STATE OF MICHIGAN

COURT OF APPEALS

BRIAN K. WALLINGTON,

Plaintiff-Appellee,

v

CITY OF MASON, WOLVERINE ENGINEERS AND SURVEYORS, INC., ELM INVESTMENTS, INC., MILLENIUM DIGITAL MEDIA SYSTEMS, LLC, and MISS DIG SYSTEM, INC.,

Defendants,

and

ELM INVESTMENTS I, INC.,

Defendant-Appellant.

UNPUBLISHED
December 28, 2006

Nos. 267919 & 269884
Ingham Circuit Court
LC No. 03-001882-NO

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In Docket No. 267919, Elm Investments I, Inc. (defendant Elm) appeals by leave granted an order denying its motion for summary disposition as to plaintiff's negligence and gross negligence claims to the extent they relied on the common work area doctrine. And in Docket No. 269884, defendant Elm appeals by leave granted an order denying its motion for summary disposition as to plaintiff's negligence and gross negligence claims to the extent they relied on plaintiff's third-party beneficiary status under a contract. This dispute arises out of injuries plaintiff sustained during the course of his employment. We reverse the denial of these motions and remand for further proceedings consistent with this opinion.

Defendant Elm entered into a contract with the city of Mason (defendant Mason) for the construction of a water main. Defendant Elm was named the general contractor of the project. It subcontracted with Underground Drilling and Boring, Inc. (Underground Drilling) for the latter to dig a trench and install the water main. Plaintiff was an employee of Underground Drilling. During the course of installing the water main, plaintiff was injured when the walls of the trench

in which plaintiff was working caved-in and buried him under several feet of dirt. Plaintiff claimed he was injured because there was no appropriate shoring or bracing in the area he was working.

Defendant Elm first argues that the trial court erred in failing to grant it summary disposition on plaintiff's common work area claim. We agree. We review summary disposition rulings de novo. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). A motion pursuant to MCR 2.116(C)(10) entitles the movant to summary disposition where there is no genuine issue of material fact. *Nastal v Henderson & Assoc*, 471 Mich 712, 721; 691 NW2d 1 (2005).

"At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ghaffari v Turner Constr Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). An exception to this rule of nonliability is known as the "common work area doctrine." *Id*. at 20-21; see *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

> [F]or a general contractor to be held liable under the "common work area doctrine," a plaintiff must show that (1) the defendant, either the property owner or general 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. [*Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 648 NW2d 320 (2004).]

Failure to establish any one of the above is fatal to a plaintiff's claim. *Id.* at 59-60, n 11.

In *Hughes v PMG Bldg, Inc*, 227 Mich App 1; 574 NW2d 691 (1997), this Court addressed whether a plaintiff had satisfied the third above element. The plaintiff was injured when he fell from a porch overhang he had been contracted to roof. *Id.* at 3. In concluding that the plaintiff failed to satisfy this element, we reasoned as follows:

> [W]e do not believe that the overhang created a "readily observable, avoidable . . . risk to a significant number of workmen." *Funk, supra* at 104. We find this case to be distinguishable from *Funk supra,* and its progeny. Liability was imposed on the general contractor in *Funk* because Funk fell from a highly visible superstructure that was part of the common work area, was within the control of the defendant, and posed a risk to thousands of other workers. In *Funk,* the Court employed a risk analysis, finding that liability should not be imputed unless the dangers in the work area involve "a *high degree* of risk to a *significant number* of workers." *Funk, supra* at 104 (emphasis added). See *Plummer v Bechtel Constr Co,* 440 Mich 646, 651; 489 NW2d 66 (1992) (the plaintiff fell from an interconnecting catwalk/platform system at a construction project involving 2,500 workers and a number of subcontractors); *Erickson* [*v Pure Oil Corp*, 72 Mich App 330, 337; 249 NW2d 411 (1976)] (the plaintiff fell from a roof used by

> numerous subcontractors when he slipped on oiled metal roof sheets). Here, it is uncontroverted that plaintiff was one of only four men who would be working on top of the overhang. Accordingly, we conclude . . . that defendant did not breach its duty to guard against a danger posing a "high degree of risk to a significant number of workmen." *Funk, supra*. [*Hughes, supra* at 7-8.]

Plaintiff testified that on the date of his injury, only he and one other individual were working in the trench and installing the water main. A third person operated an excavator to dig the trench, and a fourth operated a bulldozer and backfilled the trench after the new water main was installed. Various other individuals were at the site of the project, but none of these individuals worked in the trench.

We first conclude the trial court erred in failing to grant defendant Elm summary disposition on plaintiff's negligence claims to the extent they relied on the common work area doctrine. Viewed in the light most favorable to plaintiff, there is no issue of material fact that only two individuals were exposed to the high degree of risk that caused plaintiff's injury, i.e., a trench cave-in. Only plaintiff and one other worker were actually in the trench installing the water main. In *Hughes*, we concluded as a matter of law that four individuals did not constitute a significant number of individuals for purposes of the common work area doctrine. Because plaintiff can establish that only two individuals were at risk of the harm he suffered, he has failed to establish the third element of the common work area doctrine. And the failure to establish any one of these elements is fatal to plaintiff's claim. *Ormsby, supra* at 59-60, n 11.

Plaintiff argues that the presence of the various other individuals at the work site creates a question of fact as to whether a significant number of individuals were at risk of the harm he suffered. This argument fails for two reasons. First, it obscures the nature of the liability contemplated by the common work area doctrine. As plaintiff acknowledges, the "common work area" at issue was the trench. To conclude that other individuals surrounding the trench or in other areas of the project site were likewise exposed to the risk to which plaintiff was exposed is to broadly construe the fourth element - that the injury occurred in a common work area. And such a result is contrary to the scope of this doctrine, and would create a situation where "virtually no place or object located on the construction premises could be considered not to be a common work area." *Hughes, supra* at 8-9; see also *Ormsby, supra* at 57-58 n 9.

Second, the third common work area element requires not only a showing of exposure to a significant number of workers, but also that the danger "created a high degree of risk" to those workers. *Ormsby, supra* at 54. In the circumstances of this dispute, the high degree of risk was that of a trench cave-in. And plaintiff was directly exposed to this risk by virtue of being in the trench. As we reasoned in *Hughes,*

> Plaintiff characterizes the alleged danger at issue in this case as "the danger of collapse of the porch overhang." Since other contractors performed work on the exterior of the house in the vicinity of the overhang, plaintiff argues that these workers were exposed to the same risk and that the overhang constituted a "common work area." In support of this argument, plaintiff points out that workers from State Carpentry assembled and attached the porch. Another

> subcontractor, Robert Wurm, installed the siding on the overhang. Yet another contractor would later be pouring the cement for the support stanchions. However, there is no evidence in the record that the employees of any other trade would work on top of the porch overhang. In all probability, after the carpenters built the overhang and attached it to the house, the only workers who would need to gain access to that limited area were the roofers. Thus, giving plaintiff the benefit of any reasonable inferences, we cannot say that other workers would be subject to the same hazard. [*Hughes, supra* at 6-7.]

In the instant dispute, other individuals surrounding the trench or at other areas on the project were not exposed to the same risk, i.e., burial from a trench-wall collapse, as were plaintiff and the other trench worker. Were these remaining workers to be considered in aggregating the number of individuals exposed to the risk at issue, it would eviscerate the requirement that such workers have been exposed to "a high degree of risk." *Ormsby, supra* at 54.

Defendant Elm next argues that the trial court erred in failing to grant it summary disposition on plaintiff's third-party beneficiary claim. We agree. The existence of a duty in a negligence action is a question of law we review de novo. See *Dyer v Trachtman*, 470 Mich 45, 49; 679 NW2d 311 (2004).

To sustain a negligence action, a plaintiff must establish duty, breach, causation, and damages. *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.'" *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004) (citation omitted). Duty in a negligence action may arise by contract. *Joyce v Rubin*, 249 Mich App 231, 244; 642 NW2d 360 (2002). But a tort action may arise from the failure to perform a contract only where there exists a legal duty that is "separate and distinct" from the contractual obligation. *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 83-84; 559 NW2d 647 (1997). Consequently, a court must

> analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Fultz, supra* at 467.]

Based upon the foregoing, the trial court erred in failing to grant defendant Elm summary disposition. Plaintiff was not a party to the Water Main Contract. But plaintiff's allegations against defendant Elm stem entirely from the latter's ostensible duties under this contract. Plaintiff has failed to allege or present evidence of a duty defendant Elm owed him independent of the contract. *Id.* at 468. Under plaintiff's theory of the case, defendant Elm owed plaintiff no "separate and distinct" duty. Rather, the substance of plaintiff's allegations is defendant Elm's failure to act in a variety of ways under the contract. "[N]o tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." *Id.* at 470.

In *Fultz*, our Supreme Court observed that the viability of tort actions based on a contract had traditionally been analyzed under a "nonfeasance/misfeasance dichotomy," where the latter was and the former was not held to impose a duty in tort. *Id.* at 465-466. The Court rejected this dichotomy in favor of the "separate and distinct" inquiry discussed above. *Id.* at 467. It noted the traditional principle that where "one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Id.* at 465. And in reconciling this principle with its "separate and distinct" analysis, the Court reasoned as follows:

> Like the plaintiff here, the plaintiff in *Osman* [*v Summer Green Law Care, Inc*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999)] was injured when she fell on a patch of ice. Also, like the defendant here, the defendant in *Osman* had contracted to provide snow removal services to the premises owner. In that case, however, the defendant had breached a duty separate and distinct from its contractual duty when it created a *new* hazard by placing snow
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> > on a portion of the premises when it knew, or should have known or anticipated, that the snow would melt and freeze into ice on the abutting sidewalk, steps, and walkway, thus posing a dangerous and hazardous condition to individuals who traverse those areas.
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> > In this case, . . . defendant['s] . . . failure to carry out its snow-removal duties owed to . . . [the parking lot owner] created no new hazard to plaintiff. Thus, plaintiff alleges no duty owed to her by defendant . . . separate and distinct from its contract with [the parking lot owner. Defendant] . . . could not logically breach a duty that it did not owe. The Court of Appeals erred in holding that defendant . . . was responsible for plaintiff's injuries solely on the basis of the contract . . . . [*Id.* at 468-469 (citations omitted).]

The foregoing further underscores that plaintiff's tort action on the Water Main Contract cannot be maintained. Plaintiff has not alleged that defendant Elm actively engaged in misconduct: plaintiff claims defendant failed to properly fulfill its duties under the Water Main Contract. Plaintiff's arguments on appeal all concern this alleged failure. Yet this failure created "no new hazard" for which defendant Elm would independently owe a duty of care. *Id.* at 469. Plaintiff's claims all stem from defendant Elm's alleged want of action, but plaintiff has proffered no duty separate from the contract for which defendant Elm could be held liable.

We conclude the trial court erred in failing to grant summary disposition as to plaintiff's contract-based claim. But because the parties have not addressed this argument, it is unclear whether plaintiff could otherwise allege a "separate and distinct" duty sufficient to hold defendant Elm liable. Accordingly, while we find it clear that summary disposition should have been granted on plaintiff's claims to the extent they relied on the Water Main Contract, it is not clear that defendant Wolverine is necessarily entitled to summary judgment on remand.

The trial court erred in failing to grant defendant Elm summary disposition on plaintiff's negligence and gross negligence claims, to the extent they relied on either the common work area doctrine or a third-party beneficiary theory. We reverse the denial of the relevant partial summary disposition motions and remand this case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder