STATE OF MICHIGAN

COURT OF APPEALS

DONALD CRONK, Plaintiff-Appellant,	UNPUBLISHED July 16, 2015
v	No. 322310 Oakland Circuit Court
DE JAGER CONSTRUCTION, INC., Defendant-Appellee.	LC No. 2013-133530-NO

Before: FORT HOOD, P.J., and SAAD and RIORDAN, JJ.

PER CURIAM.

Plaintiff, Donald Cronk, appeals as of right the trial court order granting summary disposition in favor of defendant, De Jager Construction, Inc, in this construction accident involving the common work area doctrine. We affirm.

I. FACTUAL BACKGROUND

Plaintiff and his wife were co-owners of D&C Security Systems, which is a company that installs and services alarm systems. The company also employed plaintiff's son, Michael Cronk. Both plaintiff and his son were hired through a company called Checkpoint Security ("Checkpoint") to install a security system at an "Ulta" store in Novi that was undergoing a buildout. Defendant's project manager, Jerry Westhoff, testified that defendant was the general contractor on the project. Westhoff testified that as general contractor, defendant had overall supervisory authority for the worksite and that defendant would coordinate contractors and schedule their work.

The area in which plaintiff was working at the time of his accident was a "narrow receiving type area" that was "probably 20 feet wide" and "100 feet long." Plaintiff testified that there was a data cabinet to which he needed access to complete his installation work. The cabinet was three feet off of the ground. He needed a stepladder to access the top of the cabinet. To access the top he needed only to step up one step, approximately 10 inches off the ground.

As plaintiff was stepping off the ladder, he lost his footing. He testified that there was nothing slippery or defective on the ladder or floor, he simply stumbled. After losing his footing, plaintiff took a couple of steps, traversed six to nine feet, then hit his head on another ladder that he thought might have been angled in some manner. He surmised that this ladder might have

been part of a stack of other ladders. Plaintiff's son testified that he observed two stacks of ladders, one with five ladders and one with four, leaning against the wall.

Plaintiff was injured and filed a lawsuit against defendant. He alleged one count of negligence under the common work area doctrine. In response, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff failed to satisfy the elements of the common work area doctrine. The trial court agreed with defendant, found no genuine issues of material fact, and granted defendant's motion for summary disposition. Plaintiff now appeals.

II. COMMON WORK AREA DOCTRINE

A. STANDARD OF REVIEW

We review de novo a grant of a motion for summary disposition under MCR 2.116(C)(10). *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). The motion "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we consider "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (internal quotations and citations omitted).

B. BACKGROUND LAW

The traditional rule governing contractor liability is that a general contractor cannot be found liable for the negligence of independent subcontractors. *Ghaffari v Turner Const Co*, 473 Mich 16, 20, 699 NW2d 687 (2005). However, in *Funk v Gen Motors Corp*, 392 Mich 91, 220 NW2d 641 (1974), the Michigan Supreme Court departed from this traditional rule, and developed what is known as the common work area doctrine. *Ghaffari*, 473 Mich at 20.

As the Michigan Supreme Court has emphasized, "[w]e 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." *Id.* (quotation marks, citation, and emphasis omitted). The theory 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).

Accordingly, under certain circumstances, a general contractor may be found liable pursuant to the common work area doctrine. The elements of such a claim 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 108-109. The failure to prove any one of these elements is fatal to the claim. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 59; 684 NW2d 320 (2004).

On appeal, plaintiff contests the trial court's findings regarding each of these elements.

C. SUPERVISORY & COORDINATING AUTHORITY

The first factor is whether defendant, the general contractor in this case, "failed to take reasonable steps within its supervisory and coordinating authority[.]" *Shawl v Spence Bros, Inc*, 280 Mich App 213, 234; 760 NW2d 674 (2008) (quotation marks and citation omitted). To the extent that the trial court relied on *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405; 516 NW2d 502 (1994), for principles that were abrogated in *Ormsby, supra*, the trial court was in error.

Defendant highlights evidence that plaintiff was not one of its subcontractors—as plaintiff was hired directly through Checkpoint and Ulta—and that plaintiff determined his own means and methods of performing his work. However, simply because defendant's control was limited in certain respects does not negate evidence that defendant had supervisory and coordinating authority over the project. Defendant's project manager, Westhoff, testified that defendant was the general contractor on the project. Westhoff testified that as general contractor, defendant had overall supervision of the worksite. Defendant coordinated contractors and informed them when defendant was ready for them to commence their services. Kenneth Givannini, defendant's jobsite superintendent, testified that he was responsible for scheduling plaintiff's work times. As superintendent, he was in charge of the worksite, he ran the daily activities at the jobsite, he scheduled all work to be done, and ensured that the project was completed timely and on budget.

Although defendant focuses heavily on the fact that plaintiff was employed directly through Checkpoint and Ulta, the fact remains that defendant was the general contractor and exerted what appears to be complete control over the worksite, including the coordination of plaintiff's work. There is at least a question of fact regarding whether defendant could have taken reasonable steps within its supervisory and coordinating authority to guard against the alleged hazard. *Latham*, 480 Mich at 108-109. Thus, there is a genuine issue of material fact regarding the first element of the doctrine, i.e., defendant's supervisory and coordinating authority. *Shawl*, 280 Mich App at 234. However, this finding is not dispositive of the issue before us.

D. READILY OBSERVABLE & AVOIDABLE DANGER

Plaintiff also must establish that there was a readily observable and avoidable danger on the worksite. *Latham*, 480 Mich at 108-109. Of initial significance is that the Michigan Occupational Safety and Health Act (MIOSHA) does not impose a duty on defendants, although a violation of a MIOSHA regulation can be used as evidence of negligence. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 721; 737 NW2d 179 (2007); *Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 235-236; 463 NW2d 236 (1990); MCL 408.1002.

Plaintiff highlights two MIOSHA regulations to support his contention that the stacks of ladders were an observable and avoidable danger. First, MIOSHA Rule 408.41122(1) provides, "A ladder shall not be placed in a passageway, doorway, driveway, or any location where it may be displaced, unless it is protected by barricades or guards or is secured to prevent displacement." Plaintiff contends this regulation mirrors defendant's safety procedures.

However, there is no evidence that the stacks of ladders were being stored in a doorway, driveway, or similar location. Nevertheless, plaintiff contends that by placing the ladders against the wall, they were at a location where they could be displaced. Defendant counters that this interpretation would render problematic a ladder placed anywhere on a worksite because it would always have the potential to be displaced. Defendant argues that the regulation is clearly meant to keep ladders out of high traffic areas.

We agree that the interpretation plaintiff advances contravenes the plain language of the regulation. In the context of the two locations identified—a doorway or driveway—the reference to "any location where it may be displaced" is in relation to an area where worker traffic is heavy and work materials may not be secure. See *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003) ("Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context"). Nor is there any indication that the ladders in this case were unsecure in their placement against the wall, or that they were in danger of being displaced. In fact, plaintiff never testified that the ladder he fell against was displaced.

Second, plaintiff cites MIOSHA Rule 408.40818(3), which states that: "Storage areas, aisles, and passageways shall be kept free of the accumulation of materials that constitutes a hazard to the movement of material-handling equipment and employees. Such areas shall be kept in good repair." However, this rule pertains to storage of materials, not tools or equipment. Even if the rule were applicable, plaintiff does not contend that the ladders were stored in a storage area, aisle, or passageway. Instead, plaintiff was in a "narrow receiving type area," that was "probably 20 feet wide" and "100 feet long."

Plaintiff alternatively relies on the testimony of defendant's superintendent, Kenneth Givannini, to establish that the ladders were an observable and avoidable danger. Givannini hypothesized that if there were five or seven ladders in a corner "right where you were working," it could create a hazard for people working in that area. However, that is not the precise danger presented in this case. Plaintiff's son testified that there were two stacks of ladders, one with five ladders and one with four.[1] Plaintiff could not recall exactly how many ladders were present, or the exact arrangement of the ladders. At one point, plaintiff testified that the ladders were "[n]ot straight up and down, but it had to be on some sort of up and down angle or I couldn't have struck it." He eventually testified, "I can't tell you whether there were ladders this way. I don't know the answer to that question." Moreover, neither plaintiff nor his son testified that the ladders were arranged in some haphazard or unsecured fashion. Rather, they appeared to

[1] Plaintiff did not know if the ladder he fell against was one of the ladders his son identified as being placed in the area while plaintiff was working.

be stacked against the wall in a secure fashion. Plaintiff also testified that if he viewed the ladder as a hazard, he could have requested it to be moved or refused to work in the area.

We confine our analysis to the precise issue before us: whether there was a readily observable and avoidable danger. *Latham*, 480 Mich at 108-109. It is not a readily observable and avoidable danger for a worker to stumble, six to nine feet away, off of a ladder and then somehow strike his head on a seemingly secure ladder that may have been part of a stack of ladders. In sum, plaintiff contends that the mere fact that there was equipment such as ladders on the worksite—even though they posed no obvious risk and were not obstructing any obvious work area—should be sufficient to establish a readily observable and avoidable danger. Yet, as the Michigan Supreme Court has cautioned, "the danger cannot be just the unavoidable, perilous nature of the site itself." *Latham*, 480 Mich at 107.

Because plaintiff has failed to present a genuine issue of material fact regarding the readily and avoidable danger element, his common work area claim fails.

E. SIGNIFICANT NUMBER & COMMON WORK AREA

Even if we were to review the remaining elements of the common work area doctrine, plaintiff's claim still fails.

The parties dispute the last two elements of the doctrine, namely, that the danger created a high degree of risk to a significant number of workers in a common work area. *Latham*, 480 Mich at 108-109. The parties first disagree regarding the time frame for when other workers must be exposed to the risk. Defendant contends that the exposure must occur contemporaneously with plaintiff's injury; plaintiff contends that the exposure must take place during construction more generally.

Even accepting the time frame plaintiff advances, his claim on these elements still fails. The Michigan Supreme Court has held, albeit in an order, that when "two to six employees of one subcontractor, including plaintiff," are exposed to a risk, that does not constitute "a high degree of risk to a significant number of workers." *Alderman v JC Dev Communities, LLC*, 486 Mich 906; 780 NW2d 840 (2010). Further, "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).

Here, despite plaintiff's assertion that the risk or danger was that the rows of ladders could be displaced, the precise danger at issue was the risk falling off of a ladder by one's own volition, stumbling six to nine feet away, and then hitting one's head and body on one ladder that may have been part of a stack of ladders. While plaintiff produced evidence that other contractors worked in the room, he did not produce evidence that other contractors used a ladder to work in a similar fashion. He did not even know for how long the ladder he fell into had been

there. In other words, plaintiff did not produce any evidence that a significant number of workers were exposed to the alleged danger to which he was exposed.[2]

Consequently, plaintiff did not produce evidence of a genuine issue of material fact that defendant exposed other contractors to a high degree of risk in a common area. *Latham*, 480 Mich at 108-109.

III. CONCLUSION

Because plaintiff failed to establish a genuine issue of material fact regarding all the elements of the common work area doctrine, we agree with the trial court that summary disposition in favor of defendant is proper. We affirm.

/s/ Karen M. Fort Hood
/s/ Henry William Saad
/s/ Michael J. Riordan

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[2] See also *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8-9; 574 NW2d 691 (1997), for the proposition that if a "common work area" is interpreted too broadly:

> then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended. This Court has previously suggested that the Court's use of the phrase 'common work area' . . . suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard.