STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. SCHMALTZ,

Plaintiff-Appellee,

v

GREYSTONE BUILDERS, INC., d/b/a GREYSTONE CONSTRUCTION INC.,

Defendant-Appellant,

and

MICHIGAN TRACTOR AND MACHINERY COMPANY,

Defendant-Not Participating.

UNPUBLISHED
January 4, 2005

No. 237991
Oakland Circuit Court
LC No. 97-002459-NP

ON REMAND

JAMES A. SMITH,

Plaintiff-Appellee,

v

GREYSTONE BUILDERS, INC., d/b/a GREYSTONE CONSTRUCTION INC.,

Defendant-Appellant,

and

MICHIGAN TRACTOR AND MACHINERY COMPANY,

Defendant-Not Participating.

No. 237992
Oakland Circuit Court
LC No. 98-008659-NO

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant, Greystone Builders, Inc., d/b/a Greystone Construction, Inc., appealed as of right from judgments entered on jury verdicts rendered in plaintiffs' favor in this consolidated contractor liability action and we affirmed. See *Schmaltz v Michigan Tractor and Machinery, Co*, unpublished per curiam opinion of the Court of Appeals, issued May 22, 2003 (Docket Nos. 237991, 237992). Thereafter, our Supreme Court ordered defendant's application for leave to appeal held in abeyance pending its decision in *Ormbsy v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), after which the matter was remanded to this Court "for reconsideration of the issues related to the common work area doctrine in light of *Ormsby*." We again affirm.

In *Ormsby*, *supra*, our Supreme Court clarified the holding in *Funk v General Motors Corp*, 392 Mich 91, 104-105; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29, 323 NW2d 270 (1982), which established the "common work area doctrine" exception to the general rule of nonliability of property owners and general contractors for injuries resulting from the negligent conduct of independent subcontractors and their employees. See *Ormsby*, *supra* at 48, 61 n 13. The *Ormsby* Court held that the "common work area doctrine" and "retained control doctrine" are not two exceptions; rather, the "common work area doctrine" applies only to general contractors and the "retained control doctrine" is subordinate to it and applies, if at all, only to property owners. *Id*. at 55-56, n 8. Thus,

> [t]o establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Id*. at 57.]

To establish liability against the property owner the "common work area doctrine" must apply, and the property owner must have sufficiently 'retained control' over the construction project, such that the owner stepped into the shoes of the general contractor and, thus, is held to the same degree of care as the general contractor. *Id*. at 49, 55.

In this case, defendant was the general contractor who subcontracted a portion of the work on the commercial construction project to plaintiffs' employer Troy Metal Concepts. During the course of plaintiffs' employment, they were applying exterior wallboard to a building while elevated thirty to forty feet in the air through the use of a mechanical manlift which subsequently tipped over causing plaintiffs to fall to the ground and suffer injuries. Plaintiffs' causes of action were premised primarily on defendant's failure to provide a reasonably safe work site, particularly with regard to the condition of the ground since work was being accomplished through the use of mechanical manlifts. Defendant's motions for summary disposition and directed verdict were denied on the ground that plaintiffs had presented sufficient evidence regarding the elements of the *Funk* test to submit the issue to the jury. After de novo review, we affirmed and, on remand, we again affirm. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

Because defendant was the general contractor for the construction project, we must analyze plaintiffs' claims under the common work area doctrine to determine whether defendant can be held liable for the negligence of its subcontractor or its employee. See *Funk*, *supra* at 56. Plaintiffs' primary claim is that the ground at the construction site in the area of their fall was dangerous in light of the fact that several tradesmen, including themselves, were required to use heavy equipment like the mechanical manlift to accomplish their work but the ground was rough, uneven, slippery, muddy, and contained holes.

First, it is undeniable that defendant had supervisory and coordinating authority over the job site. See *Ormbsy*, *supra* at 57. As we noted in our previous opinion, "defendant was responsible for establishing and enforcing safety policies on the job site, employed a safety director on the site who was responsible for ensuring adherence to state safety regulations, had the right to stop work if safety precautions were ignored, and had the right to exclude workers from the site if they did not follow the safety rules." *Schmaltz*, *supra*, slip op at 2. Defendant also had the sole authority to order that the ground surface be graded and graveled and had, in fact, performed or caused to be performed some attempt at accomplishing a better ground surface to aid the delivery of an elevator. In light of the additional evidence to be discussed below, there is at least a question of fact as to whether defendant's actions consisted of "reasonable steps," i.e., were sufficient.

Second, we conclude that there is at least a question of fact as to whether the ground surface conditions posed readily observable and avoidable dangers. See *Ormbsy*, *supra* at 57. There is ample evidence that the ground surface in the area of the incident was uneven, rough, slippery, muddy, and contained large holes for an extended period of time and that such conditions could have been mitigated through grading and graveling procedures. Although we realize that construction sites are "works in progress" and thus will not be the "model of safety" as far as ground surfaces are concerned, because of the numbers of workers on site and the use of heavy equipment, the ground surface should at least be reasonably safe. Even the construction supervisor acknowledged that uneven ground would pose a preventable danger to subcontractors using equipment in the area and, in fact, there was a previous incident of a manlift leaning in toward the building because of slipping into a hole in the ground.

Third, we conclude that plaintiff established a question of fact as to whether the ground surface conditions created a high degree of risk to a significant number of workmen. See *Ormbsy*, *supra* at 57. The evidence included that several subcontractors were working at the site, in the immediate vicinity of plaintiffs, and most were engaged in work that required the use of machinery, including mechanical manlifts or other equipment that required a firm level surface. The users of the equipment were not the only workers subjected to the risks associated with the poor surface conditions, but workers in close proximity to the equipment were also at serious risk of injury from falling equipment, materials, debris, and workers if the equipment failed or became unstable because of the ground surface conditions.

Finally, there was a question of fact as to whether the high degree of risk was in a common work area. See *Ormbsy*, *supra* at 57. As we noted in our previous opinion, "the area in which plaintiffs were working was a common work area in that there were other contractors working on a section of the same wall, communication workers were digging a trench less than thirty-five yards from the manlift when it fell, and the daily construction report showed five subcontractors present on the site the day of the accident. In addition, ironworkers, carpenters,

and masons all worked on the wall in the same area of the accident during the project." *Schmaltz*, *supra*, slip op at 3.

Accordingly, plaintiffs established genuine issues of material fact with regard to all of the elements of the common work area doctrine; thus, defendant's motions for summary disposition and directed verdict were properly denied. See *Ormbsy*, *supra* at 57.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra