319, 321-322; 433 NW2d 360 (1988), and held that the trial court did not abuse its discretion in admitting a videotape contradicting the plaintiff's testimony regarding the extent of her injuries and resultant disability. The *Butt* Court's reasoning is applicable to the case at bar: "[W]hile plaintiffs' counsel may have been surprised by the videotape evidence, plaintiff undoubtedly knew what her capabilities were." *Id.* at 322. See also, *Lopez*, *supra* at 638.

Similarly, in the instant case plaintiff was aware of his physical capabilities which were depicted on the videotape. The trial court permitted plaintiff to view the tape the day before it was shown to the jury, and to talk to the investigators before the tape was shown to the jury. Plaintiff testified while the videotape was played, and attempted to explain his activities as depicted on the tape. Plaintiff's counsel was afforded the opportunity to cross-examine John Harris regarding the details of his investigation. We find no abuse of discretion. *Lagalo v Allied Corp*, 233 Mich App 514, 517; 592 NW2d 786 (1999).

Plaintiff also challenges the trial court's instructions to the jury. "Jury instructions are reviewed in their entirety to determine whether they 'adequately inform the jury [regarding] the applicable law[,] reflecting and reflected by the various evidentiary claims in the particular case.'" *Cipri, supra* at 18, quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 101; 485 NW2d 676 (1992). "When a party requests an instruction that is not covered by the standard jury instructions, the trial court may, in its discretion, give additional, concise, understandable, conversational, and nonargumentative instructions, provided they are applicable and accurately state the law." *Cipri, supra* at 18 (citation omitted). See also MCR 2.516(D)(4).

Plaintiff argues that the trial court erred in refusing to give a clarifying jury instruction on the issue of inherently dangerous activity and how it relates to proximate cause. Plaintiff contends that the jury was confused by the court's instruction on inherently dangerous activity when read in conjunction with the instruction that if the jury found that Monarch's conduct was the only proximate cause of the occurrence, then its verdict should be for defendants. Plaintiff argues that the trial court's instructions were inconsistent and confusing, and the court should have granted his request for a clarifying jury instruction on the interplay between the inherently dangerous activity doctrine and general negligence principles.

The trial court instructed the jury in relevant part:

> However, if you decide that the only proximate cause of the occurrence is the conduct of Monarch Welding Company, who is not a party to this case. Then your verdict should be for the defendants.
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> As a general rule a land owner is not responsible for injuries caused by an independent contractor to whom he has delegated a task. An exception to the general rule is that a land owner is not responsible for injuries caused by a [sic] independent contractor to whom he has delegated a task is [sic] where the work is inherently dangerous. Now a task is inherently dangerous activity [sic] is one in which [sic] it is apparent that an employer of an independent contractor is liable for harm resulting from work necessarily involving danger to others unless great care is used to prevent injury, or where the work involves a peculiar risk of special danger which calls for special or reasonable precautions. The risk or danger must be recognizable in advance.

The trial court denied plaintiff's request for a clarifying instruction, stating that it had given the standard instruction in accordance with the language used in *Bosak, supra*. The trial court stated that GLS should not be put in a position to defend against Monarch's negligence, as "that goes beyond the theory as set forth by the plaintiff in [his] complaint."

We find no error. The jury was instructed generally on proximate cause. The court instructed the jury that it may find more than one proximate cause. The court properly instructed the jury that if it found that the only proximate cause of the incident was the conduct attributable to Monarch, which is not a party, then its verdict should be for defendants. The trial court then proceeded to instruct the jury regarding duty, the general rule and the applicable exceptions. We

conclude that the trial court's instructions accurately stated the law on inherently dangerous activity. Further, inasmuch as plaintiff sought an instruction that would link a finding that Monarch was the only proximate cause to a verdict holding GLS liable on the basis of inherently dangerous activity, the trial court correctly concluded that such an instruction would extend beyond plaintiff's theory of the case in his complaint. Monarch was not a party, and although GLS's defense focused on Monarch's responsibility, plaintiff's complaint did not allege that Monarch was negligent.

Plaintiff also claims that the trial court erred in refusing to instruct the jury regarding a common work area. The existence of a common work area is relevant in the context of the applicability of the retained control doctrine. *Candelaria*, *supra* at 74-75. A common work area is one element of the retained control theory of liability, and does not afford a separate basis for recovery against GLS in this case. Under the retained control doctrine, in addition to a common work area, there must *also* be a sufficient degree of control exercised by the employer over the work of the independent contractor. *Candelaria*, *supra* at 75-76.

Plaintiff was not entitled to a jury instruction on common work area, because this question was resolved in the context of GLS's motion for directed verdict on the issue of retained control.[3] Accordingly, the trial court did not err in refusing to instruct the jury on this theory because the existence of a common work area, standing alone, is insufficient to impose liability on GLS.

We conclude that the trial court did not err in these rulings. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial. See *Gore v Rains & Block*, 189 Mich App 729, 744; 473 NW2d 813 (1991).

IV

Finally, plaintiff challenges the trial court's award of costs and attorney fees to GLS.[4] In this case, both plaintiff and GLS rejected the mediation award and rejected the other's offer of

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[3] The trial court determined that a common work area did not exist because Monarch was the only contractor working inside the boiler. MAG had finished with its cleaning, and the "testimony would indicate that only one subcontractor at that time should have been working in the boiler." The trial court's conclusion could be construed as contrary to *Candelaria*, *supra*. The *Candelaria* Court stated that it is not necessary that more than one subcontractor work in the area simultaneously, only "that the employees of two or more subcontractors eventually work in the same area." *Candelaria*, *supra* at 75. It is clear that employees of both MAG and Monarch worked inside the waste heat boiler at different times. However, regardless of whether a common work area existed, because it does not provide an independent basis for holding GLS liable, the trial court properly denied plaintiff's request for a jury instruction on that theory.

[4] The trial court's order granted mediation sanctions to GLS only. The trial court ruled on the record that MAG was entitled to mediation sanctions, but an order was not entered at that time because the attorneys indicated that they would "work out" the amount of fees to be included in the order. Before that occurred, plaintiff filed his claim of appeal of the order entered on the jury verdict and his delayed application for leave to appeal the trial court's award of mediation sanctions. Accordingly, there is no order from which plaintiff may appeal mediation sanctions as

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judgment. As the prevailing party at trial, GLS requested costs. Plaintiff relied on the former version of the offer of judgment rule, MCR 2.405(D)(2), and argued that defendant was not entitled to sanctions because defendant had not made a counteroffer in response to plaintiff's offer of judgment.[5] The trial court proceeded under the mediation sanctions rule, MCR 2.403(O), and awarded GLS costs on that basis. On appeal, plaintiff asserts that MCR 2.405, the offer of judgment rule, controls. The interpretation and application of court rules presents a question of law that this Court reviews de novo. *Reitmeyer v Schultz Equipment & Parts Co, Inc*, 237 Mich App 332, 336; 602 NW2d 596 (1999), citing *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

With respect to an award of costs, the interplay between the offer of judgment rule and the mediation rule is governed by MCR 2.405(E). The offer of judgment rule was amended and the amendment became effective October 1, 1997 while this case was pending. In *Reitmeyer*, *supra*, this Court addressed the question of which version of MCR 2.405(E) was applicable where, as here, mediation, offers of judgment, and the rejections thereof, all occurred while the prior offer of judgment rule was in effect. *Id.* at 334-335. This Court stated that "the norm is to apply the newly adopted court rules to pending actions unless there is reason to continue applying the old rule." *Reitmeyer*, *supra* at 337, quoting *Davis v O'Brien*, 152 Mich App 495, 500; 393 NW2d 914 (1986).

Pursuant to the amended version of MCR 2.405(E): "Costs may not be awarded under this rule in a case that has been submitted to mediation under MCR 2.403 unless the mediation award was not unanimous." In this case, the mediation award was unanimous. Accordingly, defendant may not recover costs under the offer of judgment rule. Therefore, plaintiff's reliance upon the offer of judgment rule is misplaced.

We recognize that in *Reitmeyer*, *supra*, this Court remanded for a determination of whether application of the amended rule would work an injustice on the parties. *Reitmeyer*, *supra* at 345. In the instant case, we need not remand. Even under the former offer of judgment rule, plaintiff may not prevail. The former version of the offer of judgment rule provided that "the cost provisions of the rule under which the later rejection occurred control," in this case, the offer of judgment rule, MCR 2.405. Plaintiff argues that pursuant to MCR 2.405(D)(2), GLS may not recover actual costs because GLS failed to make a counter-offer to plaintiff's offer of judgment. Plaintiff concedes that controlling authority on this issue is found in *Beveridge v*

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to MAG. Therefore, we address the trial court's award of costs to GLS only.

[5] Prior to its amendment, MCR 2.405(E) provided:

> In an action in which there has been both the rejection of a mediation award pursuant to MCR 2.403 and a rejection of an offer under this rule, the cost provisions of the rule under which the later rejection occurred control, except that if the same party would be entitled to costs under both rules costs may be recovered from the date of the earlier rejection.

Shorecrest Lanes & Lounge, Inc, 204 Mich App 466; 516 NW2d 117 (1994). In that case, this Court held that "this subrule does not apply where [ ] each party is an offeror." *Id.* at 470. This Court is required to follow the authority of *Beveridge* pursuant to MCR 7.215(H)(1). Plaintiff argues that *Beveridge* was wrongly decided and urges us to voice disagreement with that decision. We decline to do so. The trial court properly granted GLS's motion for costs.

Affirmed.

/s/ Michael J. Talbot
/s/ Martin M. Doctoroff