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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-431
A11-440

SFM Mutual Insurance Company,
Appellant (A11-431), Plaintiff (A11-440),
Michael Schwenker, Plaintiff (A11-431),
Appellant (A11-440),

vs.

Hawk & Sons, Inc., defendant and third party plaintiff,
Respondent,

vs.

Alvin E. Benike, Inc.,
Third Party Defendant,
Mayo Clinic, third party defendant,
Respondent (A11-431),
SFM Mutual Insurance Company,
Plaintiff,
Michael Schwenker,
Appellant,

vs.

Hawk & Sons, Inc., defendant and third party plaintiff,
Respondent,

vs.

Alvin E. Benike, Inc.,
Third Party Defendant,
Mayo Clinic, third party defendant,
Respondent.

Filed September 6, 2011
Affirmed
Stauber, Judge

Olmsted County District Court
File Nos. 55CV075989; 55CV079614

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Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

In these consolidated appeals, appellants challenge the summary-judgment dismissal of their negligence claims arising from a construction-worksite accident. Appellants argue that the district court erred by finding that (1) respondent-subcontractor owed no duty of care to the injured plaintiff and (2) appellants' claims are nonetheless barred by the primary assumption of risk doctrine. We conclude that respondent-subcontractor owed no duty of care and affirm on that basis.

FACTS

The material facts of this case are largely undisputed. On March 3, 2006, Mayo Clinic issued a work order to add a mezzanine level in the incinerator room at its waste-

management facility. Prior to this project, the incinerator room was an open room several stories high. It contained a steel stairway leading up to a landing where the mezzanine level would be built. The landing of the stairway was made of metal grate and was surrounded by a steel railing. The project involved installing steel framing and a steel deck, then pouring a lightweight concrete topping on the deck to create the mezzanine floor.

Mayo Clinic hired Alvin Benike, Inc. (Benike) as the general contractor for the project. Respondent Hawk & Sons, Inc. (Hawk) was hired as a subcontractor to erect the steel framing and decking upon which the concrete would be poured. Hawk commenced its work on August 1, 2006. After erecting the steel beams and laying the steel decking, Hawk cut a 30" x 30" hole in the decking. The blueprints required the hole, which was designed to allow materials to be hoisted through the floor from the level below. The blueprints stated: "30" x 30" opening thru floor. Hatch by others (owner verify size and location)."

Hawk completed its work on August 14, 2006. Before leaving, Bruce Elliott, Hawk's foreman on the project, placed a piece of plywood found onsite over the hole and wrote "Hole" on the plywood in black marker. The cover used by Elliott was not Occupational Safety and Health Act (OSHA) compliant. The guardrail around the landing was still in place and prevented anyone from accessing the new mezzanine floor unless they climbed over the rail.

After Hawk completed its work, Benike was responsible for placing mesh or rebar on the deck and pouring the concrete floor. Appellant Michael Schwenker, Benike's

foreman on the project, made his first visit to the site sometime prior to August 17, 2006, to see whether the mesh had been installed and to determine how much concrete would be needed. Schwenker was accompanied by Wade Schwinefus, a Mayo Clinic employee. When Schwenker visited the mezzanine level, the existing guardrail was in place and he had to climb over the rail to access the mezzanine floor and take measurements. Schwenker told Schwinefus that the guardrail would need to be removed so that his crew could move wheelbarrows out onto the floor. A Mayo Clinic employee removed the guardrail at Schwinefus's direction sometime after Schwenker's first visit.

Schwenker returned to the jobsite a second time on August 17. By this time, the guardrail had been removed. It is unclear whether this was the first time Schwenker noticed the hole and plywood covering or whether he saw it on his first visit to the site. Regardless, Schwenker noticed that the hole was covered with a piece of plywood with the word "HOLE" written on it. He also examined the piece of plywood, lifting it up to see if the hole was edged so that his crew could pour concrete around it.

Schwenker and another worker were in the process of placing sheets of wire mesh on the mezzanine floor when Schwenker fell through the hole to the concrete floor 17 feet below and suffered injuries as a result. Following his injury, Schwenker received worker's compensation benefits from appellant SFM Mutual Insurance Company (SFM), Benike's worker's compensation carrier. SFM brought a subrogation action against Hawk seeking recovery for payment of benefits. SFM alleged that Schwenker's injuries were caused by Hawk's failure to properly cover and guard the hole in the floor. Schwenker later commenced a separate negligence action against Hawk, and the two

actions were consolidated. Hawk answered SFM and Schwenker's complaints and brought third-party complaints against both Benike and Mayo Clinic, seeking contribution or indemnity if Hawk was found liable to SFM or Schwenker. Benike and Mayo Clinic both counterclaimed against Hawk. Mayo Clinic also brought a cross-claim against Benike.

Hawk and Mayo Clinic brought summary judgment motions for all claims asserted against them by all parties. The district court granted the motions and entered judgment, finding that neither Hawk nor Mayo Clinic owed a legal duty to Schwenker. The district court further found that even if the parties owed a duty, Schwenker's claims were barred by the doctrine of assumption of risk. Schwenker and SFM now challenge that judgment in these consolidated appeals.[1]

D E C I S I O N

Appellants argue that the district court erred by finding that Hawk owed no legal duty to Schwenker and that Schwenker primarily assumed the risk of his injuries.

On appeal from summary judgment, we ask (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). We

[1] On June 1, 2011, this court issued an order dismissing Mayo Clinic as a party to the appeal. A special term panel concluded that Mayo Clinic was not a proper responding party because Hawk did not file a notice of related appeal and had therefore not preserved for appellate review its challenge to the district court's dismissal of its third-party claim against Mayo Clinic.

view the evidence "in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

A defendant is entitled to summary judgment where the record "reflects a complete lack of proof on an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). The essential elements of a negligence claim are: "(1) duty; (2) a breach of that duty; (3) that the breach of that duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury." *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. 1982) (quotation omitted). The existence of a legal duty is ordinarily an issue for the court to determine as a matter of law. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001).

Appellants argue that Hawk owed a duty of care pursuant to federal OSHA regulations. Appellants do not appear to argue that Hawk's alleged violations of OSHA regulations constitute negligence per se, only that OSHA regulations are evidence of a standard of care that was owed to Schwenker. By rule, federal OSHA regulations have been adopted for application under the Minnesota Occupational Safety and Health Act (MOSHA), Minn. Stat. §§ 182.65 to .676 (2010). Minn. R. 5205.0010 (2009).

OSHA contains general fall protection regulations for construction workplaces. *See* 29 C.F.R. § 1926.500 (2011). But steel erection work is governed by a separate, more specific set of regulations. *See* 29 C.F.R. § 1926.500(a)(2)(iii) ("Fall protection requirements for employees performing steel erection work (except for towers and tanks) are provided in subpart R of this part"). Subpart R, 29 C.F.R. §§ 1926.750-.761 (2011), provides requirements intended "to protect employees from the hazards associated with

steel erection activities involved in the construction, alteration, and/or repair of single and multi-story buildings, bridges, and other structures where steel erection occurs." 29 C.F.R. § 1926.750(a). It is undisputed that Hawk was engaged in steel erection work.

The relevant fall-protection regulations for steel erection work are as follows:

> (a) *General requirements*. (1) Except as provided by paragraph (a)(3) of this section, each employee engaged in steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.
>
> (2) *Perimeter safety cables*. On multi-story features, perimeter safety cables shall be installed at the final interior and exterior perimeters of the floors as soon as the metal decking has been installed.

29 C.F.R. § 1926.760(a). The regulations also provide guidelines for when fall protection equipment must be left in place for use by other trades:

> (e) *Custody of fall protection*. Fall protection provided by the steel erector shall remain in the area where steel erection activity has been completed, to be used by other trades, only if the controlling contractor or its authorized representative:
>
> (1) Has directed the steel erector to leave the fall protection in place; and
>
> (2) Has inspected and accepted control and responsibility of the fall protection prior to authorizing persons other than steel erectors to work in the area.

29 C.F.R. § 1926.760(e).

The district court found that Hawk had no duty to provide fall protection to Benike's employees or to leave fall protection in place after it completed its work on August 14, 2006. The district court concluded that because Benike did not direct Hawk

to leave fall protection in place and did not inspect and accept responsibility for the fall protection, Hawk owed no duty to Schwenker.

Appellants argue that under this court's decision in *O'Neil v. Wells Concrete Products Co.*, 477 N.W.2d 534, 537 (Minn. App. 1992), *review denied* (Minn. Jan. 17, 1992), Hawk owed a duty to all workers on the construction site, not just its own. In *O'Neil*, this court held that the district court properly admitted testimony on OSHA standards as evidence of a standard of care, despite the fact that the plaintiff was not an employee of the violating contractor. *O'Neil*, 477 N.W.2d at 537. The *O'Neil* court stated that the "primary purpose of OSHA and MOSHA is to protect the safety of all workers on a construction site, not just the workers of the particular contractor violating the OSHA regulations." *Id.*

Hawk argues that OSHA regulations impose obligations on employers only with respect to their own employees. Hawk cites Minn. Stat. § 182.653, subd. 2, which provides that "[e]ach *employer* shall furnish to each of *its employees* conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or harm to *its employees*." (Emphasis added.) Hawk also notes that in other situations, Minnesota courts have recognized that OSHA regulations impose duties on employers only with respect to their own employees. *See Anderson v. Anoka Hennepin Ind. Sch. Dist. 11*, 678 N.W.2d 651, 663 (Minn. 2004) (rejecting plaintiff's argument that woodshop teacher and school district had duty to comply with OSHA regulations when injured plaintiff was a student); *see also Banovetz v. King*, 66 F. Supp. 2d 1076, 1081 (D. Minn. 1999) ("OSHA only governs duties that are

owed by an employer to an employee, and not duties assigned between . . . an employer and a third-party.").

We recognize that there is some tension between the *O'Neil* holding and the language of OSHA. But even if we accept appellants' argument that the *O'Neil* holding applies here, we still must conclude that Hawk did not owe a legal duty. Assuming that OSHA regulations may establish a duty of care regardless of whether the injured worker was an employee of the violating contractor, appellants must still articulate that duty of care. We conclude that the OSHA regulations applicable to Hawk do not establish such a duty.

Under the applicable OSHA regulations, Hawk, as the steel subcontractor, did not owe a legal duty to provide fall protection to Benike, the general contractor on the project. The regulations require steel erection subcontractors to leave fall protection in place for use by other trades only if the controlling contractor has directed them to do so and has inspected and accepted control of the fall protection. 29 C.F.R. § 1926.760(e). A contractor performing general construction work is subject to separate fall protection guidelines. *See* 29 C.F.R. § 1926.502(a)(2) (2011) ("Employers shall provide and install all fall protection systems required by this subpart for an employee, and shall comply with all other pertinent requirements of this subpart before that employee begins the work that necessitates fall protection."). A steel subcontractor therefore has a duty to provide fall protection only to its own employees while the work is being completed. Once a steel subcontractor's work is finished and they leave the worksite, it is the duty of a general contractor or another subcontractor to provide fall protection to its employees.

Thus, only under certain circumstances does a steel contractor have a duty to leave fall protection in place for other trades after it has completed its work. Hawk did not have such a duty here. It is undisputed that Benike did not direct Hawk to leave fall protection in place. Hawk therefore had no duty to provide fall protection for Benike's employees after it completed its work and left the jobsite on August 14. It was Benike's duty as general contractor to train its employees about fall hazards and to provide fall protection equipment. The district court did not err in finding that Hawk owed no legal duty to Benike or its employees.

Appellants also argue that Hawk was required by its bid to install a steel guardrail around the hole, yet failed to do so. The district court rejected this argument, finding that the claim sounded in contract and appellants had not pleaded a breach of contract claim. We agree with the district court. Minnesota law does not recognize a claim for negligent performance of a contract or negligent breach of a contract. *See Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983) (holding that Minnesota does not recognize cause of action for negligent breach of contract and that it was error for the district court to submit theory of negligence to jury where duties between parties only arose out of the contract). To maintain a negligence claim, appellants must establish that Hawk owed a duty separate from its obligations under the contract. *See Arden Hills North Homes Ass'n v. Pemtom, Inc.*, 475 N.W.2d 495, 500 (Minn. App. 1991) (allowing plaintiff to bring negligence claim against builder because contractor "has a duty, independent of the contract itself, to erect a building in a reasonably good and workmanlike manner"), *aff'd as modified*, 505 N.W.2d 50 (Minn. 1993).

Furthermore, the record does not support appellants' assertion that Hawk was required by contract to install a guardrail around the hole. After Schwenker fell through the hole and was injured, Benike requested that Hawk return and fabricate a guardrail around the hole. Hawk did so on August 22, 2006. Appellants argue that because a bid from Hawk's estimator dated May 4, 2006 includes ten feet of guardrail, this creates a genuine issue of fact as to whether Hawk was required to install guardrail around the hole. We disagree. None of the plans issued to Hawk required Hawk to install a guardrail. Elliot, Hawk's foreman on the project, testified that he had never seen that estimate and did not know what the bid was for. The blueprints Hawk worked from provided for the 30" x 30" opening, and stated: "Hatch by others (owner verify size and location)." Moreover, even if Hawk contracted to install a guardrail, the record shows that the guardrail would not have been installed until after Benike finished its concrete work. Schwinefus testified that the guardrail could not be in place while Hawk or Benike were still doing their work. Although Hawk placed pipes in the floor from which a guardrail or hatch would eventually be built, Schwinefus testified that the concrete had to be poured around the pipes and given time to cure before a guardrail could be built. Therefore, there is no evidence to indicate that Hawk was required to build a guardrail prior to Benike commencing its work.

Appellants argue finally that under OSHA's "multi-employer citation policy" (the policy), Hawk had a duty to provide adequate protection for the hole because Hawk was the party that created the hazard. *See* OSHA, Multi-Employer Citation Policy, CPL 2-0.124 (Dec. 10, 1999). The policy is part of OSHA's Field Inspection Reference Manual,

and it sets forth the agency's policy for issuing citations on multi-employer worksites. *Id.* at IX(A). The policy provides that on such worksites, "more than one employer may be citable for a hazardous condition that violates an OSHA standard." *Id.* at X(A). An employer may be citable if it is determined to be a "creating, exposing, correcting, or controlling employer." *Id.* at X(A)(1).

We cannot agree that the multi-employer citation policy imposes a duty of care on Hawk for purposes of tort liability. The policy provides guidelines for when an employer "may be *citable* for a hazardous condition that violates an OSHA standard." *Id.* at X(A) (emphasis added). The policy does not set forth separate OSHA standards that could create a duty of care; rather, it provides guidelines for issuing citations where OSHA standards have already been violated. Appellants have not established the violation of any OSHA standard applicable to Hawk. The only case addressing the multi-employer citation policy involved liability under the policy for an OSHA *citation*, not tort liability. *See Bastian v. Carlton Cnty. Highway Dep't*, 555 N.W.2d 312, 318 (Minn. App. 1996) (holding that principal on a multi-employer construction project was improperly *cited* for OSHA violation because it did not exercise sufficient level of work site authority), *review denied* (Minn. Jan. 7, 1997). We therefore conclude that Hawk did not owe a legal duty based on the multi-employer citation policy.

The district court did not err by finding that Hawk owed no legal duty to Schwenker. Because we affirm on this basis, we have no occasion to address the additional issue of whether Schwenker primarily assumed the risk of his injuries.

Affirmed.