

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA AARON,

Plaintiff-Appellant,

v

WALSH CONSTRUCTION COMPANY OF
ILLINOIS,

Defendant

and

ROSATI MASON CONTRACTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
November 1, 2005

No. 261297
Wayne Circuit Court
LC No. 03-315044-NO

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant Rosati Mason Contractors, LLC. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was an ironworker for Exterior Wall Specialists, a subcontractor on a construction site. Plaintiff and other workers were leaving their work area through a designated exit when plaintiff encountered construction debris, including a large ball of yellow caution tape. Employees of defendant Rosati were working on scaffold above the area. Plaintiff tried to kick the tape out of the way, but her boot became entangled, and she fell to the ground sustaining a knee injury.

Plaintiff sued Walsh, one of two general contractors, and Rosati, a subcontractor. Plaintiff alleged that both Walsh and Rosati breached their duty to guard against readily observable and avoidable dangers – specifically by refraining from scattering debris. Rosati moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that it owed no duty to plaintiff because the complained-of condition – the ball of tape – was open and obvious. Plaintiff argued that the open and obvious doctrine did not apply because Rosati was not in possession of the premises; and, even if it did apply, that the condition had special aspects that made it unreasonably

dangerous. The trial court granted Rosati's motion, finding that no genuine issue of material fact existed as to whether the condition was open and obvious.¹

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2D 406 (2001).

The threshold question in a negligence action is whether the defendant owed a duty to protect the plaintiff against the condition that caused the harm. *Fultz v Union-Commerce Assocs.*, 470 Mich 460, 463; 683 NW2d 587 (2004). "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997).

In *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005), our Supreme Court² held that the open and obvious doctrine is not applicable to cases where the common work area doctrine³ is implicated. *Ghaffari, supra*, at 20. *Ghaffari* involved claims against a general contractor and a subcontractor for injuries sustained by a worker at a construction site. The Supreme Court determined the trial court erred in dismissing the claims against the general contractor on the open and obvious doctrine, concluding the open and obvious doctrine is incompatible with the principles supporting the common work area doctrine.

As for the claims against the subcontractor, the Supreme Court in *Ghaffari* remanded the case to address the question whether the complained-of hazard was caused or created by the defendant subcontractor. The Supreme Court directed this Court to determine whether the subcontractors owed plaintiff, as a third-party beneficiary to the contract, an affirmative duty to protect plaintiff from the complained-of hazard.⁴

¹ After the trial court granted Rosati's motion for summary disposition, plaintiff voluntarily dismissed Walsh from the suit.

² *Ghaffari* was decided after the trial court's grant of summary disposition in the instant case. Plaintiff filed a supplemental authority to her appeal, citing *Ghaffari*.

³ See *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 54; 684 NW2d 320 (2004)

⁴ See *Ghaffari, supra*, at 30-31; *Fultz, supra*, at 463.

We reverse the judgment of the trial court as it relates to the application of the open and obvious doctrine. We remand for consideration whether Rosati owed plaintiff any contractual duty under *Fultz, supra*, that would sustain this claim. If the trial court determines Rosati owed plaintiff a contractual duty under *Fultz*, summary disposition should be denied. However, if the trial court concludes Rosati owed plaintiff no contractual duty, then judgment should enter in favor of Rosati. *Ghaffari, supra* at 31.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens