STATE OF MICHIGAN

COURT OF APPEALS

BRENT MILOSEVICH,

Plaintiff-Appellant,

v

JOHN M. OLSON COMPANY and LEAR CORPORATION,

Defendants,

and

ROSS STRUCTURAL STEEL,

Defendant-Appellee.

UNPUBLISHED
May 28, 2002

No. 226686
Oakland Circuit Court
LC No. 98-008148-NO

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Plaintiff, Brent Milosevich, appeals the trial court's order which grants summary disposition to defendant, Ross Structural Steel, Inc. (Ross).[1] We affirm.

I. Facts and Procedural History

This dispute arises out of an accident that occurred during the construction of an office building for Lear Corporation in Southfield. At the time of the accident, John M. Olson Company (Olson) was the general contractor for the construction. Olson contracted with defendant, Ross, to fabricate and erect the steel for the job, which included a 100,000 square foot structure for office space, an elevated pedestrian bridge and a 4,000-foot addition to an existing building. Ross, in turn, contracted with Abray Steel Erectors (Abray) to do the actual erection of the steel because Ross did not do steel erections but, instead, limited its business to steel fabrication. Abray hired plaintiff, a journeyman ironworker, out of the local ironworkers union hall to work on the Lear construction project.

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[1] Plaintiff appeals as of right from the trial court's order of judgment, a final order under MCR 7.203(A)(1).

As of the date of the accident, plaintiff had performed various jobs on the Lear project for two or three months. By that time, Abray had completed the steel framework for the main building. On the morning of October 14, 1997, between 8:00 a.m. and 8:45 a.m., an Abray supervisor, Todd Morgan, instructed plaintiff to connect one end of a 28-foot-long steel brick lintel[2] to a lug located on a steel column, approximately twenty-five feet in the air. To access the lug, plaintiff walked up to the third floor of the building, slid down the column, and stood on the lug to receive his end of the steel lintel. Meanwhile, ironworker David Stewart stood on a lug on the next column to receive and set the other end of the lintel. On the ground, Morgan hooked the lintel to a crane operated by Hugh Campbell. Importantly, Morgan did not attach a tag line to the lintel.[3] Campbell used the crane to lift the lintel into the air and boomed out toward plaintiff and Stewart.

Witness statements differed regarding the events that occurred as Campbell lifted the lintel towards plaintiff and Stewart. The Michigan Department of Labor Bureau of Safety and Regulation Accident Investigation Report, dated October 20, 1997, indicates that "it appear[ed] the wind caught [the lintel] and turned the piece into [plaintiff]." The report states that plaintiff made contact with the lintel as he reached out for it and then fell off the column to the ground. Stewart's statement indicates that the lintel was headed toward plaintiff, but Stewart further stated that, "I don't know whether [plaintiff] grabbed for the piece or justed [sic] tried to stop the piece from turning. I was adjusting my coat and I looked over and [plaintiff] was hunched over on his way down."

In his statement, Campbell maintained that, as the lintel neared plaintiff, plaintiff reached out to grab it and, as he made contact, plaintiff dropped to the ground. In his post-accident statement, plaintiff indicated that he remembered the lintel moving toward him and then remembered spiraling toward the ground, but did not recall what caused his fall. At his deposition, plaintiff at first insisted that the lintel struck him somewhere on his body, causing him to fall. However, plaintiff then modified his testimony and said that he only remembered reaching for the lintel, not being struck by it.

The parties agree that plaintiff fell twenty-five feet, two inches to the ground, then fell another three feet, six inches into a trench and onto a pipe. Plaintiff asserts that he sustained numerous injuries as a result of the fall, including a broken arm, lacerated liver, bruised kidney and a closed head injury. Plaintiff is collecting workers' compensation benefits and testified that his doctor said that plaintiff can no longer perform iron work.

Plaintiff filed his original complaint in this case against Olson and Lear on August 7, 1998.[4] On November 24, 1998, plaintiff amended his complaint to add Ross as a defendant.

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[2] Brick lintels are installed around the completed steel frame of a building to support the brick veneer assembled by the bricklayers. The lintel in this case measured 28 feet long by 20 inches high by 8 inches deep.

[3] This fact is important as our discussion regarding plaintiff's inherently dangerous activity claim will reveal.

[4] The record reflects that Lear and Olson filed third party complaints against Abray in February and March 1999, claiming contractual and common law indemnification, breach of contract to

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Plaintiff claimed that Ross negligently failed to provide a safe place to work, that Ross retained control over the work site, yet failed to provide adequate fall protection or to require tag lines and failed to warn of hazardous conditions. Plaintiff further alleged that the work plaintiff performed was inherently dangerous and that Ross owed plaintiff a duty of reasonable care for his safety.

On December 1, 1999, Ross filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Following oral argument, the trial court ruled that Ross cannot be liable for plaintiff's injuries because Ross hired Abray as an independent contractor and did not retain control over plaintiff's work environment. Further, the trial court ruled that Ross is not liable under an inherently dangerous activity theory because plaintiff was engaged in routine iron work and would not have been injured if Abray had implemented well-known and available safety measures. The trial court entered an order of judgment in favor of Ross on February 23, 2000, and, thereafter, denied plaintiff's motion for reconsideration.

II. Analysis

Plaintiff claims that the trial court erred by granting summary disposition to Ross because evidence shows that Ross negligently failed to perform its duty to provide fall protection.

This Court reviews the grant of a motion for summary disposition de novo. *Spiek v Dep't of Transportatio*n, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim." *Colista v Thomas*, 241 Mich App 529, 537; 616 NW2d 249 (2000). As our Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

> In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law.

"As a general rule, when an owner or general contractor hires an independent contractor to perform a job, the owner or general contractor may not be held liable in negligence to third parties or employees of the independent contractor." *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999); see also *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405-406; 516 NW2d 502 (1994). However, our courts recognize certain exceptions to this general rule, one of which is the doctrine of retained control, which plaintiff raised in his complaint and in opposition to defendant's motion for summary disposition. *Candelaria, supra* at 72.

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procure insurance and breach of warranty. As a result, plaintiff stipulated to dismiss Lear and Olson as defendants and Olson and Lear stipulated to dismiss their third party claims against Abray. The trial court entered an order of dismissal on August 3, 1999.

To establish a negligence claim under a theory of retained control, the plaintiff must present evidence of: "1) a general contractor with supervisory and coordinating authority over the job site, 2) a common work area shared by the employees of more than one subcontractor, and 3) a readily observable and avoidable danger in that common work area, 4) that creates a high degree of risk to a significant number of workers." *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996).

The retained control theory does not apply to Ross because, at the relevant time, Ross was not a general contractor. *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc.*, 414 Mich 29; 323 NW2d 270 (1982). Testimony clearly established that Lear was the owner and Olson was the general contractor on the construction project. Further, documentary evidence and deposition testimony establish that Ross and Abray were both subcontractors. Because the retained control doctrine specifically applies to "general contractors" and "landowners," plaintiff may not rely on this doctrine to recover from Ross.[5]

Moreover, "[a]t 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." *Candelaria*, *supra* at 76. Here, the trial court properly granted summary disposition to Ross because Ross hired Abray as an independent contractor to perform the steel erection work for the Lear project and retained little or no control over the erection work.

The record clearly reflects that Ross contracted with Abray to provide every aspect of its erection responsibilities, and that this contract included Abray's obligation to provide a safe work environment for its own employees. All the parties clearly understood that Ross would provide no on-site supervision and that Abray ensured the safety of its erection by instituting its own safety program and submitting its own safety manual to Ross and to Olson. Further, Abray

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[5] This is particularly evident in light of the retained control doctrine's underlying principles:

> Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
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> > '(A)s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. * * * (I)t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so.' [*Funk, supra* at 104, quoting *Alber v Owens*, 66 Cal2d 790; 59 Cal Rptr 117, 121-122; 427 P2d 781, 785-786 (1967).]

attended regular safety meetings and was directly accountable for on-site safety violations. While Olson's Project Superintendent, Gary Marchionna, testified that he would notify Ross of any safety problems he observed during construction, he made clear that he approached Abray while on the job to correct any areas of concern. Marchionna specifically stated that he monitored all aspects of safety on the job, not Ross. Moreover, testimony clearly established that Abray was in the best position to implement its own safety program because Ross provided no specific safety rules or enforcement measures on the job. Indeed, plaintiff was directly supervised by an Abray foreman, Todd Morgan, and plaintiff admitted that he looked to Morgan and Abray, not Ross for any safety measures he might need while performing his work.

Plaintiff does not assert an alternative argument, for example, that respondeat superior liability should apply because Ross exercised a degree of control inconsistent with independent contract status. Instead, plaintiff says that Ross's contract with Olson establishes Ross's liability to plaintiff. Again, we disagree. Ross hired Abray as an independent contractor to perform steel erection work according to applicable safety rules. While Ross contracted with Olson to comply with safety rules, Ross hired Abray pursuant to Abray's own written safety program and pursuant to Abray's contractual agreement to comply with applicable safety rules. No evidence indicates that hiring Abray constituted a breach of Ross's contract with Olson or that it amounted to a breach of Ross's duty of care under the contract. In brief, plaintiff's assertion of negligence against Ross is without merit because plaintiff's employer, Abray, was responsible for plaintiff's safety, not Ross, and plaintiff has failed to show that Ross's contract with Olson imposed on Ross a duty to protect Abray's employees.

Accordingly, the trial court correctly concluded that Ross may not be held liable for plaintiff's injuries under a theory of retained control. Ross simply did not exercise sufficient control over the project, oversight, direction or monitoring of the actual construction to impose liability for plaintiff's injury.

B. Inherently Dangerous Activity Doctrine

Plaintiff also avers that the trial court erred in ruling that steel erection and setting the lintel did not constitute 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." *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985). "To be inherently dangerous, the risk involved must be recognizable in advance, at the time of the contract, and must be inherent in the work itself or normally expected in the ordinary course of doing the work." *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 316; 507 NW2d 827 (1993). "[L]iability should not be imposed where the activity involved was not unusual, the risk was not unique, 'reasonable safeguards against injury could readily have been provided by well-recognized safety measures,' and the employer selected a responsible, experienced contractor." *Szymanski v K Mart Corp*, 196 Mich App 427, 431-432; 493 NW2d 460 (1992), vacated and remanded on other grounds 442 Mich 912 (1993), quoting *Funk, supra* at 110.

Here, while performing steel connection work twenty-five feet above the ground presents a possibility of serious injury, the danger "could have been prevented by the use of well-

recognized safety measures . . . ." *Szymanski, supra* at 432, quoting *Funk, supra* at 110. Gary Marchionna testified that plaintiff's task, connecting a lintel twenty-five feet above ground, was routine, not unusual. Further, viewing the evidence in a light most favorable to plaintiff, the record indicates that one or more routine safety measures would have prevented this accident. According to Dave Stewart, Marchionna, plaintiff, and the citation issued to Abray by the Michigan Department of Consumer and Industry Services, the use of a tag line attached to the lintel, a commonly recognized tool in steel erection work, would have prevented the lintel from striking plaintiff, if that is what occurred. Further, a standard harness or safety line would have prevented plaintiff from falling from the column, according to plaintiff and his safety expert, Ingo Zeise. Unfortunately, neither of these standard safety measures were employed here. Of course, we are mindful of the tragic consequences of plaintiff's fall, but in light of these facts and the law as articulated by our Courts in *Szymanski* and *Funk*, it is undeniably clear that Ross does not bear legal responsibility for this incident.

Because the risk of injury under these circumstances was created by the failure to use well-recognized safety measures and because the task at issue was not unique and common safety measures would have prevented the fall, no reasonable juror could conclude that plaintiff was engaged in an inherently dangerous activity that required further, special safety precautions.

Therefore, the trial court properly granted summary disposition to Ross on this issue.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad