STATE OF MICHIGAN

COURT OF APPEALS

COLLEEN CONWAY, Personal Representative of the Estate of JAMES THOMAS CONWAY, Deceased,

Plaintiff-Appellant,

V

KILGOUR & COMPANY, INC,

Defendant-Appellee,

and

DAN'S EXCAVATING, INC., GENESEE COUNTY DRAIN COMMISSION, PAUL LONG, BRADLEY KELLY, AND MATT RAYSEN,

Defendants.

UNPUBLISHED
February 26, 2002

No. 226648
Genesee County Circuit Court
LC No. 98-063909-NO

Before: Whitbeck, C.J., and Markey, and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's orders granting summary disposition[1] in favor of defendant-appellant Kilgour & Company, Inc. and denying plaintiff's motion for reconsideration. We affirm.

Plaintiff asserts that defendant Kilgour as the subcontractor owed a duty to plaintiff's decedent, James Conway, who was an employee of the general contractor, to correct safety hazards on the construction site. We disagree. The issue whether a defendant owes a duty to a

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[1] Although plaintiff asserts that defendant Kilgour's summary disposition motion should have been submitted under MCR 2.116(C)(8), we conclude that the trial court properly granted summary disposition under MCR 2.116(C)(10) because it relied on evidence outside of the pleadings. *Hughes v PMG Bldg., Inc.,* 227 Mich App 1, 4; 574 NW2d 691 (1998).

plaintiff to avoid negligent conduct in a certain circumstance is a question of law for the court to determine. *Hughes v PMG Bldg. Inc.*, 227 Mich App 1, 5; 574 NW2d 691 (1998). Further, this Court reviews a summary disposition decision de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Id*. at 4. The elements of a negligence cause of action are that the defendant owed a legal duty to the plaintiff, that the defendant breached that duty, that the plaintiff suffered damages, and that the breach was a proximate cause of the damages. *Id*. at 5. "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship of the parties and the foreseeability and nature of the risk." *Id.*

Generally, in Michigan, the immediate employer of a construction worker is responsible for job safety. *Funk v General Motors Corp*, 392 Mich 91, 102; 220 NW2d 641 (1974), overruled in part on others grounds, *Hardy v Monsanto Enviro-Chem Systems, Inc.*, 414 Mich 29; 323 NW2d 270 (1982); *Hughes, supra* at 12. However, a general contractor may be held liable to employees other than his own in a situation where the contractor retains supervisory and coordinating authority over the job site, the accident occurs in a common work area, the danger is readily observable and avoidable, and there is a high risk of injury to a significant number of workers. *Funk, supra* at 104; see, also, *Groncki v Detroit Edison Co*, 453 Mich 644, 662 (Brickley, C.J.); 557 NW2d 289 (1996); *Hughes, supra* at 5-6. This Court has declined to extend the "common work area" exception to subcontractors. *Hughes, supra* at 12 (the "common work area" exception can impose liability on a general contractor, but does not apply where the employee of one subcontractor seeks to recover from another subcontractor).

In this case, plaintiff attempts to extend the subcontractor's responsibility to employees of the general contactor. However, this is not a matter of Kilgour performing its casing operation in a hazardous manner that caused injury to someone, but rather whether Kilgour should have ensured that Conway, Dan's employee, utilized an air monitor when he went into the casing to perform the star drilling operation. The contract in this matter between Dan's, the contractor, and Kilgour, the subcontractor, clearly states that Kilgour's obligations ceased when the obstruction was found until such time as the obstruction was removed "by others," and the contract was renegotiated.[2] In fact, Kilgour suspended its operation and sent its employees to

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[2] The contract between the parties provided, in relevant part:

> All utility lines, sewers, water mains, conduits, or other obstructions which may retard the progress of the work herein described shall be promptly relocated or removed by others unless otherwise specified on the face of this proposal.
>
> * * *
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> Where rock, including slate or boulders, is present to the extent, based on our past experience, that the boring operations cannot be completed, an invoice will be rendered for the length installed that is usable by the contractor. Completion of the installation of a casing by another method such as jacking or tunneling will be negotiated in this case.

lunch so that Dan's could decide how it was going to handle the removal of the boulder. Further, Dan's made the decision to break the boulder with a star drill and was commanding its own employees to perform the star drilling operation. In addition, Dan's owned the equipment and the only air monitor. The fact that James Kilgour volunteered to assist Conway in taking the equipment inside the casing does not change these facts. There is no evidence that Conway relied upon James Kilgour's presence or acted any differently from how he otherwise might have had James Kilgour not been there.

Plaintiff further asserts that the federal and state regulations of OSHA and MIOSHA impose a duty on Kilgour. However, these regulations do not create a new common law or statutory duty on employers. *People v Hegedus*, 432 Mich 598, 615, 616; 443 NW2d 127 (1989); *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997); *Zalut v Andersen & Associates, Inc.*, 186 Mich App 229, 235-236; 463 NW2d 236 (1990); 29 USC 653(b)(4). Further, we agree with defendant Kilgour that the expert witness' testimony in this case regarding the existence of a duty was improper. The question of duty in a negligence action is a question of law for the court to determine, and not the experts. *Reeves v Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998).

We affirm.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly