STATE OF MICHIGAN

COURT OF APPEALS

JOANN P. BROWN and DAVID P. BROWN, Personal Representative of the Estate of DAVID JAMES BROWN, Deceased,

Plaintiffs-Appellants,

v

OLIVER/HATCHER CONSTRUCTION & DEVELOPMENT, INC, and SERVICE IRON WORKERS, INC, REQUESTED,

Defendants-Appellees.

UNPUBLISHED
February 10, 2004

No. 244740
Macomb Circuit Court
LC No. 00-00136-NO

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

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants, Oliver/Hatcher Construction and Development, Inc (Oliver/Hatcher), and Service Iron Workers, Inc, Requested (Service Iron), summary disposition. This case arises from the death of an iron worker, David James Brown (decedent), who fell to his death during construction of the Warren Business Center Project. We affirm.

Oliver/Hatcher was the construction manager of the project. Under contract with Oliver/Hatcher, Service Iron provided the structural steel aspects of the project building. Under contract with Service Iron, American Erectors, Inc, (American Erectors) erected the structural steel that Service Iron fabricated. American Erectors employed decedent as an iron worker for the project.

A. Standard of Review

> 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. Analysis

Generally, "a general contractor is not liable for a subcontractor's negligence." *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997); see also *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 173; 660 NW2d 730 (2003). However, there are exceptions to this general rule, including:

> (1) when the general contractor retains control over the work; (2) where there are readily observable and avoidable dangers in common work areas that create a high degree of risk to a significant number of workers; and (3) where the work is inherently dangerous. [*Ormsby, supra* at 173 (internal citations omitted).]

1. Doctrine of Retained Control

To be liable for injuries to employees of subcontractors under the retained control exception, the general contractor's retention of control must have had, at a minimum "'some *actual effect* on the manner or environment in which the work was performed.'" *Ormsby, supra* at 183 quoting *Candelaria v BC General Contractors, Inc*, 236 Mich 67, 76; 600 NW2d 348 (1999) (emphasis in original). There must be a high degree of actual control; supervisory and coordinating authority over the job site is insufficient. *Id*. at 185. The general contractor must not only possess control over the job site, but must exercise it and thus affect the manner or environment in which work is performed. *Id*. at 185-186.

Plaintiffs argue that defendants' failure to communicate the actual height in which decedent was working affected American Erectors decision not to employ fall protection. In other words, had either defendant told American Erectors that decedent was working over thirty feet above ground, American Erectors would have employed fall protection as required by OSHA and MIOSHA, and decedent would not have fallen to his death.

The gravaman of plaintiffs' complaint is that defendants failed to properly oversee and enforce safety standards. "The contractor must 'retain at least partial control and direction of *actual* construction work, which not equivalent to safety inspections and general oversight.'" *Ormsby, supra* at 185-186 quoting *Samodai v Chrysler Corp*, 178 Mich App 252, 256; 443 NW2d 391 (1989) (emphasis in original). Here, there is no showing that defendants retained control over *actual* construction work. Therefore, the trial court did not err in granting summary disposition of plaintiffs' claim against defendants based on the retained control exception.

2. Common Area

> A general contractor may be held liable if it failed to take "reasonable steps within its supervisory and coordinating authority" to guard against "readily

> observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen." *Funk v General Motors Corp,* 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on another ground *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29, 323 NW2d 270 (1982). Thus, for there to be liability, there must be: (1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, and (3) a readily observable, avoidable danger in that work area (4) that creates a high risk to a significant number of workers. *Groncki v Detroit Edison Co,* 453 Mich 644, 662; 557 NW2d 289 (1996). It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area. *Phillips v Mazda Motor Mfg (USA) Corp,* 204 Mich App 401, 408; 516 NW2d 502 (1994); *Erickson v Pure Oil Corp,* 72 Mich App 330, 337; 249 NW2d 411 (1976). [*Hughes, supra* at 5-6.]

Plaintiffs assert that the relevant common work area relevant is the area in which decedent landed from his fall. The trial court disagreed, holding that this area is not pertinent to the common work area exception because the safety measures plaintiffs allege were absent would have been in place on the roof. We hold that the area pertinent to the common work area exception is the area where the work is being performed. The purpose of the common work area exception evidences this conclusion.

> [t]he common work area formulation was an effort to distinguish between a situation where employees of a subcontractor were working in isolation from employees of other subcontractors and a situation where employees of a number of subcontractors were working in the same work area. [*Plummer v Bechtel Constr Co,* 440 Mich 646, 667; 489 NW2d 66 (1992).]

Here, plaintiffs do not allege that decedent worked in the area where he fell, and therefore, the trial court's holding was proper. Moreover, plaintiffs have not claimed that the roof was a common work area shared by the employees of several subcontractors. Therefore, the trial court did not err in granting summary disposition of plaintiffs' claim against defendants based on the common work area exception.

3. Inherently Dangerous Doctrine

In *Frances S Schoenherr v Stuart Frankel* Development Co, ___ Mich ___; ___ NW2d ___ (issued December 23, 2003), slip op pp 2-3, this Court addressed the requirements for applying the inherently dangerous exception:

> 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 [has] 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.

Similarly, liability 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. [Citing *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 548-549; 536 NW2d 221 (1995), (emphasis in original) (internal citations omitted).]

To support the contention that decedent's work fit this definition, plaintiffs assert that decedent was working thirty feet above ground and without the benefit of safety harness, in violation of MIOSHA and OSHA requirements. Here, as in *Schoenherr*, it cannot be disputed that the activity in which plaintiff was engaged was not inherently dangerous because "the work being performed was not unusual, the risks were not unique, and well-recognized safety measures could have been provided." *Schoenherr*, *supra* at 3. Plaintiffs assert that the existence of MIOSHA and OSHA regulations indicate that it must be inherently dangerous to work thirty feet above the ground. However, the regulations indicate only that well recognized safety measures existed to provide reasonable safeguards against falling from high elevations. Therefore, the trial court did not err in granting summary disposition of plaintiffs' claim against defendants based on the inherently dangerous exception.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra