# STATE OF MICHIGAN

# COURT OF APPEALS

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RONALD JOHNSON,

Plaintiff-Appellant,

v

GGG INDUSTRIES LIMITED LIABILITY COMPANY,

Defendant/Cross Plaintiff-Appellee,

and

INLAND WATERS POLLUTION CONTROL, INC. and PROGRESSIVE ENVIRONMENT CONSULTING & ENGINEERING, INC.,

Defendants/Cross Defendants-Appellees.

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UNPUBLISHED
February 11, 2003

No. 235145
Macomb Circuit Court
LC No. 00-002439-NO

Before: Murphy, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant, Inland Waters Pollution Control, Inc. (Inland Waters), in this contractor liability action. We affirm.

In 1998, plaintiff was employed as a burner[1] at a demolition company that had been subcontracted by Inland Waters, the general contractor, to perform certain demolition activities at an industrial property that was owned by GGG Industries Limited Liability Company. On December 1, 1998, plaintiff was on the roof dismantling a shed-like structure when one of the walls began falling toward him, causing him to step back and inadvertently onto an unguarded skylight. Plaintiff fell through the skylight approximately thirty feet to the ground and sustained

[1] Apparently, a burner is someone who cuts up iron for removal and demolition purposes and prepares buildings for implosions.

injuries. On June 13, 2000, plaintiff filed this action against Inland Waters[2] alleging that Inland Waters retained control of the construction site and thus owed plaintiff a duty to provide a reasonably safe work environment, which it breached.

On April 27, 2001, pursuant to MCR 2.116(C)(8) and (C)(10), Inland Waters filed a motion for summary disposition. Inland Waters argued that (1) it did not retain control of the work being performed by plaintiff and his employer, experts in the demolition business, (2) the subcontract required that plaintiff's employer be solely responsible for the health, safety, and welfare of its employees, including through the provision of safety equipment like harnesses, and (3) the work being performed by plaintiff at the time of his fall was not inherently dangerous and his fall would have been prevented by the use of a safety harness.

Plaintiff responded to defendant's motion arguing that the roof was a common work area, that the unguarded skylight located on the roof was clearly observable and dangerous, and that Inland Waters, as general contractor, was obligated to remedy the danger or provide safety equipment. Plaintiff further argued that Inland Waters retained control over the demolition and the construction site as evidenced by its exercise of coordinating and supervisory activities and imposition of safety rules and regulations. Finally, plaintiff argued that performing demolition work near an unguarded skylight on a roof without safety equipment was an inherently dangerous activity.

The trial court agreed with Inland Waters and, pursuant to MCR 2.116(C)(10), dismissed plaintiff's action. Quoting *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999), the trial court held that plaintiff did not establish (1) that Inland Waters "retained control that had 'some actual effect [sic] on the manner or environment in which the work was performed,'" (2) that plaintiff was injured in a common area, or (3) that the "skylight posed a high risk to a significant number of workers." The trial court also held that plaintiff was not engaged in an inherently dangerous activity when he fell through the skylight. Accordingly, on June 5, 2001, the court issued an opinion and order dismissing the case. This appeal followed.

Plaintiff argues that the trial court erred in summarily dismissing his claims against Inland Waters because there was, at least, a genuine issue of fact as to whether Inland Waters retained control over the work performed on the project. We disagree. This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Because a motion under MCR 2.116(C)(10) tests the factual support for a claim, affidavits, admissions, and documentary evidence are considered in the light most favorable to the opposing party to determine whether the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Generally, an employer of an independent contractor owes no legal duty to an employee of the independent contractor; therefore, a general contractor is ordinarily not liable for a

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[2] Because plaintiff only appeals the dismissal of his action against Inland Waters, no other claims will be discussed.

subcontractor's negligence. See *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997); *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 316; 507 NW2d 827 (1993). An exception to the general rule, however, is the retained control doctrine which permits the imposition of liability where the general contractor has not truly delegated the work but, instead, retained and exercised control over the work which actually affected the manner or environment in which the work was performed. See *Funk v General Motors Corp*, 392 Mich 91, 101-102, 108; 220 NW2d 641 (1974), overruled in part on another ground by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982); *Candelaria*, *supra* at 77. General oversight or monitoring is insufficient. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994).

Here, plaintiff argues that the contract between Inland Waters and plaintiff's employer demonstrates that Inland Waters retained control over the work being performed. In particular, plaintiff alleges that the contract allocated scheduling and coordinating activities to Inland Waters, permitted them to make changes in the work within the general scope of the subcontract, and reserved to them the right to terminate the contract for neglect or failure to perform. The contract also allegedly required plaintiff's employer to submit drawings and samples, periodic progress reports, and evidence that it paid for the necessary materials, equipment, and labor with regard to the project. However, even if plaintiff's representations of the contractual obligations are accurate, they do not demonstrate that Inland Waters retained and exercised control over the work which actually affected the manner or environment in which the demolition work was performed. Contractual provisions that include measures designed to monitor progress and minimize the risk of delay, as well as those that require cooperation and flexibility in scheduling and performing work are insufficient to establish the requisite control.

Further, plaintiff's claim that Inland Waters retained control of the work because it "expected subcontractors to comply with its own health and safety plan" is contrary to the plain language of the contract which provides that "[s]ubcontractor shall be solely responsible for the health, safety and welfare of its employee and agents and others with regard to the Services." Although a minimum health and safety standard was instituted that was applicable to "the Contractor's employees entering the site," the contract also provided that the "[s]ubcontractor is solely responsible for establishing and enforcing any additional requirements that Subcontractor deems necessary to protect its employees . . . ." Plaintiff and his employer, demolition experts, were reasonably expected to know and implement the most appropriate safety measures and equipment necessary to accomplish their particular and specialized work. In sum, plaintiff has failed to establish a genuine issue of material fact with regard to the application of the retained control exception to the rule of general contractor nonliability.

Next, plaintiff argues that the trial court erred in summarily dismissing his claims because there was, at least, a genuine issue of material fact as to whether plaintiff established the requirements of the common work area exception to the general nonliability rule. We disagree.

To establish liability under the common work area exception, there must be "(1) a general contractor with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of several subcontractors, and (3) a readily observable, avoidable danger in that work area (4) that creates a high risk to a significant number of workers." *Hughes*, *supra* at 6, citing *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996). Here, plaintiff claims that he was injured in a common work area and that the unguarded skylight

that he fell through posed a high risk of harm to a significant number of workers. However, plaintiff failed to establish that the area of the roof containing the skylight was a common work area or that the skylight was a danger that posed a high risk of harm to a significant number of workers. Rather, the evidence shows that plaintiff was working on the unique project of dismantling a shed-like structure in the immediate vicinity of the skylight, in a location remote from other workers, and thus experienced a unique exposure to the alleged danger of stepping on the skylight. See *Hughes*, *supra* at 8. Thus, we agree with the trial court that plaintiff did not establish that this exception to the rule of nonliability was applicable.

Finally, plaintiff argues that he was entitled to benefit from the inherently dangerous activity exception. We disagree. Under this exception, liability is imposed "if the work contracted for is likely to create a peculiar risk of physical harm or if the work involves a special danger inherent in or normal to the work that the employer reasonably should have known about at the inception of the contract." *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 268; 480 NW2d 330 (1991). Here, plaintiff was performing demolition activities and, at the time of his injury, was dismantling a shed-like structure that was located on the roof. We agree with the trial court that there was no genuine issue of material fact that any risk in performing plaintiff's work was not inherent in or normal to the work; rather, "[r]easonable safeguards against injury could readily have been provided by taking well-recognized safety measures." *Funk, supra* at 110. Accordingly, summary disposition of plaintiff's action was proper.

Affirmed.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Janet T. Neff