STATE OF MICHIGAN

COURT OF APPEALS

FRANK DEBEUL, Plaintiff-Appellant,	UNPUBLISHED February 15, 2011
V	No. 296094 Oakland Circuit Court
BARTON MALOW COMPANY, Defendant-Appellee.	LC No. 2008-094349-NO

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this action involving an injury at a construction site, plaintiff, an employee of a plumbing contractor, appeals as of right from the trial court's order granting summary disposition to defendant, the contract manager of the project, pursuant to MCR 2.116(C)(10). Relying on *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), the trial court concluded that defendant was entitled to summary disposition because, although the hazard that caused plaintiff's injury was within the scope of defendant's contractual obligations to Southfield Public Schools, "defendant did not owe plaintiff a duty that was separate and distinct from its contractual obligation as construction manager." Because we conclude that the trial court erred by failing to consider defendant's potential liability under the common-work-area doctrine applicable to general contractors, we reverse and remand for further proceedings.

Defendant was the manager of a construction project at Southfield High School pursuant to a contract with Southfield Public Schools. Plaintiff was employed by Oakland Plumbing, a plumbing contractor for the project. Plaintiff was injured when he tripped on "rebar" that was protruding through concrete in an area where he was unloading and transporting pipe from a truck. Plaintiff filed this negligence action against defendant, asserting that defendant was liable under the common-work-area doctrine, which provides an exception to the general rule that a general contractor is not liable to employees of subcontractors who are injured at a construction site. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it was not subject to liability under the common-work-area doctrine because it was only a contract manager, not a general contractor, and that it did not owe plaintiff any duty of care separate and

distinct from its contractual duties to Southfield Public Schools. The trial court agreed and granted defendant's motion.[1]

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Meridian Twp v Ingham Co Clerk*, 285 Mich App 581, 586; 777 NW2d 452 (2009). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Driver v Naini*, 287 Mich App 339, 344; 788 NW2d 848 (2010). The court must consider any admissible evidence submitted by the parties in a light most favorable to the nonmoving party. MCR 2.116(G)(6); *Meridian Twp*, 285 Mich App at 586. Summary disposition should be granted if the evidence fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

We agree with plaintiff that the trial court erred by analyzing defendant's potential liability under *Fultz*, without considering the common-work-area doctrine. The common-work-area doctrine provides a basis for defendant's liability to plaintiff, "separate and distinct" from its duties to Southfield Public Schools under its contract with Southfield Public Schools. As explained in *Ghaffari v Turner Constr Co*, 473 Mich 16, 20; 699 NW2d 687 (2005):

> At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees. However, in *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), this Court departed from this traditional framework and set forth an exception to the general rule of nonliability in cases involving construction projects:
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> "We regard it to be 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. [Emphasis added.]"

"Essentially, the rationale behind [the common-work-area] 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 Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008).

We disagree with defendant's argument that its status as "contract manager," as opposed to being a "general contractor," precludes liability under the common-work-area doctrine. The premise for imposing liability on a contractor under the common-work-area doctrine is the

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[1] Defendant alternatively argued that even if it were subject to general contractor liability under the common-work-area doctrine, plaintiff was unable to establish a genuine issue of material fact concerning its liability under that doctrine. In light of its decision, the trial court did not reach this question.

contractor's supervisory and coordinating authority over the worksite. *Ghaffari*, 473 Mich at 20; *Latham*, 480 Mich at 109. As explained in *Ghaffari*, 473 Mich at 20-21, quoting *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974):

> "Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.
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> [A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect employees of many or all of the subcontractors. . . . [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so. [*Id.* (internal citation and quotation marks omitted).]"

In this case, defendant's contract with Southfield Public Schools provided it with responsibility for coordinating the activities and responsibilities of the various other contractors on the project, including the sequence of construction and assignment of space in areas where the other contractors are performing work. Defendant was also responsible for reviewing the various other contractors' safety programs and coordinating the safety programs with those of the other contractors. In addition, defendant was required to regularly monitor the work of the other contractors on the project. In sum, defendant's contract provided it with the supervisory and coordinating authority of a general contractor. Under these circumstances, defendant's title as "contract manager," as opposed to "general contractor," is a distinction without a difference for purposes of the common-work-area doctrine. See *Ghaffari*, 473 Mich at 19 n 1 (under the terms of the defendant's contract with the premises owner, the defendant's title as a "construction manager," and not "general contractor," was a distinction without a difference for purposes of the common-work-area doctrine). Accordingly, the trial court erred by failing to consider defendant's potential liability under the common-work-area doctrine.

The elements of a claim under the common-work-area doctrine are: (1) 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 workers (4) in a common work area. *Latham*, 480 Mich at 109.

Defendant argues that, because plaintiff was the only worker at the site of the accident when the injury occurred, relief was precluded. However, in *Hughes v PMG Building, Inc*, 227 Mich App 1, 6; 574 NW2d 61 (1998), this Court explained that "[i]t is not necessary that other subcontractors be working on the same site at the same time; the common-work-area rule merely requires that employees of two or more subcontractors eventually work in the area." The Court held that the third prong of the doctrine was not satisfied where four workers were exposed to the alleged risk. *Id*. at 7. More recently, in *Alderman v JC Development Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010), the court held that six workers were not significant enough for the application of the common-work area-doctrine. In this case, however, defendant's

construction supervisor acknowledged that 45 workers were on the job site on the day the plaintiff was injured, albeit not at the time he fell. Given that the rebar was near an entry point to the jobsite, it is reasonable infer that a significant number of those 45 workers were exposed to risk.

As stated above, the risk must also be readily observable and avoidable. Plaintiff and defendant's construction supervisor both provided testimony that the rebar was readily observable. The parties have a dispute regarding the condition of the rebar at the time of the injury. Both sides agree that it was bent over. Both sides agree that the bending the rebar is designed to minimize the risk. The construction manager testified that caution tape, capping and bending were available means for minimizing risk but did not state that all of those measures needed to be employed to render the site reasonably safe, nor did he give unequivocal statements regarding which of those measures were utilized. Plaintiff argues that reasonable efforts to avoid the risk would include taping and capping. Plaintiff has offered the Department of Consumer and Industry Services Director's Office Construction Safety Standards and OSHA website excerpts regarding the kind of guarding recommended to avoid injury from rebar and work progress notes addressing the need to replace any missing rebar caps. Thus, there is a is a material question of fact related to whether, on the day at issue, the rebar was capped or marked with caution tape and whether all these measures were necessary to meet the standard of care for a common work area.

The analytical framework for determining whether there was a high degree of risk does not focus solely on the injury sustained by this plaintiff. In *Funk*, the case from which this theory of liability flows, the Court addressed the need to protect from aggravated injury. Thus, the focus is on the severity of potential harms to which workers are exposed, as opposed to the probability of an injury occurring. The case law on this issue is sparse and primarily unpublished. In *Pavia v Ellis-Don Michigan, Inc*, unpublished per curiam opinion of the Court of Appeals, issued November 27, 2001 (Docket No. 224327), the court found that a plaintiff who was faced with numerous beams on the ground in a common work area was not exposed to a high degree of risk. However, the only potential risk presented to that panel was a trip or fall. In this case, plaintiff has presented excerpts from governmental websites noting the danger of impalement on rebar. Defendant urges that the warning in those websites apply only when one falls from a substantial height. The website does not contain such a limitation. Further, this Court believes that the analysis should be on the instrumentality of the rebar, not the height of the potential fall. The rebar appears to be a substantial metal object with appreciable girth. While it is certain that falling onto it from a great height above the floor creates a substantial risk, so does tripping on such an object from any height as it brings a danger of the object protruding through a shoe, a knee or an arm and causing great damage to muscles, tendons, and nerves. The only evidence on the issue of high risk of harm was presented by plaintiff. The defense argued that the risk was minimal from a trip. However, they offered no contrary bulletins, expert testimony or other competent evidence to rebut the governmental warning.

For the reasons discussed above, plaintiff presented sufficient evidence to create genuine issues of material fact relating to each of the elements of a common-work-area cause of action. Consequently, the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause