STATE OF MICHIGAN

COURT OF APPEALS

DENISE FERGUSON,

Plaintiff-Appellant,

and

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH

Intervening Plaintiff,

v

PATSY PARKER,

Defendant-Appellee.

UNPUBLISHED
January 15, 2004

No. 242814
Genesee Circuit Court
LC No. 01-070466-NO

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff, Denise Ferguson, appeals as of right an order granting defendant, Patsy Parker's, motion for summary disposition of plaintiff's negligence claims. We affirm.

I. Facts and Procedure

After a storm damaged a tree in defendant's yard, plaintiff and defendant (who was plaintiff's aunt) agreed to contact William Gill, a handyman, to remove the tree. Plaintiff called Gill, and Gill later went to defendant's house to remove the tree. While Gill was using a chainsaw to cut limbs off the tree, Glen Jackson and plaintiff's brother arrived and agreed to help. They tied a rope around the tree, pulled it taut with Jackson's truck, and continued to cut the tree. Plaintiff was standing about ten to fifteen feet from the truck when Gill said that the tree was cut enough. As plaintiff was walking away, the rope broke and struck plaintiff, injuring her.

Plaintiff brought suit against defendant, Gill,[1] and Jackson.[2] In her complaint against defendant, plaintiff alleged that defendant failed to keep her property safe, warn of dangerous conditions, have someone with sufficient expertise remove the tree, and sufficiently supervise the tree removal. The Michigan Department of Community Health intervened, claiming that it had paid over $22,000 in medical bills for plaintiff through Medicaid. Defendant moved for summary disposition under MCR 2.116(C)(10), claiming that she had no liability for the actions of her independent contractor. The trial court granted defendant's motion, concluding that tree removal is not an inherently dangerous activity, and that defendant did not have a duty to exercise reasonable care in selecting or retaining an independent contractor. Plaintiff moved for reconsideration, arguing that the trial court failed to address the issue of whether defendant exercised control over the tree removal. The trial court denied the motion, concluding that plaintiff had not raised any new issues, there was no palpable error, the Supreme Court had rejected plaintiff's position, and no evidence established that defendant retained control over the tree removal.

II. Analysis

A. Standard of Review

Defendant filed her motion for summary disposition under MCR 2.116(C)(10).

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A motion for summary disposition should be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Veenstra, supra* at 164. In deciding a motion brought under this subsection, the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Veenstra, supra* at 164. . . . The decision whether to grant a motion for summary disposition is a question of law that is reviewed de novo. *Id.* at 159. [*Kelly-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 611-612; 658 NW2d 494 (2003), lv gtd 468 Mich 942 (2003).]

B. Discussion

1. Negligent Hiring of Independent Contractor

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition because a landowner can be liable for negligent selection of an independent

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[1] The trial court entered a default judgment against Gill for $250,000.

[2] The trial court dismissed plaintiff's and the Michigan Department of Community Health's claims against Jackson by stipulation of the parties.

contractor. We disagree. This Court has specifically held as follows: "Michigan has not recognized a duty requiring an employer to exercise care in the selection and retention of an independent contractor. Furthermore, we hold that such a duty does not exist." *Reeves v Kmart Corp*, 229 Mich App 466, 475-476; 582 NW2d 841 (1998). Defendant argues that *Reeves* was wrongly decided. However, a panel of this court must follow the rule of law established by a prior published Court of Appeals decision issued on or after November 1, 1990. MCR 7.215(J)(1). Further, we do not agree that *Reeves* was wrongly decided.

2. Liability for Independent Contractor's Negligence

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition because defendant was in control of the tree removal, and tree removal is an inherently dangerous activity. Generally, the employer of an independent contractor is not liable for the contractor's negligence. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985); *Reeves, supra* at 471. However, "a party may be liable for the negligence of an independent contractor where the party retains and exercises control over the contractor or where the work is inherently dangerous." *Id.*, citing *Funk v General Motors Corp*, 392 Mich 91, 108-110; 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). Plaintiff argues also that both of these exceptions apply to the present case.

(a). Retained Control

We first conclude that defendant did not have control over the tree removal operation. A landowner can be held liable for the negligent acts of an independent contractor if the landowner effectively retained control over the work involved. *Phillips v Mazda Motor Manufacturing Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994). "There must be a high degree of actual control; general oversight or monitoring is insufficient." *Id.* A landowner's retention of control must have had some actual effect on the manner or environment in which the work was performed. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 76; 600 NW2d 348 (1999). Whether a landowner had retained control is a question of fact. *Phillips, supra* at 408.

There is no evidence in the present case that defendant exercised a high degree of control over the tree removal work. She helped Gill purchase equipment, but there is no evidence she chose the equipment or was involved in any decisions regarding how to safely remove the tree. Defendant stated that she "supervised" the tree removal. However, the evidence establishes that defendant merely watched passively and called out a warning moments before the accident occurred. The evidence shows that defendant's participation in the removal of the tree amounted to, at most, general oversight. Therefore, the control exception to the general rule that the employer of an independent contractor is not liable for the contractor's negligence does not apply to this case.

(b). Inherently Dangerous

We also conclude that the tree removal in this case was not 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.' " *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995), quoting *Bosak, supra* at 724.

> An employer 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" or "special danger" which calls for "special" or "reasonable" precautions. . . . It must be emphasized, however, that the risk or danger must be "recognizable in advance," *i.e.*, at the time the contract is made, for the doctrine to be invoked. [*Ormsby v Capital Welding, Inc*, 255 Mich App 165, 189; 660 NW2d 730 (2003), lv gtd 469 Mich 947 (2003), quoting *Bosak, supra*, at 727-728.]

In order to be inherently dangerous, the risk must be inherent in the work or expected in the ordinary course of performing the work. *Portelli v IR Construction Products Co*, 218 Mich App 591, 597; 554 NW2d 591 (1996). This Court has previously declined to apply the inherent danger exception in a case where homeowners had a tree removed from their yard. See *Justus v Swope*, 184 Mich App 91, 98-99; 457 NW2d 103 (1990). In *Justus, supra* at 96-98, this Court explained that it is not reasonable to expect a "mere homeowner" to be aware of the dangers inherent in activities such as tree removal. In the present case, as in *Justus, supra* at 98, there is no factual support for the proposition that defendant had any knowledge of tree removal procedures or the "peculiar risks" involved for plaintiff. Therefore, the inherent danger doctrine does not apply and the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper