STATE OF MICHIGAN

COURT OF APPEALS

AMY FELTY, Personal Representative of the ESTATE OF LEO FELTY, JR.,	UNPUBLISHED July19, 2011
Plaintiff-Appellant,	
v	No. 297991 Washtenaw Circuit Court
SKANSKA USA BUILDING, INC.,	LC No. 08-001132-NO
Defendant-Appellee.	

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order granting summary disposition to defendant. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

Leo Felty, Jr. sustained fatal injuries when he fell from a scaffold while performing masonry work on a remodel and addition to the University of Michigan Museum of Art in Ann Arbor. Defendant, Skanska USA Building, Inc. (Skanska), was the general contractor for the project and Felty worked for a subcontractor, Davenport Masonry (Davenport). The record reflects that, on February 28, 2008, Davenport's foreman, Richard Benner, directed two Davenport employees, James Copeman and Jeffery Townsend, to move a hydromobile scaffold to another location on the job site. Copeman and Townsend moved the scaffold, but failed to install some of the scaffold planking and a guardrail before they took a break at around 10:00 a.m. After their break, Copeman was called to work in a different location on the job site, and Townsend returned to the scaffold with Felty and another mason, Lyle Vance. According to Townsend, he was operating a crane and Felty instructed him to hoist some tools up to them on the scaffold. Though Townsend knew that the scaffold was missing a guardrail, he believed Felty and Vance would install the guardrail before they began their work. Felty had installed guardrails on the scaffold in the past and was, in fact, the union job steward who was primarily responsible for ensuring jobsite safety for himself and other employees.

According to Vance, he and Felty noticed that the scaffold's guardrail was missing, but did not install it. Vance conceded that the guardrail was 12 feet away and that it would have taken only around five minutes to mount it on the scaffold. Vance stated that it was simply a "terrible mistake" that he and Felty chose not to put the guardrail up before they began their

work. Vance and Felty worked from approximately 10:30 a.m. until they took their lunch break at noon. At around 12:30 p.m., they returned to their work on the scaffold and, at approximately 3:00 p.m., Felty fell off of the unguarded end of the scaffold as he worked backwards installing a backer rod on the wall of the building. Later that afternoon, Felty died of his injuries at the University of Michigan hospital.

Felty's wife filed this action on November 7, 2008, and alleged that, as the general contractor, Skanska is liable for Felty's death because it breached various duties on the job site, including, among other things, failing to inspect the scaffold, warn of a dangerous condition, adequately supervise contractors, and implement adequate accident prevention programs. Skanska filed a motion for summary disposition on February 1, 2010, and argued that, as the general contractor, Skanska is not liable for Felty's injuries and that plaintiff cannot establish a claim under the common work area doctrine. In response, plaintiff argued that there are questions of material fact regarding the application of the common work area exception that should be determined by a jury. The trial court granted summary disposition to defendant on the ground that the common work area doctrine does not apply because plaintiff failed to show that the scaffold presented a high degree of risk to a significant number of workers.

II. ANALYSIS

Plaintiff contends that the trial court erred in its application of the common work area doctrine. The trial court granted summary disposition to Skanska under MCR 2.116(C)(10). This Court reviews de novo the trial court's grant of summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). As the Court in *Latham* further explained:

> We review a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. [*Id.*]

"In Michigan, as a matter of public policy, the subcontractors on a job site have a duty to ensure the worksite is safe for their employees." *Shawl v Spence Bros, Inc*, 280 Mich App 213, 234; 760 NW2d 674 (2008). Accordingly, it is a well-established rule in Michigan that "the immediate employer of a construction worker is responsible for the worker's job safety," *Latham*, 480 Mich at 112, and a general contractor is not liable for the negligence of a subcontractor. *Shawl*, 280 Mich App at 234. However, an exception applies under the "common work area" doctrine as set forth by our Supreme Court in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro–Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

Only when the four-part test set forth in *Funk* is satisfied may a general contractor be held liable for the negligence of employees of an independent subcontractor. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48, 56; 684 NW2d 320 (2004). Under the "common work area" doctrine, for a general contractor to be held liable, "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." *Id*. at 54.

As discussed, the trial court ruled that plaintiff failed to establish that there was a danger "that created a high degree of risk to a significant number of workmen . . . ." *Id*. A "plaintiff must satisfy all the elements that give rise to a duty owed by a general contractor." *Latham*, 480 Mich at 115 n 25; *Ormsby*, 471 Mich at 59-60. Accordingly, if correct, the trial court's finding on this element is dispositive of plaintiff's claim.

We hold that the trial court correctly ruled that plaintiff failed to establish that the absence of a guardrail on the scaffold created a high degree of risk to a significant number of workers. The record evidence shows that this was a hazard created by employees of a single subcontractor, Davenport, and that only two Davenport employees were exposed to the risk. This is not a case in which a general contractor required multiple trades to work at heights without any available fall protection. Davenport's own job foreman directed two Davenport employees, Copeman and Townsend, to move the scaffold for use by two other Davenport employees, Felty and Vance. Copeman and Townsend both were deemed "competent persons" to erect and move scaffolding on the job site. Their failure on this day to install the guardrail placed Felty and Vance at risk, and Felty and Vance's recognition of the danger—and their failure to abate it—placed themselves at risk. However, no evidence established that any other workers were placed at risk by this isolated failure. We calculate the alleged danger to a "significant number of workers" at the time the plaintiff was injured. *Ormsby*, 471 Mich at 59-60 n 12. Here, the area was roped off to prevent others from walking underneath the scaffold and no other trades were using the scaffold when this occurred. See *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 7-8; 574 NW2d 691 (1997). Accordingly, plaintiff failed to establish a genuine issue of material fact that a significant number of workers were exposed to the risk and the trial court correctly granted summary disposition to Skanska.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio