STATE OF MICHIGAN

COURT OF APPEALS

DAVID SLATER,

Plaintiff-Appellant,

v

F.H. MARTIN CONSTRUCTION COMPANY,

Defendant-Cross-Plaintiff-Cross-Defendant-Appellee,

and

KROGER COMPANY OF MICHIGAN

Defendant-Cross-Defendant-Cross-Plaintiff,

and

SUMMIT ROOFING LLC,

Defendant-Cross-Plaintiff-Cross-Defendant,

and

CIMARRON SERVICES,

Defendant-Cross-Defendant-Appellee.

UNPUBLISHED
June 23, 2009

No. 285745
Oakland Circuit Court
LC No. 2006-079246-NO

Before: Borrello, P.J., and Meter and Stephens, JJ

PER CURIAM.

In this common work area doctrine cause of action, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant F.H. Martin Construction Company. We reverse.

Plaintiff asserts that the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) after the court determined that there were no genuine issues of material fact relating to plaintiff's common work area claim. We agree. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) or MCR 2.116(C)(8) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the pleadings, admissions and other evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007).

Our Supreme Court initially established the common work area doctrine in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974) (overruled on other grounds by 414 Mich 29). More recently, our Supreme Court applied *Funk* in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004), in which it explained:

> for 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.

"Essentially, the rationale behind the *Funk* doctrine is that the law should be such as to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees." *Latham v Bartan Marlow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008).

The first prong of the common work area doctrine requires plaintiff to show that defendant, as the general contractor, failed to take reasonable steps within its supervisory and coordinating authority. In addressing this issue, the trial court noted that Bob Charleston told plaintiff to remove the chain by going on the roof and cutting it from there. The court concluded that the recommendation constituted a reasonable step and that it was plaintiff's disregard of that recommendation that caused the injury. In referencing plaintiff's testimony that he did not feel comfortable with the method recommended by Charleston, the court concluded that plaintiff's "feelings" and "honest beliefs" about accessing the ladder from the "flat roof" were not sufficient to create a genuine issue of material fact regarding that particular prong. In so concluding, the trial court misconstrued the documentary evidence and oversimplified the situation in which plaintiff found himself on the day of the accident.

Both the trial court and defendant appear to conclude that Charleston ordered plaintiff to access the ladder from the structure's roof. However, plaintiff's deposition testimony indicated that Charleston merely *recommended* going on the roof. Plaintiff testified that Charleston said that if it were him that was responsible for cutting the chain, he would do it from the roof. Therefore, the question is whether it was reasonable for Charleston, when faced with plaintiff's inquiries about the ladder, to instruct plaintiff to remove the ladder and to *suggest* doing so by first accessing the roof. There is a genuine issue of material fact regarding whether Charleston's suggestion qualifies as a reasonable step. The record indicates that at the time that Charleston made his suggestion, he did not inquire into plaintiff's experience with ladders and with being on

a roof. Furthermore, despite the trial court's statement that the roof was flat, the record provides evidence that there was a slight pitch to the roof. Finally, it is undisputed that there had recently been a snowstorm and that plaintiff was concerned about potential traction problems on the roof. Therefore, when considering all of the evidence in the light most favorable to plaintiff, a trier of fact could potentially determine that Charleston failed to act reasonably when he instructed an untrained individual to access a pitched and potentially slippery rooftop. The trial court erred in determining that there was no genuine issue of material fact regarding this prong.

Regarding the second prong, the trial court found that there was not a genuine issue of material fact because the ladder was not a readily observable and avoidable danger. The court's holding was erroneous. As stated in *Latham*, the rationale of the common work area doctrine is to discourage general contractors from ignoring the unsafe working conditions that are created by subcontractors. The ladder in question was chained to the building by a subcontractor and was left in the way of plaintiff and his crew. Aware that the ladder was chained along the roofline and that plaintiff did not have the key to unlock the chain, defendant's agent instructed plaintiff to remove the ladder by cutting the chain. In order to cut the chain, defendant knew that plaintiff would either have to climb the ladder itself, or access the roof of the building. Plaintiff had not been trained to execute either of the potential removal methods and did not have any fall protection. Though a ladder may appear to be a simple and common tool at a construction site, a general contractor should certainly be aware that a 32-foot tall ladder poses a threat of harm to an untrained individual. Furthermore, the risk of harm was avoidable where Charleston could have prohibited plaintiff from removing the ladder and could have secured the assistance of someone more suited to the task. As indicated in *Latham*, a dangerous height, when combined with a lack of fall protection, can certainly present a readily observable and avoidable danger. *Latham, supra* at 113-114. The trial court therefore erred where a genuine issue of material fact existed regarding this prong of the common work area doctrine.

Next, the trial court held that there was no genuine issue of material fact regarding the third prong of the common work area doctrine. The third prong of the doctrine requires a showing that the readily observable danger created a high degree of risk to a significant number of workers. In granting defendant summary disposition, the trial court concluded that, "plaintiff cannot show that anyone but himself was endangered by his decision to climb the ladder." In contrast, we find that the dangerous condition at the construction site created a high degree of risk for six individuals, which is a significant number of workers.

The ladder in question was allegedly 32 feet in length. Plaintiff testified that at the time of the accident, he weighed approximately 215 pounds. Therefore, the ladder posed a high degree of risk to plaintiff, who fell from the ladder, and to five other individuals who were in the immediate vicinity and were at risk of being struck by plaintiff's falling body or the collapsing ladder. Specifically, plaintiff testified that four of his coworkers were in the immediate area of the accident at the time that he fell. Additionally, John Blickensdorf testified that plaintiff's body landed within four feet of where Blickensdorf was standing when the accident occurred. Each of these individuals could have been seriously injured because of the hazardous working condition.

In addition to finding that six people were placed in a high degree of risk by the ladder, we also find that six employees represent a significant number of workers, as required by the third prong of the common work area doctrine. While this Court has not explicitly stated what constitutes a "significant" number of workers, we do have some guidance on what constitutes an

insignificant number. In *Hughes v PMG Building, Inc*, 227 Mich App 1, 7-8; 574 NW2d 61 (1998), this Court held that the third prong of the doctrine was not satisfied where four workers were exposed to the alleged risk. The holding of *Hughes* does not prevent this Court from concluding that six is a sufficiently significant number of workers to satisfy the third prong. One of the workers was employed by Cimarron and Oliver C. Deluca Company employed the other five. The five Deluca employees represent the majority of that company's workers that were present at the site. The fact that six individuals faced potential injury is not insignificant and the trial court's holding to the contrary was inconsistent with the rationale of the common work area doctrine.

Finally, the trial court held that the fourth prong of the common work area doctrine was not satisfied where plaintiff failed to show that the accident occurred in a common work area. The record does not support the trial court's holding. "For a common work area to exist there must be an area where the employees of two or more subcontractors will eventually work." *Groncki v Detroit Edison Co*, 453 Mich 644, 663; 557 NW2d 289 (1996). Blickensdorf explicitly stated during his deposition that he and the other Cimarron employees were planning to work in the area of the accident on the day the accident occurred. It is undisputed that Deluca had additional concrete work that needed to be done at the time the accident occurred. Therefore, two separate subcontractors would have eventually worked in the area of the accident. Consequently, the area qualifies as a common work area and the fourth prong of the doctrine is satisfied.

The trial court erred in granting defendant's motion for summary disposition where the record demonstrates that plaintiff can satisfy each prong of the common work area doctrine.

Reversed and remanded for further proceedings on plaintiff's claims. We do not retain jurisdiction.

/s/.Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens