STATE OF MICHIGAN

COURT OF APPEALS

FARON D. WHITEYE, Personal Representative of the Estate of ROBERT JAMES WHITEYE,

Plaintiff-Appellant,

v

LANZO CONSTRUCTION CO.,

Defendant-Appellee.

UNPUBLISHED
December 22, 2005

No. 258095
Oakland Circuit Court
LC No. 01-031447-NO

FARON D. WHITEYE, Personal Representative of the Estate of ROBERT JAMES WHITEYE,

Plaintiff-Appellant,

v

ANGELO D'ALESSANDRO,

Defendant-Appellee,

and

HUBBELL ROTH & CLARK INC.,

Defendant/Third-Party Plaintiff Appellee,

and

LANZO CONSTRUCTION CO.,

Third-Party Defendant.

No. 258098
Oakland Circuit Court
LC No. 02-041065-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In Docket No. 258095, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants Lanzo Construction Company (Lanzo) and Angelo D'Alessandro pursuant to MCR 2.116(C)(8) and (C)(10). In Docket No. 258098, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant Hubbell, Roth & Clark Inc. (HRC) pursuant to MCR 2.116(C)(10). The cases were consolidated for appeal. We affirm.

FACTS AND PROCEDURAL HISTORY

The City of Southfield (city) solicited bids for a project involving the installation of an underground water main in a subdivision. On September 1, 1997, the city entered into a contract with defendant HRC, a private engineering firm. HRC was to serve as a consultant for the project. As part of its consulting responsibilities, HRC assisted the city in securing bids for the project. HRC recommended that the city award the bid for the project to defendant Lanzo. The city did award the bid to Lanzo, and on December 1, 1998, Lanzo and the city entered into a contract in which Lanzo was to complete the project for $5,274,750.

Plaintiff's decedent, a fifty-two-year-old male, was employed by defendant Lanzo as a pipe layer. On May 24, 1999, plaintiff's decedent was working as the chief pipe layer at the construction site of the Southfield project. He was working in a trench that was eighteen to twenty feet deep. The trench had been excavated to permit the installation of the water main. One safety feature to protect workers who are working in a trench is a trench box. A trench box is a steel cage with two sides that is placed in the trench to prevent cave-ins where soil has been excavated. Plaintiff's decedent was in the trench installing a pipe. However, he was working outside of the trench box because the size of the pipe would not allow him to do the work inside the trench box. As plaintiff's decedent worked to install the pipe, a trench wall collapsed on him, and he was buried alive. He died as a result of the cave-in.

The estate of plaintiff's decedent filed a wrongful death action against Lanzo and a separate wrongful death action against HRC and D'Alessandro. Plaintiff's complaint against Lanzo alleged, among other things, that Lanzo was liable for the death of plaintiff's decedent under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Plaintiff's complaint against HRC and D'Alessandro alleged that HRC was negligent in failing to properly investigate Lanzo and in recommending that the city contract with Lanzo when HRC knew or should have known that Lanzo would be unable to perform under the contract in a safe manner. The complaint further alleged that HRC was negligent in failing to stop Lanzo's work on the project when it became aware of Lanzo's unsafe trenching methods. The complaint also alleged that D'Alessandro was individually liable under the intentional tort exception to the exclusive remedy provision of the WDCA, in part because he allegedly made the decision to reduce the size of the trench box. The parties stipulated to consolidating the cases, and the trial court entered a consolidation order on November 21, 2002.

Defendants Lanzo and D'Alessandro moved for summary disposition under MCR 2.116(C)(8) and (C)(10).[1] They argued that plaintiff's claim was barred by the exclusive remedy provision of the WDCA, MCL 418.131(1), because plaintiff could not establish the existence of an intentional tort. According to Lanzo and D'Alessandro, a trench cave-in, by its very nature, is an unpredictable event, and plaintiff could not establish that defendants specifically intended an injury or had actual knowledge that the cave-in or an injury was certain to occur. Plaintiff contended that Lanzo's conduct fell under the intentional tort exception to the exclusive remedy provision of the WDCA because defendants had actual knowledge that injury was certain to occur and willfully disregarded that knowledge. Plaintiff further contended that summary disposition was premature because virtually no discovery had taken place.

The trial court granted Lanzo's and D'Alessandro's motion for summary disposition under MCR 2.116(C)(8) and (C)(10) and dismissed plaintiff's claims against them. The trial court ruled that "even after accepting all of plaintiff's allegations as true, and even assuming the plaintiff has evidence to support her [sic] claims under the facts of this case, the plaintiff cannot show defendant specifically intended to cause injury or that injury was certain to occur." Therefore, the trial court granted Lanzo's and D'Alessandro's motion for summary disposition based on plaintiff's failure to establish the intentional tort exception to the exclusive remedy provision of the WDCA.

Thereafter, defendant HRC moved for summary disposition under MCR 2.116(C)(10). HRC argued that it had no duty to protect the decedent from harm at the construction site and that defendant Lanzo was responsible for job safety and for providing a safe workplace. HRC asserted that Lanzo was bound, by language in its construction contract with the city, to ensure safety at the construction site. The trial court granted HRC's motion for summary disposition under MCR 2.116(C)(10). According to the trial court, Lanzo's contract with the city provided that Lanzo had full responsibility for the work and was responsible for taking precautions to prevent injuries, and HRC's contract with the city did not impose a contractual duty to protect the decedent. The trial court entered a final order dismissing all of plaintiff's claims against Lanzo, D'Alessandro, and HRC on July 7, 2004, and subsequently denied plaintiff's motion for reconsideration.

ANALYSIS

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant Lanzo under MCR 2.116(C)(8) before discovery was complete. Plaintiff asserts that there was not sufficient discovery for the trial court to find that plaintiff had failed to state a claim as a matter of law. We disagree.

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[1] In their motion for summary disposition, Lanzo and D'Alessandro cited only MCR 2.116(C)(8) as a ground for summary disposition. However, in their brief in support of their motion for summary disposition, Lanzo and D'Alessandro cited both MCR 2.116(C)(8) and (C)(10) as grounds for summary disposition.

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(8). *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone. *Newton v Bank West*, 262 Mich App 434, 437; 686 NW2d 491 (2004). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The motion "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

A motion for summary disposition under MCR 2.116(C)(8) does not test whether there is a genuine issue of material fact, but tests the legal sufficiency of the complaint. *Id.* Summary disposition based on the failure to state a claim tests the legal sufficiency of a claim by the pleadings alone, and the motion may not be supported with affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2), (G)(5); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Therefore, discovery was irrelevant to the trial court's decision to grant summary disposition under MCR 2.116(C)(8) because the trial court could only consider the pleadings in deciding the motion. Plaintiff's argument that the trial court's decision to grant summary disposition under MCR 2.116(C)(8) before discovery was complete is without merit.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant Lanzo based on the exclusive remedy provision of the WDCA. Again, we disagree.

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

MCL 418.131(1) of the WDCA "provides that employee compensation is the exclusive remedy for a personal injury, except for an injury resulting from an intentional tort." *Bock v General Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001). Plaintiff asserts that it established a genuine issue of material fact regarding whether defendant Lanzo's conduct constituted an intentional tort. MCL 418.131(1) defines an intentional tort:

> The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall

> be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

Whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court; whether the facts are as the plaintiff alleges is a jury question. MCL 418.131(1); *Gray v Morley (After Remand)*, 460 Mich 738, 743; 596 NW2d 922 (1999), citing *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 188; 551 NW2d 132 (1996).

To avoid the exclusive remedy provision of the WDCA through the intentional tort exception, there must be a deliberate act by the employer and a specific intent that there be an injury. *Herman v Detroit*, 261 Mich App 141, 148; 680 NW2d 71 (2004), citing *Travis*, *supra* at 169 (Boyle, J.), 191 (Riley, J.). A deliberate act may be one of commission or omission. *Id.* An employer's omission, "such as a failure to remedy a dangerous condition . . . may constitute the 'act' necessary to establish an intentional tort." *Travis*, *supra* at 169 (Boyle, J.). To establish that the employer specifically intended an injury, the employer must have had "a purpose to bring about certain consequences." *Herman*, *supra* at 148. The specific intent to injure may also be established if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. MCL 418.131(1); *id.* An injury was certain to occur if there was no doubt that it would occur. *Herman*, *supra* at 148. The plaintiff must allege a specific danger known to the employer that was certain to result in injury and further must allege that the employer required the plaintiff to work despite the danger. *Id.* An employer's knowledge of general risks is insufficient to establish an intentional tort. *Id.* at 149.

Plaintiff contends that it established a genuine issue of material of fact regarding whether defendant Lanzo had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge because Lanzo had a history of violations under the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.*, it decreased the width of the safety trench box, it failed to provide additional shoring for the trench after a significant rainfall, and it was aware that the excavated area was unstable after the rain. In *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 151-152; 565 NW2d 868 (1997), we rejected the plaintiff's contention that the defendant's willful MIOSHA violations established that the defendant possessed actual knowledge of the certainty of an injury sufficient to create a question of fact for the jury. Even accepting the truth of plaintiff's remaining assertions, they establish, at most, that Lanzo would have been alerted that their trenching methods may have presented a general risk of harm under the circumstances. However, knowledge of a general risk is not the equivalent of certainty of injury. See *Agee v Ford Motor Co*, 208 Mich App 363, 367-368; 528 NW2d 768 (1995). Furthermore, an employer's awareness that a dangerous condition exists is not enough to establish certainty. *Palazzola*, *supra* at 150. Certainty is established only when there is no doubt regarding whether the injury will occur. *Travis*, *supra* at 174 (Boyle, J.).

The evidence establishes that Lanzo knew that the trench was dangerous and that there was a risk of a cave-in; however, even viewing the evidence in a light most favorable to plaintiff, the evidence simply does not show that Lanzo knew that injury was certain to occur. Despite the general risk involved, a cave-in was not inevitable. Moreover, the fact that plaintiff's decedent, who was an experienced pipe layer, willingly worked in the trench despite the risk of a cave-in belies plaintiff's assertion that injury was certain to occur. Clearly, plaintiff's decedent would not have taken the risk to work in the trench that day had he known that a cave-in was a certainty. Rather, plaintiff's decedent was willing to take a calculated risk by working in the

trench outside of the trench box when he knew that the trench was dangerous and that a cave-in was a possibility. Neither Lanzo nor plaintiff's decedent knew that an accident was certain to occur; merely showing a likelihood of an accident is insufficient to establish an intentional tort. *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 756; 593 NW2d 219 (1999). The trial court did not err in granting summary disposition in favor of Lanzo under the exclusive remedy provision of the WDCA because plaintiff failed to establish a genuine issue of material fact regarding whether Lanzo's conduct constituted an intentional tort.

Plaintiff next argues that the trial court erred in granting HRC's motion for summary disposition under MCR 2.116(C)(10). According to plaintiff, HRC owed a duty to plaintiff under its engineering contract with the City of Southfield and breached this duty by failing to include safety as part of the selection criteria in recommending Lanzo for the city's water main project. This argument is without merit because one who retains a contractor has "no duty to investigate the contractor and [is] free to assume the contractor [is] of good reputation and competent to do the work safely." *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995), citing Restatement Torts, 2d, § 411, p 376; see also *Reeves v Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998). Although the city, and not HRC, retained Lanzo, we similarly conclude that, absent a specific contractual duty to investigate the safety record of contractors who bid on the project, which did not exist in this case, HRC also had no duty to investigate Lanzo's safety record.

Plaintiff asserts that it established a genuine issue of material fact regarding whether HRC breached its duty under its contract with the city by failing to stop work on the project when the work being performed was not being performed according to specifications and was creating a safety hazard. We have carefully reviewed the two contracts that are relevant to this case. The first is the contract between HRC and the city (the engineering contract), and the second is the contract between Lanzo and the city (the construction contract). Neither the language in the engineering contract nor the language in the construction contract supports plaintiff's contention that HRC had a contractual duty to stop work on the project for safety reasons. Under the construction contract, Lanzo was specifically declared to be in charge of the construction work and responsible for safety at the job site. The engineering contract between HRC and the city does not impose a duty upon HRC to direct or supervise the work of Lanzo's employees or ensure their safety. Under the engineering contract, HRC had four main responsibilities. These responsibilities related to the preliminary or "design report" phase, the design phase, the construction phase, and construction inspection. Plaintiff's argument relates to HRC's construction inspection obligation under the contract. HRC's duty to inspect construction was defined as "[t]echnical observation of the construction by a full time resident project engineer or technician and supporting staff as required, and providing appropriate reports to the City." While HRC did have a duty to observe and inspect, the engineering contract makes it clear that HRC's obligation in this regard was limited to "[t]echnical observation" and did not include a duty to inspect and observe for safety issues. The city could have included in the engineering contract a provision imposing a duty upon HRC to inspect and observe for safety issues, but it did not. Instead, the city placed responsibility for the safety of the job site upon Lanzo under the express terms of the construction contract between Lanzo and the city. We will not write a different contract for the parties when the city clearly manifested its intent to impose the duty to keep the job site safe upon Lanzo in the construction contract between Lanzo and the city.

In arguing that HRC had a duty to stop Lanzo's work if there were safety issues at the job site, plaintiff cites a provision in the construction contract between Lanzo and the city. However, HRC was not a party to the construction contract between Lanzo and the city and was not bound thereby; any so-called duties which the construction contract attempted to impose upon HRC were not binding upon HRC. See *McDonough v General Motors Corp*, 388 Mich 430, 442; 201 NW2d 609 (1972). Plaintiff also cites *Drenkhahn v Smith*, 103 Mich App 278; 303 NW2d 176 (1980), in support of its argument that HRC had a duty to ensure the safety of the job site. In *Drenkhahn*, the estate of a construction worker who died in a cave-in at a sewer construction site sued the City of Portage, the city's engineer, and two inspectors in the engineering department. This Court held that the contract between the city and the decedent's employer, which did not specifically vest responsibility for the safety of the job site with the city, nevertheless imposed a duty upon the city to maintain the safety of the job site:

> A careful reading of the contract between the City of Portage and Barry Excavating, Inc. reveals several contract provisions which vested defendants with the authority and duty to supervise and inspect the construction work to insure compliance with contract specifications. Logically deducible from this contract language is the duty to use reasonable care in maintaining the job site in a safe condition for workers such as plaintiff's decedent. [*Id.* at 286.]

The instant case is distinguishable from *Drenkhahn*, however, because in this case, Lanzo expressly assumed responsibility for the safety of the job site under the terms of its construction contract with the city. There is no indication from the facts in *Drenkhahn* that there was another party who had assumed the responsibility for safety at the job site in that case. Furthermore, as noted above, HRC was not a party to the contract between Lanzo and the city and therefore cannot be said to have assumed any duties under that contract.

Plaintiff finally argues that the trial court erred in granting HRC's motion for summary disposition because HRC acted as construction manager of the work site. According to plaintiff, a construction manager is treated the same as a general contractor and HRC is therefore liable because it retained control of the work site and the job constituted an inherently dangerous activity.

The employer of a worker is generally responsible for job safety and maintaining a safe workplace. *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 531; 542 NW2d 912 (1995). A general contractor is ordinarily not liable for the negligence of independent subcontractors and their employees. *Ghaffari v Turner Construction Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). However, there are two exceptions to this rule. The first exception to the nonliability of a general contractor involves dangers occurring in common work areas. Under this exception, it is "part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken 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 other grounds *Hardy v Monsanto Envir-Chem Systems, Inc*, 414 Mich 29 (1982). The second exception to the nonliability of the general contractor involves work that constitutes an "inherently dangerous activity." *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004). Plaintiff argues that he established a genuine issue of material fact regarding the

inherently dangerous activities exception and what it characterizes as the retained control exception. We disagree.

Plaintiff argues that HRC retained control because it retained the right to inspect the work to ensure that the plans and specifications were being followed, it drafted the contract documents, including the plans and specifications for the work that was to be done and the trenching safety measures that were to be used, and it had the authority to suspend Lanzo's work. In *Ormsby v Capital Welding, Inc*, 471 Mich 45, 49; 684 NW2d 320 (2004), the Supreme Court clarified that "the 'retained control doctrine' is a doctrine subordinate to the 'common work area doctrine' and is not itself an exception to the general rule of nonliability." Furthermore, under *Ormsby*, the retained control doctrine only applies to property owners. *Id.* at 49. "The 'retained control' doctrine is merely a *subordinate* doctrine . . . that has no application to general contractors." *Id.* at 56 (emphasis in original). Therefore, even assuming, as plaintiff alleges, that HRC was a general contractor, the retained control doctrine is inapplicable because HRC was not the property owner in this case. *Id.*

Furthermore, the trial court did not err in granting HRC's motion for summary disposition based on plaintiff's failure to establish a genuine issue of material of fact regarding whether the work was inherently dangerous. Plaintiff asserts on appeal that the work was inherently dangerous because the wet soil conditions made a cave-in a certainty. However, plaintiff merely asserts in its brief on appeal that the work was inherently dangerous without citation to any documentary evidence to support its position. Furthermore, plaintiff does not cite any case law or statutory authority in its appellate brief to support its contention that the wet soil made a cave in a certainty. A party who fails to brief the merits of an alleged error has abandoned the issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). In any event, the inherently dangerous activities exception does not apply under the facts of this case. The Supreme Court has held that the inherently dangerous activities doctrine applies only to innocent third parties, and not to individuals who are involved in the performance of dangerous work. *DeShambo, supra* at 28, 38. "[T]he inherently dangerous activity exception does not apply when the injured party is an employee of an independent contractor rather than a third party." *Id.* at 41. Because plaintiff's decedent was an employee of Lanzo who was actively involved in the performance of the dangerous work, the exception is inapplicable to the facts of this case.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello