STATE OF MICHIGAN

COURT OF APPEALS

EMILE RIHANI, Individually and as Next Friend of DEENA RIHANI, Minor,

Plaintiff-Appellee,

v

GREELEY & HANSEN OF MICHIGAN, LLC,

Defendant-Appellant.

and

CITY OF DETROIT and L D'AGOSTINI & SONS, INC,

Defendants.

UNPUBLISHED
October 25, 2005

No. 256921
Lapeer Circuit Court
LC No. 02-031545-NO

EMILE RIHANI, Individually and as Next Friend of DEENA RIHANI, Minor,

Plaintiff-Appellee,

v

L D'AGOSTINI & SONS, INC,

Defendant-Appellant,

and

CITY OF DETROIT and GREELEY & HANSEN OF MICHIGAN, LLC,

Defendants.

No. 256941
Lapeer Circuit Court
LC No. 02-031545-NO

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

In these consolidated cases arising out of a work-site accident, defendant Greeley & Hansen of Michigan, LLC (G&H), and defendant L. D'Agostini & Sons, Inc. (D'Agostini), appeal by leave granted the trial court's denial of their motions for summary disposition. Defendants also appeal the trial court's order precluding defendants from naming the city of Detroit a nonparty at fault, after the city was granted summary disposition on the basis of governmental immunity. We reverse in Docket No. 256921 because G&H was a subcontractor to plaintiff's employer, NTH Consultants, Ltd. (NTH), it did not owe plaintiff[1] a duty of care under the common work area doctrine. In Docket No. 256941, we affirm in part and reverse in part, and remand for further proceedings consistent with this opinion.

I. Summary of Facts and Proceedings

In 1999, the city of Detroit contracted with D'Agostini to increase the capacity of its Detroit Water and Sewage Department (DWSD) Imlay City pumping station, which sent Lake Huron water north to the city of Flint and south to the Detroit area. D'Agostini contracted to provide five new pumping units, improve the existing pumping units, and add a new 108-inch water main with the ability for either line pump (route water directly through the station to its northern or southern destination), or could draw water from a huge concrete reservoir. That part of the project requiring work inside the reservoir was to commence in January 2001. In anticipation of this part of the project, the city drained most of the water from the reservoir. On November 13, 2000, DWSD construction inspector George Galster issued an AVO[2] to D'Agostini's project manager, Art Nichols, which read, "As of 10:15 AM 11.13.00 Imlay Station Reservoir has six inches of water in it. The pump was turned off, and it was turned over to the contractor." Nichols acknowledge receipt of the AVO by signing it on behalf of D'Agostini.

After the reservoir had been drained, D'Agostini employees cut a hole in its concrete wall to permit entry for a preliminary inspection inside. On November 16, 2000, Nichols wrote to Thomas DeRiemaker, the DWSD general superintendent of engineering, that certain structures inside the reservoir precluded D'Agostini from installing the proposed 108-inch pipe because "we do not have the room." Nichols also noted that cracks were observed in the walls and floor, which raised concern about the reservoir's structural integrity. Thereafter, the city hired NTH to assess the condition of the reservoir. The parties do not dispute the NTH survey was not part of the city's contract with D'Agostini, and that the city contracted directly with NTH for that work. DeRiemaker in his deposition explained that the city had an open agreement with NTH, and therefore, "it would be less expensive, and cleaner" to use NTH rather than to add this extra work to D'Agostini's contract. NTH subcontracted with G&H to assist in evaluating the reservoir. After entering the reservoir to take measurements on November 21, 2000, plaintiff, an NTH project engineer, fell into an unguarded sump pump pit and was seriously injured.

Plaintiff filed this negligence action against the city, D'Agostini, and G&H. After extensive discovery, the parties brought cross motions for summary disposition. D'Agostini

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[1] The singular plaintiff refers to Emile Rihani because Deena Rihani's claim is derivative.

[2] "AVO" means "avoid verbal orders."

argued that it was not the general contractor on the project, but rather a subcontractor to the city, which retained control over the premises. G&H asserted that as a subcontractor it did not have a duty to protect employees of other contractors and that the condition of the reservoir was open and obvious. The city argued that it was entitled to governmental immunity. Plaintiff moved for partial summary disposition, requesting an order declaring that D'Agostini, as general contractor, possessed and controlled the interior of the reservoir when plaintiff fell.

The trial court heard the motions on March 8, 2004, and read its rulings on them from the bench. First, the trial court ruled that the city was immune from tort liability under MCL 691.1401, *et seq*. The court reasoned that by operating a municipal water supply system, the city was engaged in the exercise or discharge of a governmental function. MCL 691.1407; MCL 691.1401(f). Further, the court concluded the public building exception, MCL 691.1406, did not apply because the pumping station was not open to the public. The court ruled that presence of workers for the renovation project did not alter this conclusion, citing *Dudek v Michigan*, 152 Mich App 81, 86; 393 NW2d 572 (1986).

Relying on *Munson v Vane Stecker*, 347 Mich 377; 79 NW2d 855 (1956), the trial court denied G&H's motion, reasoning that G&H owed a duty of reasonable care in favor of NTH employees because the two contractors were working together toward a common goal. Thus, the trial court concluded a question of fact remained whether G&H "properly exercised its duty of reasonable care." The court also rejected G&H's argument that the sump pit was an open and obvious danger, finding that questions of fact existed regarding the nature of the danger presented by the unguarded pit and whether the risk of harm remained unreasonable even if the danger was found to be open and obvious.

The trial court denied D'Agostini's motion, finding that plaintiff had presented evidence raising material issues of fact that if decided in plaintiff's favor would impose liability on D'Agostini under the common work area doctrine. The court noted that plaintiff produced evidence that D'Agostini possessed and controlled the interior of the reservoir after the city had drained most of the water from it. Thereafter, D'Agostini created a hole in a wall of the reservoir permitting access to its interior. Further, the court reasoned that under its contract with the city, D'Agostini was responsible for all aspects of the project, including overall job safety.

The elements of the common work area doctrine require a plaintiff to establish 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." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004). Here, the trial court noted that evidence indicated employees of D'Agostini, the city, G&H, and NTH were all working in and around the reservoir on the day plaintiff fell into the sump pump pit. Thus, the trial court reasoned that from this evidence a jury could find a common work area existed. Further, the trial court found that plaintiff presented testimony and other evidence from which a jury could conclude the unguarded sump pump pit was a readily observable, avoidable hazard that presented a high degree of risk to a significant number of workers. Thus, the trial court reasoned, the evidence presented a question of fact for the jury to resolve whether D'Agostini breached its duty of care as general contractor to take reasonable steps to protect against the hazardous condition that resulted in plaintiff being injured.

The trial court also granted plaintiff's motion for partial summary disposition against D'Agostini, finding that plaintiff had presented evidence showing that D'Agostini possessed and controlled the reservoir on the date of the accident because the city relinquished its control on November 13, 2000 after draining most of the water from the reservoir. Again, the court observed that D'Agostini was contractually responsible for all aspects of the project, including overall job safety, particularly after creating an opening in the reservoir's wall permitting entry inside.

Finally, the trial court granted the request of plaintiff's counsel to preclude defendants from naming the city as a nonparty at fault because the city was immune from tort liability.

On April 1, 2004, the trial court entered three separate orders implementing its various rulings. D'Agostini and G&H moved for reconsideration, which motions the trial court denied. This Court granted defendants' applications for leave to appeal, and consolidated these appeals.

II. Standard of Review

We review de novo a trial court's decision to grant or deny summary disposition to determine if a party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Maiden*, *supra* at 120. Both the trial court and this Court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Id*. at 120-121. Summary disposition is proper if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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." *Id*.

We also review de novo questions of law, including whether a party has a duty of care giving rise to a tort action for negligence upon its breach. *Benejam v Detroit Tigers, Inc*, 246 Mich App 645, 648; 635 NW2d 219 (2001).

III. Docket No. 256921 (G&H)

We find that the trial court erred by not granting summary disposition in favor of G&H. It general, a subcontractor has no duty to maintain a reasonably safe workplace for employees of other subcontractors. "At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ghaffari v Turner Constr Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). But in *Funk v Gen Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974) our Supreme Court modified the common law by establishing the common work area doctrine as an exception to the general rule of nonliability in cases involving construction projects. This exception, however, does not extend to cases where an employee of a subcontractor injured at a worksite seeks to recover from another subcontractor working on the same general project. *Id*. at 104, n 6; *Klovski v Martin Fireproofing Corp*, 363 Mich 1; 108 NW2d 887 (1961). Rather, a construction employee's immediate employer is generally responsible for job safety. *Johnson v A & M Custom Built*

Homes of West Bloomfield, LPC, 261 Mich App 719; 683 NW2d 229 (2004); *Hughes v PMG Building, Inc*, 227 Mich App 1, 12; 574 NW2d 691 (1997). We conclude these same principles apply here where the G&H is a subcontractor of NTH.

Nevertheless, there are situations where a subcontractor may incur liability for a workplace injury of another subcontractor's employee. For example, liability may arise when a subcontractor owns the instrumentality causing injury to an employee of another subcontractor at the workplace. *Ghaffari, supra* at 30-31 (the plaintiff tripped on pipes allegedly owned by the defendant subcontractor). Further, when a subcontractor creates a hazardous condition, it may be liable for injuries the hazard causes to an employee of another subcontractor. *Johnson, supra* at 723 (the plaintiff alleged a subcontractor improperly installed roofing toe boards that gave way causing the plaintiff to fall). The *Johnson* Court analyzed the plaintiff's claim as one of active negligence.[3] *Id*. at 723. Regardless of whether a subcontractor has a direct duty to maintain a safe workplace, "'as between two independent contractors who work on the same premises, either at the same time or one following the other, each owes to the employees of the other the same duty of exercising ordinary care as they owe to the public generally.'" *Id*., quoting 65A CJS § 534 p 291.

Here, G&H did not own or create the sump pit into which plaintiff fell. Accordingly, the trial court misapplied *Munson, supra.* In that case, the subcontractor both owned and created the hazard that caused the plaintiff's injury, a defectively assembled scaffold that the defendant left at a job site. *Id*. at 384. Because it is undisputed that G&H was only a subcontractor to NTH, and therefore, not responsible for overall workplace safety, and because plaintiff has not alleged, nor factually supported a claim that G&H was actively negligent, the trial court erred by not granting summary disposition in favor of G&H. *Ghaffari, supra* at 31, n 7.

IV. Docket No. 256941 (D'Agostini)

To establish liability under the common work area doctrine, plaintiff must produce evidence that (1) D'Agostini 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, supra* at 54. A failure to establish any one of these four elements is fatal to a plaintiff's common work area claim. *Id*. at 59, n 11. Here, D'Agostini only contests the first element, arguing on appeal that the undisputed evidence establishes as a matter of law that it did not have supervisory and coordinating authority over the work of NTH and G&H.

Specifically, D'Agostini argues that it was not the general contractor with respect to the work being performed by NTH, nor did it possess or control the premises where the injury occurred. Rather, D'Agostini contends that the city was the property possessor, owner, and general contractor for the pumping station improvement project and for the survey work the city

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[3] "The general duty of a contractor to act so as not to unreasonably endanger the well-being of employees of either subcontractors of inspectors, or anyone else lawfully on the site of the project, is well settled." *Clark v Dalman*, 379 Mich 251, 262; 150 NW2d 755 (1967).

contracted with NTH to perform. D'Agostini claims that because it had the same subcontractor relationship to the city as NTH, a duty of care did not arise under the common work area doctrine to employees of NTH. Instead, the duty to guard against readily observable and avoidable dangers rested with NTH as plaintiff's employer, and the city as the property owner and general contractor to NTH. Defendant's argument has superficial merit.

Plaintiff does not dispute that the city, not D'Agostini, contracted with NTH, and that NTH subcontracted with G&H to conduct a survey of the pumping station reservoir. It is also undisputed that D'Agostini's contract with the city did not include the survey of the reservoir that NTH and G&H employees were performing when plaintiff fell into the sump pit inside the reservoir. D'Agostini's contract with the city, as it existed before the accident, required D'Agostini to install a 108-inch water main inside the reservoir. D'Agostini was not scheduled to perform this work until January 2001. In addition, after the city drained the reservoir of all but six inches of water, D'Agostini inspected its inside and found possible structural integrity problems and physical impediments that precluded D'Agostini from proceeding with its planned installation of the 108-inch water main inside the reservoir.

Furthermore, in its contract with D'Agostini, the city reserved the right to contract directly with other parties for other work related to the pumping station improvement project, such as the DWSD contract with NTH. Indeed, both DWSD general superintendent of engineering DeRiemaker, as well as DWSD field engineer and the pumping station improvement project manager, Ramesh Shukla, acknowledged that the city bypassed D'Agostini to save time and money. Shukla testified that it was "cheaper to go through NTH directly rather than go through D'Agostini . . . because if NTH goes to D'Agostini there's an additional overhead and profit" for the city to pay D'Agostini. Thus, D'Agostini argues it had no contractual, monetary, or other supervisory control over the work of NTH and G&H was performing when plaintiff was injured. Because it lacked supervisory and coordinating authority over NTH and G&H, D'Agostini asserts it was not the general contractor under the common work area doctrine.

Plaintiff, on the other hand, forcefully argues that it is disingenuous for D'Agostini to assert it is the general contractor for most of the pumping station improvement project, but not all the work in connection with that project. Plaintiff contends that D'Agostini's reliance on the terms of its contract with the city and the contractual relationships among the parties is misplaced because plaintiff's claim is not contractual; it is based on common law tort liability. Moreover, plaintiff asserts, D'Agostini's contract with the city is replete with provisions making D'Agostini responsible for the safety of the project at the job site. Further, D'Agostini has not appealed the trial court's ruling that D'Agostini controlled the interior of the reservoir where the accident occurred. Plaintiff points to language about the common work area doctrine that originated in *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996), and that this Court applied it in *Johnson*, *supra* at 721, and *Hughes*, *supra* at 6. Specifically, the first element of general contractor liability under the common work area doctrine pertains to geographic work location. Justice Brickley, in *Groncki*, restated the four elements of the common work area doctrine under *Funk*: "1) a general contractor with supervisory and coordinating authority *over the job site*, 2) a common work area shared by the employees of more than one subcontractor, and 3) a readily observable and avoidable danger in that common work area, 4) that creates a high degree of risk to a significant number of workers." *Groncki, supra* at 662 (emphasis added).

Plaintiff's reliance on Justice Brickley's restatement of *Funk* is misplaced. The geographic location element of the common work area doctrine is found in the doctrine's namesake second element, not its first. In *Hughes*, this Court discussed how the location of a workplace accident can affect 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. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will "render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." [*Hughes, supra* at 8-9, quoting *Funk, supra* at 104.]

Our Supreme Court recently approved this Court's statement in Hughes. *Ormsby, supra* at 57, n 9. The Court also noted that *Gronki* was a non-binding plurality opinion. *Id*. at 56, n 8. Even so, Justice Brickley recognized that supervisory control was the focus of *Funk*'s first element, noting, "[t]he mere presence of a common work area, *without supervisory control by the general contractor* and a readily observable and avoidable risk to a significant number of workers, will not necessarily impose liability. *Groncki, supra* at 663 (emphasis added).

Thus, to establish liability under the common work area doctrine, plaintiff must show that "'(1) 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 workmen (4) in a common work area.'" *Ghaffari, supra* at 21, quoting *Ormsby, supra* at 54 (emphasis altered).

After careful consideration of the party's arguments and the record below, we conclude that evidence exists from which the trier of fact could find that D'Agostini possessed supervisory and coordinating authority over both the work site where the accident occurred and the work being performed by NTH and G&H. First, the city had drained the water from the reservoir, turned off the pumps, and granted D'Agostini access to the reservoir for the purpose of performing its contract work inside. Second, in his letter to DeRiemaker dated November 16, 2000, it was Nichols who suggested the work being performed by NTH and G&H when he wrote that the city should "have [its] experts look at the reservoir before [D'Agostini] start all the work inside." Third, it is undisputed that the reservoir survey and structural changes that might be recommended on the basis of the survey were necessary for D'Agostini to complete its contract obligations. Finally, D'Agostini's contract with the city explicitly required D'Agostini be responsible for coordinating and supervising ancillary "other work" necessary for the project.

Article 13 of the D'Agostini's contract with the city, titled "Related Work at Site," in pertinent part provides:

13.1.1. During the period allowed for performance and completion of the work, the **Owner** may perform other work at the site with its own forces, or have other work performed by other parties (including, but not limited to other contractors or public utilities). . . .

13.1.2. The **Contractor** shall afford each other party (or the **Owner** when performing other work) *proper and safe access to the site* and a reasonable opportunity for the handling, unloading and storage of materials and equipment and for the execution of their work, and shall properly connect and coordinate the Work with theirs. . . .

13.1.3. If any part of the Work depends for proper execution or results on the work of the **Owner** or another party, the **Contractor** *shall inspect* and promptly report to the **Engineer** in writing conditions in that work that render it unavailable or unsuitable for proper execution and results. . . .

13.1.4. Whenever Work to be performed by the **Contractor** is dependent upon the work of other parties, the **Contractor** *shall coordinate that work with the dependent work to the same extent that* the **Contractor** *is required to coordinate dependent subcontractor work. . . .*

13.1.5. If the **Owner** contracts with other parties for other work, the **Engineer** will have the authority and responsibility for coordinating the activities of the **Contractor** and those parties, unless another person or organization with specific authority and responsibility for coordination of the activities of the **Contractor** and those parties is expressly designated in the Supplementary Conditions or at the pre-construction conference.

13.1.6. If the **Owner** contracts with other parties for other work the **Contractor** *shall be responsible for cooperating* with the **Engineer** *fully in the coordination* of the **Contractor**'s Submittals with dependent Submittals of those other parties whose work in any way relates or depends upon the Work, or vice versa. [DWSD Contract No. DWS-812, Imlay Station Improvements, 00700-29/30; (Italics added).]

Although the parties may dispute the meaning and application of these contract provisions, a jury could find that they, together with the other pertinent evidence noted already, proved that D'Agostini possessed supervisory and coordinating authority over the "other work" being performed by NTH and G&H that was necessary for the pumping station improvement project. Accordingly, we find that the trial court correctly determined that material issues of fact remain whether D'Agostini failed to take reasonable steps within its supervisory and coordinating authority, the first element of tort liability under the common work area doctrine. D'Agostini has not appealed the trial court's determination that material issues of fact exist regarding the other three elements of the common work area doctrine. Therefore, we accept the trial court's determinations in that regard without expressing any opinion. We also express no opinion regarding alternate theories of liability plaintiff advances that the trial court has not ruled on. Because issues of material fact remain regarding the first element plaintiff must establish to impose tort liability on D'Agostini under the common work area doctrine, D'Agostini was not

entitled to judgment as a matter of law. *Maiden, supra* at 120. We affirm the trial court's denial of D'Agostini's motion for summary disposition as to this theory.

Next, D'Agostini argues that the decision of the city and NTH to work inside the reservoir without guarding the known sump pits inside was unforeseeable, intervening negligence precluding a finding that any negligence by D'Agostini proximately caused plaintiff's injuries.[4] We disagree.

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Haliw v City of Sterling Heights*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). The causation element requires proof of both cause in fact and proximate cause. *Id*. at 310; *Skinner, supra* at 162-163. Cause in fact requires that a plaintiff establish that the claimed injuries would not have occurred but for defendants' conduct. *Skinner v Square D Co,* 445 Mich 153, 163; 516 NW2d 475 (1994). In general, proximate cause involves whether the consequences of the defendant's conduct were foreseeable and whether a defendant should be held legally responsible for such consequences. *Id*. Proximate cause is that which, in a natural and continuous sequence, unbroken by any independent, unforeseen cause, produces the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985); *Babula v Robertson*, 212 Mich App 45, 54; 536 NW2d 834 (1995). There may be more than one proximate cause of an injury, and when several factors contribute to produce an injury, "one actor's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in producing the injury." *Brisboy v Fibreboard Corp*, 429 Mich 540, 547, 418 NW2d 650 (1988). Whether a defendant's conduct is a proximate cause of a plaintiff's injuries will be a factual question for the factfinder to decide, unless reasonable minds could not differ. Then, the court should decide the issue as a matter of law. *Babula, supra* at 54; *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002).

Thus, in general, whether an intervening act is a superseding cause that relieves a defendant from liability will be a question for the trier of fact. *Meek v Dep't of Transportation,*

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[4] We note that although D'Agostini argues proximate causation, whether the circumstances resulting in injury are foreseeable is also closely related to the existence of a duty of care. "[T]he question of proximate cause has been characterized as 'a policy question often indistinguishable from the duty question.'" *Babula v Robertson*, 212 Mich App 45, 53; 536 NW2d 834 (1995), quoting *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977). The factors a court may consider when addressing the question of duty include: "the foreseeability of the harm, the degree of certainty of injury, the closeness of connection between the conduct and injury, the moral blame attached to the conduct, the policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach." *Babula, supra* at 53. Here, our Supreme Court has already determined a general contractor under the circumstances of this case owes a duty of care under the common work area doctrine to ensure that subcontractors take appropriate safety precautions for worker safety. "Placing ultimate responsibility on the general contractor for job safety in common work areas will, from a practical, economic standpoint, render it more likely that the various subcontractors being supervised by the general contractor will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Funk, supra* at 104.

240 Mich App 105, 118; 610 NW2d 250 (2000). But under the circumstances of this case, D'Agostini's argument that the negligence of others in not guarding against the sump pit hazards was unforeseen, and therefore, a superceding cause, fails as a matter of law. The parties recognize that for an intervening cause to be a superseding cause relieving defendant of liability, it must not be reasonably foreseeable. *Id*. at 120. Here, however, plaintiff alleges D'Agostini negligently failed to guard against the hazard resulting in plaintiff's injury. "Where the defendant's negligence consist[s] of enhancing the likelihood that the intervening cause would occur or consist[s] of a failure to protect the plaintiff against the risk that occurred, the intervening cause was reasonably foreseeable." *Id*. at 120-121, citing *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 438 (Brickley, J.), 447 (Riley, J.); 487 NW2d 106 (1992), amended 440 Mich 1203 (1992). Accordingly, D'Agostini's argument that it is entitled to judgment as a matter of law fails. Whether D'Agostini breached its duty of care under the common work area doctrine, and, if such breach was cause in fact and a proximate cause of a plaintiff's injuries, are questions for the trier of fact resolve. *Babula, supra* at 54; *Nichols, supra* at 532.

V. Nonparty At Fault

After the city was dismissed from this lawsuit on the basis of governmental immunity, plaintiff requested and received an order from the trial court precluding defendants from noticing the city as a nonparty at fault pursuant to MCL 600.2957 and MCL 600.6304. Plaintiff based his request on *Jones v Enertel, Inc*, 254 Mich App 432, 438; 656 NW2d 870 (2002), which held that absent a legal duty to a plaintiff, a nonparty could not be named as a nonparty at fault in a negligence action. Plaintiff now concedes that to the extent the trial court dismissed plaintiff's claims against the city on the basis of governmental immunity, the trial court erred by precluding defendants from naming the city as a nonparty at fault.

In general, in actions seeking damages for wrongful death, personal injury, and property damage, the Legislature has replaced the common-law doctrine of joint and several liability among multiple responsible parties with the doctrine of several liability. MCL 600.2956; MCL 600.6304(4); *Jones, supra at* 435. Where the factfinder determines the "fault" of multiple parties proximately caused the damage the plaintiff sustained, each defendant is responsible for paying only that part of the plaintiff's damages attributable to its proportionate percentage of fault or so-called "fair share." MCL 600.2957(1); MCL 600.6304(4), (8); *Jones, supra at* 435, citing *Smiley v Corrigan*, 248 Mich App 51, 55; 638 NW2d 151 (2001). The Legislature has broadly defined "fault" to include "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability." Importantly, this statutory "fair share" scheme requires the factfinder to assess the fault of all parties that contributed to the plaintiff's injury, property damage, or death, "regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1); MCL 600.6304(1)(b); *Kopp v Zigich*, ___ Mich App ___; ___ NW2d ___ (No. 254155, September 22, 2005), slip op at 2. Moreover, the determination or assessment of a percentage of fault to a nonparty does not affect the availability of a defense or immunity otherwise accorded that person, and "a finding of fault does not subject the nonparty to liability." MCL 600.2957(3). Therefore, the trial court erred by precluding defendants from naming the city as a nonparty at fault. MCL 600.2957(2); MCR 2.112(K).

We also conclude that the trial court abused its discretion by determining that defendants' notices on its motions for reconsideration were untimely. In general, a notice of nonparty fault must be given within 91 days after the party against whom a claim is asserted files its first responsive pleading. MCR 2.112(K)(2), (3)(c). But, a later filing "shall" be permitted upon a "showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party." MCR 2.112(K)(3)(c). Here, defendants gave notice as soon as the trial court granted the city's motion for summary disposition. Thus, defendants could not have given notice any sooner than they did because, until that point, the city was a named party in the lawsuit. Moreover, plaintiff can hardly claim unfair prejudice or surprise when he had named the city as a defendant in his complaint.

VI. Conclusion

We reverse in part, affirm in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey