STATE OF MICHIGAN

COURT OF APPEALS

NATHAN R. OPHOFF,

Plaintiff-Appellant,

v

HOME DEPOT, assumed name for HOME DEPOT USA, INC., and JAMES HARDIE BUILDING PRODUCTS, INC.,

Defendants/Third-Party Plaintiffs-Appellees,

and

RIVERSIDE EXTERIORS, L.L.C.,

Third-Party Defendant.

UNPUBLISHED
September 26, 2006

No. 267921
Macomb Circuit Court
LC No. 04-001225-NP

Before: Cavanagh, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition to defendants under MCR 2.116(C)(10). We affirm.

Riverside Exteriors ("Riverside"), contracted with James Hardie Building Products ("Hardie"), to construct a display case of Hardie's siding products inside a Home Depot store. Riverside hired independent contractors plaintiff and Shawn Bradford to build the display. Plaintiff was injured when he fell from an elevated platform. Plaintiff brought this negligence action against Home Depot and Hardie for failing to provide a safe place to work and proper safety equipment. The trial court granted defendants' motion for summary disposition, ruling that plaintiff could not establish the liability of either Hardie or Home Depot under the common work area doctrine, and also rejecting plaintiff's alternative theories of liability.

We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence submitted by the parties and,

drawing all reasonable inferences in favor of the nonmoving party, determine whether there is a genuine issue of material fact for trial. *Id*. at 120.

Plaintiff argues that the common work area doctrine applies only to claims involving vicarious liability and does not apply to this case where plaintiff claims defendants are liable for their own negligent conduct. We disagree.

"At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004). Yet, in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), our Supreme Court held that a general contractor may be held liable under the common work area doctrine if the plaintiff can show (1) that the defendant 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 workers (4) in a common work area. See *Ormsby*, *supra* at 54, 57. Our Supreme Court explained that "only when the *Funk* four-part 'common work area' test is satisfied may an injured employee of an independent subcontractor sue the general contractor for that contractor's alleged negligence." *Id*. at 49. The failure to satisfy any element of this test is fatal to a common work area claim. *Id*. at 59.

In *Funk*, the Court added that when a property owner exercises a high degree of control over the project it may also be held liable under this test. *Funk*, *supra* at 105, 108. "[T]he 'retained control doctrine' is . . . subordinate to the 'common work area doctrine' and is not itself an exception to the general rule of nonliability." *Ormsby*, *supra* at 49. Instead, when the common work area doctrine applies, "and the property owner has sufficiently 'retained control' over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor." *Id*.

In the present case, plaintiff concedes that he and his coworker were working on a unique project in isolation from other workers. Consequently, the accident did not occur in a common work area. *Id*. at 57 n 9. Plaintiff also acknowledges that failing to satisfy any one element of the four part test—here, that the danger created a high degree of risk to a significant number of workers—is fatal to a *Funk* claim. See *Ormsby*, *supra* at 58-60. Plaintiff admittedly cannot prevail against either defendant on a common work area theory of liability. Thus, there is no need to determine whether Home Depot retained sufficient control for the doctrine to apply to it.

Instead, plaintiff argues that the common work area doctrine applies only to claims based on vicarious liability, not those involving direct negligence as alleged here. We disagree.

The rationale for the common work area doctrine established in *Funk* is that where all the elements of the test are met, general contractors and property owners that retain sufficient control should be held liable for *their own* failure "either to require the employer to implement a meaningful safety program or to themselves supply the obviously necessary safety equipment." *Funk, supra* at 102. Additionally, an examination of the claims alleged in *Funk*, *Ormsby*, and other cases, demonstrates that plaintiff's argument is without merit.

In *Funk*, a subcontractor's employee was injured when he fell 30 feet while attempting to move piping that he had previously hung from steel beams. He sued the owner and the general contractor, alleging "negligence in the defendants' failure to implement reasonable safety precautions for men working over 30 feet above the ground." *Funk, supra* at 100. Thus, the plaintiff in *Funk* clearly alleged that the defendants were directly negligent.

In *Ormsby*, a subcontractor's employee was injured when the unsecured joist he was aligning collapsed due to the negligence of his own employer, who had improperly loaded the joist with decking. The plaintiff sued the steel contractor, and later the general contractor, alleging that both "negligently supervised the project, and acquiesced to unsafe construction activities." *Ormsby, supra* at 50. Thus, *Ormsby* was not a vicarious liability case. Rather, the plaintiff sought to hold the contractor and the general contractor liable for their own direct negligence in tolerating the improper loading of unwelded joists.

In *Ghaffari v Turner Constr Co*, 259 Mich App 608, 610; 676 NW2d 259 (2003), rev'd 473 Mich 16; 699 NW2d 687 (2005), a subcontractor's employee fell when he tripped on pipes stacked by another subcontractor. The worker sued the owner and the general contractor alleging that they "owed plaintiff a duty to provide a safe place . . . for work." *Id.*

Similarly, in *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 70; 600 NW2d 348 (1999), a worker's estate sued the contractor and the cable company alleging that their negligence caused the plaintiff's death. After a jury trial, both were found liable. *Id*. at 71. On appeal, this Court specifically noted that the plaintiff's claim against the general contractor was not based on the theory of respondeat superior. *Id*. at 77. "Instead, plaintiff advanced a claim that . . . [the general contractor] could be held liable *for its own negligence* under a theory of retained control." *Id*. (emphasis added). This Court reversed and remanded, finding that there was no evidence of a common work area and insufficient evidence of retained control. *Id*.

Contrary to plaintiff's arguments, while the "immediate cause of the accident" in the cases cited above may have been an act committed by a subcontractor or its employees, or even by the injured party, each case involved a claim that the property owner or general contractor was *directly negligent* in failing to provide a safe worksite, reasonable safety measures, or appropriate safety equipment. Plaintiff does not cite any cases holding otherwise. We find no principled distinction between these cases and the instant case in which plaintiff similarly asserts direct negligence claims against defendants based on their alleged failure to provide a safe workplace and appropriate safety equipment. Therefore, the trial court properly rejected plaintiff's argument that the common work area doctrine does not apply.

We also reject plaintiff's arguments that defendant Home Depot is liable under a premises liability theory. "Generally, a landowner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 9; 574 NW2d 691 (1997). "However, an owner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against." *Id.* "This duty of care generally extends to invitees who are employees of independent contractors." *Id.* at 10.

"While an invitor must warn of hidden defects, there is generally no duty to warn of 'open and obvious' dangers." *Id.* In other words, "'if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize the danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized the danger.'" *Id.*, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995). Conversely, if the risk of harm remains unreasonably high despite the obviousness of the danger, the invitor may be required to take reasonable precautions to protect the invitee. *Hughes, supra* at 10. "Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Id.* This is an objective test. *Id.* at 11.

In the present case, plaintiff and Bradford were both aware that the platform where they were working was comprised of unfastened boards with two-inch gaps in between. Additionally, both were aware that the platform was approximately six feet high, and that the display rose nine feet above the platform. The danger of falling was open and obvious because it was, or should have been, discoverable upon casual inspection. Therefore, the trial court properly found that Home Depot was entitled to summary disposition on plaintiff's premises liability theory.

We find no merit to plaintiff's contention that the trial court's decision was predicated on a determination that plaintiff's own comparative negligence was the cause of his injury. The trial court did not find plaintiff comparatively negligent. Rather, in the context of analyzing plaintiff's premises liability argument, the trial court examined "[p]laintiff's ability to make the site safer . . . in determining whether the danger was effectively avoidable." This was relevant to determining whether Home Depot had a duty to warn despite the obviousness of the danger. See *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001). The trial court also examined plaintiff's ability to request safety and other equipment in the context of his claim that defendants had a contractual duty to provide a safe workplace and appropriate safety equipment. Again, however, the trial court did not find that plaintiff was comparatively negligent. Rather, the court noted that plaintiff could have requested additional equipment or materials if he felt the area was not sufficiently prepared. Thus, there is no merit to plaintiff's argument that the trial court granted summary disposition because it concluded that his own negligence was also responsible for causing his injury.

Plaintiff also argues that defendants may be liable under general principles of negligence. In particular, plaintiff argues that Hardie provided all the tools and materials for the job but failed to provide the necessary safety equipment. He additionally argues that because Hardie assumed detailed direction of the job, it may be liable for negligence in failing to provide a safe work area and appropriate safety equipment, and in failing to warn of latent dangers such as the moveable slats. Similarly, plaintiff argues that Home Depot was negligent for allowing this unsafe situation to occur in its store and in allowing its employees to remove plaintiff's only makeshift barrier, i.e., a rolling ladder, which might have prevented plaintiff's fall.

Plaintiff relies on *Johnson v A & M Custom Built Homes*, 261 Mich App 719; 683 NW2d 229 (2004), in which an employee of a subcontractor fell off a roof when a toe board installed by a different subcontractor gave way when he stepped on it. The employee's conservator sued the subcontractor who installed the toe board, among others. On appeal, this Court reversed the trial court's grant of summary disposition in favor of the subcontractor. *Id.* at 720. This Court

acknowledged that the common work area exception does not apply to subcontractors. *Id*. at 722, citing *Funk*, *supra* at 104 n 6; see also *Hughes*, *supra* at 12-13. Nevertheless, the *Johnson* Court, citing *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), concluded that *Funk* had not abrogated the common-law duty that one who undertakes a task must perform it with reasonable care. *Johnson, supra* at 722-723.

We find that *Johnson* is distinguishable because in the present case, plaintiff is suing the owner and general contractor—the entities explicitly covered by the common work area doctrine—not a fellow subcontractor to whom the doctrine does not apply, as was the case in *Johnson*. Additionally, the so-called general common-law duties that plaintiff seeks to impose on defendants, i.e., the duty to provide a safe workplace and appropriate safety equipment, are the same duties that are the subject of the common work area exception. Aside from the common work area exception, the immediate employer of a construction worker is generally responsible for job safety. *Funk*, *supra* at 102; *Hughes, supra* at 12. Therefore, we conclude that the trial court correctly rejected plaintiff's attempt to hold defendants liable for these same claims outside the context of the common work area doctrine.

Lastly, plaintiff argues that because defendants contractually agreed to provide everything needed for the job, except the labor, they had a contractual duty of care to provide a safe place to work and proper safety equipment, but negligently failed to do so.

As plaintiff recognizes, the common law "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark, supra* at 261. This duty "may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligence performance constitutes a tort as well as a breach of contract." *Id*.

The contract between plaintiff's employer and Hardie required defendants to prepare the area, and Hardie to provide the materials. Contrary to plaintiff's argument, the contract does not impose upon defendants a duty to provide plaintiff with a safe workplace or the necessary safety equipment. Rather, as discussed above, plaintiff's employer owed that duty. The trial court did not err in rejecting plaintiff's contractual duty argument.

For the foregoing reasons, the trial court did not err in granting defendants' motion for summary disposition.

We affirm.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Patrick M. Meter