STATE OF MICHIGAN

COURT OF APPEALS

BRIAN K. COCKFIELD and RACHAEL COCKFIELD,

Plaintiffs-Appellants,

v

SACHSE CONSTRUCTION & DEVELOPMENT CORPORATION,

Defendant-Appellee,

and

AMERICAN STEEL CONSTRUCTION, INC.,

Third-Party Defendant.

UNPUBLISHED
January 23, 2018

No. 333376
Oakland Circuit Court
LC No. 2014-139022-NI

Before: TALBOT, C.J., and MURRAY and O'BRIEN, JJ.

PER CURIAM.

Plaintiffs, Brian K. Cockfield and Rachael Cockfield,[1] appeal as of right the trial court's order granting the motion for summary disposition filed by defendant, Sachse Construction & Development Corporation. For the reasons stated herein, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This matter arises from a construction accident during the building of a Walgreens in Birmingham. Sachse served as the general contractor for the project, and plaintiff worked on the project as an employee of subcontractor American Steel Construction, Inc.[2]

[1] As the injured party in this matter, we will use plaintiff in the singular to refer to Brian Cockfield.

On January 7, 2013, plaintiff and fellow American Steel employee, Chris Ecker, were assembling a stairway in the building. The assembly involved tack welding various pieces of the stairway together using stringers and clamps, and only permanently welding upon completion of the entire structure. After lunch that day, when plaintiff went to the top platform of the uncompleted stairway to look for a tool, one of the clamps broke, causing the stairway and plaintiff to fall.

According to plaintiff, he wore no fall protection equipment while assembling the stairway or when the accident occurred because, although they had the equipment on site, there was no place above to "tie off." Further, he testified that Sachse construction manager John Ealy[3] observed him and Ecker assembling the stairway and asked about tying off, but only nodded and walked away when plaintiff pointed out the lack of places to do so.

Following the accident, plaintiffs filed a negligence complaint against Sachse, seeking damages for the injuries plaintiff sustained in the fall. Plaintiff alleged that: (1) the area where he and Ecker had been building the stairway was a "common area" under Sachse's supervision as general contractor; (2) Sachse had a duty to subcontractor employees under the common law, MIOSHA,[4] and OSHA,[5] to provide safety equipment that would prevent falls from heights above six feet; and (3) "Sachse . . . negligently failed to discharge its duty . . . by failing to provide safety harnesses, failing to instruct the workers in the common area of the stairway to utilize safety harnesses, and negligently instructing their subcontractors to perform dangerous activities without proper safety devices in place when they knew, or should have known, that severe injury could occur as a result of a fall from a section of unwelded stairway."

Sachse answered plaintiffs' complaint and separately filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), requesting dismissal of the entire complaint. In so doing, Sachse asserted that the common work area exception to the general rule that general contractors cannot be held liable for the negligence of subcontractors and their employees did not apply, because the failure of the clamp was not a readily observable danger that created a high degree of risk to a significant number of workers in a common area. Further, Sachse argued that it owed plaintiff no legal duty because MIOSHA regulations apply only to a worker's employer—in this case subcontractor American Steel—and that it is subcontractors who have the duty to ensure workplace safety for their employees.

In response to the motion, plaintiffs argued that Sachse contracted with Walgreens to assume responsibility for safety on the project, Ealy undertook that duty when he asked plaintiff

---

[2] The trial court granted Sachse's motion to file a third-party complaint against third-party defendant American Steel, but American Steel is not a party to this appeal.

[3] In his deposition, plaintiff refers to this Sachse employee as John Healy, but the record makes clear that his name is actually John Ealy.

[4] Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq*.

[5] Occupational Safety and Health Act, 29 USC 651 *et seq*.

about tying off, and Sachse breached the duty by failing to provide a place to tie off. Thus, they asserted, Sachse was liable for plaintiff's injuries under the common work area doctrine because: (1) it had control over workplace safety; (2) the danger of working on the stairway without fall protection was readily observable and avoidable—Sachse allowed a previous demolition subcontractor to leave no appropriate tie-off area, and Ealy knew this but allowed work on the stairway to continue; and (3) the area near the stairway was a common work area where a significant number of subcontractor employees could have been hit by plaintiff or other falling debris.

Sachse filed a reply to plaintiffs' response, arguing that plaintiff misstated the relevant danger in this case as falling debris from the stairway collapse, when the complaint alleged only that Sachse breached its duty to require the use of safety harnesses, and that plaintiff was the only worker exposed to this fall risk. Further, it asserted that plaintiffs cited to the construction agreement between Sachse and Walgreens as a source of Sachse's duty to plaintiff, but failed to allege that he was a third-party beneficiary of the agreement.[6]

At the end of the motion hearing during which the parties made arguments consistent with those made in their briefs, the trial court granted Sachse's motion for summary disposition, holding that plaintiff failed to present sufficient evidence to support all elements of the common work area doctrine. In so doing, it initially stated: "First, plaintiff has not established that there was a readily observable and avoidable danger on the work site. The danger cannot be just the unavoidable perilous nature of the site itself. Here, the failure of the clamp itself was not a readily observable and avoidable nature." But then, it reasoned:

> Next, plaintiff has not established the last two elements. Namely, the danger created a high degree of risk to a significant number of workers in a common work area. Here the danger alleged in plaintiff's complaint is that plaintiff was not wearing appropriate fall protection when he decided to climb up on the unwelded stairway in search of his tools. However, the only worker exposed to this fall risk would be plaintiff. Therefore, the failure to plaintiff to wear appropriate fall protection clear did not present a "high degree of risk to a significant number of workman [sic]."[7]

---

[6] Plaintiffs then filed a response to Sachse's reply, requesting leave to amend the complaint, if necessary, and stating: "In this case, the area in question was demolished by a company under the supervision of Sachse. The area was left with no safety tie offs before Plaintiff's employer was asked to install the stairs." However, it is not clear that the trial court actually considered this response. At the beginning of the motion hearing, the court said, "So, I've read the defendant's motion, the response, and the reply."

[7] Plaintiffs subsequently filed a motion for rehearing and to set aside the trial court's order, which the court denied for failure to demonstrate a palpable error.

II. ANALYSIS

Plaintiffs first argue that the trial court erred by granting summary disposition solely on the basis of the common work area doctrine. Specifically, they assert that the common work area doctrine does not prevent suits against a general contractor for direct negligence.[8]

We review de novo a trial court's decision on a motion for summary disposition. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). "A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996).[9] A court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "[A] genuine issue of material fact exists when, viewing the evidence in a light most favorable to the nonmoving party, the 'record which might be developed . . . would leave open an issue upon which reasonable minds might differ.' " *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013) (quotation marks and citations omitted). To make the determination, we must consider " 'the pleadings, admissions, affidavits, and other relevant documentary evidence of record . . . .' " *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206-207; 828 NW2d 459 (2012), quoting *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

For their argument, plaintiffs focus on the Michigan Supreme Court's statement, in *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008), that traditionally, "*in the absence of its own active negligence*, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee and . . . the immediate employer of a construction worker is responsible for the worker's job safety." (Emphasis added.) And they contend that they alleged such "direct negligence" against Sachse in Paragraph 10 of the complaint, which reads:

---

[8] We note that plaintiffs failed to adequately preserve this argument for appellate review. " 'For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.' " *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) (citation omitted). Plaintiffs never asserted, in their response to Sachse's motion for summary disposition, that the trial court should look beyond the common work area doctrine to analyze their negligence claim. And to the extent, if at all, they raised the argument for the first time in their motion for rehearing, it is not properly preserved. See *Farmers Ins Exch v Farm Bureau Gen Ins Co*, 272 Mich App 106, 117-118; 724 NW2d 485 (2006). Nevertheless, we address the argument, as any potential preservation issues do not affect our conclusion.

[9] Sachse also brought the motion for summary disposition pursuant to MCR 2.116(C)(8), but attached deposition transcripts and other evidence, and the trial court appeared to consider these attachments to make its ruling. If a trial court looks beyond the pleadings to decide a motion for summary disposition, this Court "will review the motion as having been denied pursuant to MCR 2.116(C)(10)." *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 31; 627 NW2d 5 (2001).

> Defendant Sachse, by and through its employees, negligently failed to discharge its duty to the Plaintiff under Michigan Common Law and statutory authority by failing to provide safety harnesses, failing to instruct the workers in the common area of the stairway to utilize safety harnesses, and negligently instructing their subcontractors to perform dangerous activities without proper safety devices in place when they knew, or should have known, that severe injury could occur as a result of a fall from a section of unwelded stairway.

The common work area doctrine is an exception to the rule of general contractor nonliability. *Latham*, 480 Mich at 112. "[F]or a general contractor to be held liable under the 'common work area doctrine,' a plaintiff must show that (1) the . . . 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; 684 NW2d 320 (2004). Thus, the doctrine contemplates some form of negligence or breach of duty on the part of a general contractor. And upon review of plaintiffs' complaint, especially in the context of the arguments made by plaintiffs in response to Sachse's motion for summary disposition, it is clear they alleged liability solely on the basis of the common work area doctrine. Paragraph 10 of the complaint simply lists the ways in which plaintiffs believed Sachse failed to take reasonable steps within its authority to guard against the dangers plaintiff faced when working on a tall stairway.

Moreover, the allegations plaintiffs made against Sachse in Paragraph 10 are the type of allegations made against general contractors in other common work area doctrine cases. In *Latham*, for example, as here, the plaintiff claimed that the defendant construction manager "failed to ensure that plaintiff would use proper fall protection . . . despite knowing that such protection was necessary . . . . *Latham*, 480 Mich at 109. And in *Ormsby*, the injured subcontractor employee alleged that the contractor "negligently supervised the project, and acquiesced to unsafe construction activities[.]" *Ormsby*, 471 Mich at 50. Thus, the trial court did not err by analyzing plaintiffs' claims against Sachse under the common work area doctrine only.

Plaintiffs also argue that the trial court's analysis and determinations under the common work area doctrine were flawed because: (1) contrary to the court's reasoning, the relevant danger Sachse failed to guard against was not a defect in one of the stairway's clamps, but the risk of performing work high above the ground with no fall protection equipment, and (2) this danger created a high degree of risk to a significant number of workers, as other subcontractor employees were working in the area near the stairway, and could have been hit by falling debris or plaintiff himself.

Plaintiffs are correct that the trial court initially misstated the relevant danger plaintiff faced when it reasoned that "the failure of the clamp itself was not a readily observable and avoidable nature." For purposes of the common work area doctrine, "the danger [which presents a high degree of risk to a significant number of workers] cannot be just the unavoidable, perilous nature of the site itself." *Latham*, 480 Mich at 107. And in a factually similar case where the plaintiff was working on a mezzanine without fall protection equipment and fell when a sheet of

drywall cracked, *id*. at 108, the Supreme Court reasoned that the relevant danger was that "of *working at heights without fall protection equipment*," *id*. at 114. However, in the end, the court actually conducted its common work area doctrine analysis using the danger alleged by plaintiffs, stating: "Here the danger alleged in plaintiffs' complaint is that plaintiff was not wearing appropriate fall protection when he decided to climb up on the unwelded stairway in search of his tools. However, the only worker exposed to this fall risk would be plaintiff. Therefore, the failure of plaintiff to wear fall protection clearly did not present a 'high degree of risk to a significant number of workman [sic].' "

The evidence presented and relevant law supports the trial court's determination. Seemingly ignoring their own argument that the danger Sachse failed to protect plaintiff from was working at a great height with no fall protection equipment, plaintiffs assert that the trial court "erred in ruling as a matter of law that the collapse of the stairway . . . could not create a high degree of risk to a significant number of workers who could be injured by falling material or [plaintiff] himself." Although plaintiff testified in his deposition that other contractors used a makeshift door near the stairway to transfer materials, and that he believed other people were working in the area behind the stairway, plaintiff never testified or presented any evidence that these employees worked at great heights without fall protection, and "[i]t is this danger to which a significant number of workers must [have been] exposed in order for a claim to exist." *Latham*, 480 Mich at 114. Indeed, "the common work area formulation [is] 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." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 8; 574 NW2d 691 (1997). Thus, the fact that other workers in the vicinity of the stairway could have been hit by debris from its collapse is irrelevant. See *Hughes*, 227 Mich App at 6-8 (reasoning that, where a subcontractor employee fell from a collapsed porch overhang, workers near the vicinity of the overhang, but not working on it, were not subject to the same danger).

Further, plaintiff admitted that he and one other American Steel employee had been assembling the stairway, and no other contractors used the stairway before it was installed. But in *Hughes*, this Court determined that four workers subject to the same danger did not amount to a significant number for common work area doctrine purposes. *Id*. at 6-8. And in *Alderman v JC Dev Communities, LLC*, 486 Mich 906, 906 (2010), the Supreme Court held that two to six employees of one subcontractor did not constitute a significant number of workers. Thus, plaintiffs failed to establish a genuine issue of material fact with regard to the third element of the common work area doctrine, and the trial court correctly determined that Sachse was entitled to judgment as a matter of law.[10]

[10] Plaintiffs make no arguments on appeal regarding whether the area near the stairway constituted a common work area. Thus, we do not address this fourth element of the common work area doctrine.

Affirmed. Having prevailed in full, Sachse may tax costs. MCR 7.219(A).

/s/ Michael J. Talbot
/s/ Christopher M. Murray
/s/ Colleen A. O'Brien