STATE OF MICHIGAN

COURT OF APPEALS

NEDZAD LULANAJ,

Plaintiff-Appellant,

v

MULTI-BUILDING CO., INC., a Michigan Corporation, and ASPEN CONSTRUCTION CO., a Michigan Corporation,

Defendant-Appellee

and

JOHN KARL CHRISTIAN,

Defendant.

UNPUBLISHED
May 10, 2002

No. 230422
Wayne Circuit Court
LC No. 98-839924-NO

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting defendants Multi-Building Company (Multi-Building,) and Aspen Construction's (Aspen,) respective motions for summary disposition. We affirm.

I. Basic Facts and Procedural History

The facts of this case are not in dispute. At the time of the incident giving rise to the litigation, plaintiff was employed by S & G Painting (S & G.) On October 14, 1998, plaintiff was dispatched to work on a construction project in a Plymouth Township subdivision where he was to paint a particular home. Multi-Building was the general contractor on the project. Aspen was a subcontractor hired by Multi-Building to do the roofing. Aspen thereafter subcontracted the roofing work to defendant John Christian.

When plaintiff arrived on the project, he discovered Christian along with another man, on top of the home installing the roof. According to industry practice, the exterior painting of a new home should precede the roofing because paint from the spray gun employed by the painters would inadvertently spray onto the shingles requiring their replacement.

When plaintiff discovered the two men installing the roof on the home that plaintiff was assigned to paint, plaintiff went to a construction trailer located on the premises to advise of the situation. Plaintiff spoke with Dave Kalota, the superintendent for Multi-Building, and as a result of that conversation, Kalota went to the job site and instructed the roofers to suspend their work until plaintiff completed painting the exterior. When Kalota left, an altercation between plaintiff and Christian ensued. During the altercation, defendant Christian struck plaintiff with a ladder and a "2 x 4" causing plaintiff severe injuries to his knees, head and back. Plaintiff's extensive injuries not only required several surgeries to correct, but moreover rendered him permanently disabled.

Plaintiff brought an action against Multi-Building, the general contractor, Aspen, the roofing subcontractor, and Christian[1], in his individual capacity. Eventually, defendants Multi-Building and Aspen filed motions for summary disposition. After finding that plaintiff failed to come forward with facts "showing that there was a foreseeability or a duty here," the trial court granted both defendants' respective motions.

II. Standard of Review

This court reviews decisions on motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of plaintiff's complaint. *Int'l Brotherhood of Electrical Workers, Local 58 v McNulty*, 214 Mich App 437, 443-444; 543 NW2d 25 (1995). Where plaintiff's claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery," summary disposition in accord with (C)(8) is appropriate. *Id*. When a trial court rules on this motion, it may only consider the pleadings and may not consider affidavits, depositions or any other documentary evidence. MCR 2.116(C)(G)(4).

Conversely, a motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the underlying complaint. The inquiry relative to a (C)(10) motion is whether, looking at all of the evidence in a light most favorable to the nonmoving party, there are genuine factual issues presented upon which reasonable minds may differ. *Maiden, supra* at 120. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

In this case, the trial court did not indicate upon which court rule it relied to grant defendants' motions. A review of the lower court record, however, reveals that the trial court considered documentary evidence submitted aside from the pleadings. Accordingly, we consider the trial court's ruling as one made on the authority of MCR 2.116(C)(10).

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[1] A default judgment was entered against Christian. He is not a party to this appeal.

III. A. Multi-Building and Aspen's Duty to Plaintiff

First, plaintiff argues that Multi-Building, as the general contractor, breached the duty to make the premises reasonably safe for plaintiff by failing to adequately supervise its employees and the employees hired by subcontractors working at the site. We disagree.

The question of whether or not a duty exists in the first instance is a question of law for the court to decide. *Johnson v Turner Const Co*, 198 Mich App 478, 480; 499 NW2d 27 (1993). The general rule provides that there is no duty to protect another individual placed into jeopardy by the conduct of a third party. *Mason v Royal Dequindre, Inc*., 455 Mich 391, 397; 566 NW2d 199 (1997). However, a special relationship existing between a plaintiff and a defendant may provide an exception to this general rule. *Id*. A subcontractor's employee entering onto the landowner's premises "for a purpose mutually beneficial to both the invitee and invitor" is held to be a business invitee. *Creech v Consumers Power, Co*, 59 Mich App 167, 171; 229 NW2d 358 (1975) (citation omitted.) This designation imposes upon a landowner a duty to warn of "hidden defects or dangerous conditions on the premises." *Kirner v General Motors Corp*, 41 Mich App 211, 213; 199 NW2d 827 (1972). This duty applies specifically to contractors and subcontractors. *Id*.

As an employee of a subcontractor, plaintiff submits that Multi-Building had an affirmative duty to "inspect and discover dangerous conditions." According to plaintiff, Multi-Building had a duty to investigate and determine whether the different tradesmen employed to perform various jobs at a construction site by its subcontractors, have histories of engaging in assaultive behavior and could thus pose a danger to other tradesmen working at the same site. Thus, plaintiff essentially argues that defendant Christian's presence at the job site constituted a "condition" on the premises for which Multi-Building had a duty to warn.

We find that plaintiff's statement does not precisely capture the applicable duty. As our Supreme Court iterated:

> A possessor of land is subject to liability for bodily harm caused to business visitors *by a natural or artificial condition thereon* if, but only if, he (a) knows, or by exercise of reasonable care could discover, the condition, which, if known to him, he should realize as involving an unreasonable risk to them. *Riddle v McLouth Steel Products*, 440 Mich 85, 92-93; 485 NW2d 676 (1992) (quoting 2 Restatement Torts, 2d, § 343) (emphasis added.)

Here, plaintiff was not injured by an existing condition arising out of the land itself. On the contrary, plaintiff was the victim of an intentional act; a criminal assault. There is no evidence in the record to suggest that plaintiff was a reasonably foreseeable victim of defendant Christian's assault or that Multi-Building had any indication that Christian was a violent person. Consequently, agents for Multi-Building did not act in an unreasonable manner by failing to conduct background checks on various contractors employed by its subcontractors to perform work on the site. See *Murdock v Higgins*, 454 Mich 46, 59; 559 NW2d 639 (1997). Additionally, for the very same reason, agents for Aspen did not act in an unreasonable manner by failing to conduct a background check on defendant Christian before contracting with him on

this project considering that Christian's predisposition to engage in assaultive conduct toward others was not foreseeable to Aspen. The trial court did not err in granting summary disposition.

IV. The Retained Control Doctrine

Next, plaintiff argues that defendant Multi-Building retained sufficient control over the work and method of performance to make it directly liable for plaintiff's injuries in accord with the retained control doctrine. Again, we do not agree.

At the very outset, we recognize that although plaintiff argues that a general contractor "remains responsible" if the general contractor retains control of the project, plaintiff does not provide any authority demonstrating that a general contractor is liable for an *intentional tort* committed by an employee of its subcontractor's contractor pursuant to the retained control theory. However, because plaintiff raises the issue, we will nevertheless avail ourselves of the opportunity to discuss the retained control concept.

Typically, a general contractor is not liable for a subcontractor's *negligent* acts. *Johnson v Turner Const Co*, 198 Mich App 478, 480; 499 NW2d 27 (1993). There are, however, exceptions to this general rule. A general contractor may be liable for a subcontractor's negligence, where it retains control of the work performed by the subcontractor and otherwise fails to protect against "readily observable, avoidable dangers in common work areas that create a high degree of risk to a number of workers." *Id.* See also *Phillips v Mazda Motor Mfg*, 204 Mich App 401, 407; 516 NW2d 502 (1994). In other words, an affirmative duty on the part of the general contractor to guard against "readily observable" and "avoidable" dangers arises where the general contractor does not completely delegate the work to a subcontractor but rather, retains control over the work to be performed. *Plummer v Bechtel Const Co*, 440 Mich 646; 489 NW2d 66 (1992); *Funk v General Motors Corp*, 392 Mich 91, 101; 220 NW2d 641 (1974).

Although there is no specific test to discern the level of control that a general contractor must retain to trigger the retained control exception to the general rule, *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 317; 507 NW2d 827 (1993), the general contractor must retain, at the very least, partial control over the construction work performed beyond safety inspection and general oversight. *Id.* Indeed, as one panel of this Court explained, "[a]t a minimum, for an owner or general contractor to be held directly liable in negligence, its retention of control must have had some *actual effect* on the manner or environment in which the work was performed." *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 76; 600 NW2d 348 (1999) (emphasis in original.)

Plaintiff argues that Multi-Building retained control over the work performed on the site sufficient to make it directly liable for plaintiff's injuries. To that end, plaintiff first points to specific language in the contract between Multi-Building and Aspen, its subcontractor, which provides in pertinent part:

> 10. Contractor agrees to complete service requests under the direction of the Service Manager, to be completed within 5 working days or Multi-Building Co., Inc. reserves the right to complete said work with outside sources and fully bill said Contractor for labor and materials incurred.

> 11. Contractors are to perform all work per Superintendent schedule or Multi-Building Co., Inc. reserves the right to have said work completed at our discretion.

Plaintiff also argues that further evidence of Multi-Building's retained control is that it maintained a construction trailer at the subdivision where several of its employees supervised the project. Plaintiff also submits that Kalota, it's superintendent, scheduled, directed and orchestrated the subcontractors' work and that when a construction problem arose, Kalota was the individual charged with resolving the dispute. From this, plaintiff argues that Multi-Building retained sufficient control to give rise to an affirmative duty on its part to guard against the type of injury suffered by plaintiff. We are not of the same opinion.

The caselaw is abundantly clear that general oversight and safety standards contained in a written contract are insufficient to retain control. See *Johnson, supra* at 481. Indeed, "[c]ontractual provisions subjecting the contractor to the owner's oversight alone are not enough to retain control." *Burger, supra* at 317. For purposes of the retained control exception, a high degree of "actual control" is required and general oversight or monitoring will not suffice. *Phillips, supra* at 408.

In the case at bar, the documentary evidence establishes that Multi-Building had general supervisory authority over the construction project at best. Because the evidence submitted by plaintiff failed to demonstrate that Multi-Building exercised something more than general supervisory authority over the construction project, plaintiff failed, as a matter of law, to establish the requisite level of actual control necessary to levy an affirmative duty upon Multi-Building. We find that on the facts herein presented, Multi-Building did not owe plaintiff any duty by virtue of its retained control. Accordingly, the trial court did not err by granting Multi-Building's motion for summary disposition.

Indeed, even assuming, arguendo, that Multi-Building, as a general contractor, retained control over the work sufficient to impose a duty upon Multi-Building to protect against "readily observable, avoidable dangers in common work areas," *Phillips, supra* at 407, summary disposition in Multi-Building's favor would nonetheless remain the appropriate disposition.

To be sure, the law imposes upon a general contractor that retains control over the work performed by subcontractors an affirmative duty to take reasonable precautions to avoid "readily observable" dangers in common work areas. An intentional tort inflicted upon a third party plaintiff by a subcontractor's contractor is certainly not a "readily observable" danger arising in a common work area that would necessarily create a "high degree of risk to a significant number of workmen." *Funk, supra* at 104. The reason, of course, is that plaintiff did not sustain injury due to the negligent conduct of another or by virtue of a dangerous condition existing in or arising out of a common work area located on the site itself. On the contrary, plaintiff was the victim of an intentional tort; indeed a criminal assault. Thus, by definition, the danger posed by defendant Christian's tendency to engage in assaultive conduct was not a "readily observable danger" existing in a common work area for purposes of liability premised on the theory of retained control.

In fact, foisting liability upon a general contractor for the intentional torts committed by a subcontractor's contractor would not further the purpose served by the law of torts. In *Funk,*

supra, our Supreme Court discussed the policy underlying the law of torts, advising that tort law not only seeks to compensate victims but it also "seeks to encourage implementation of reasonable safeguards against risks of injury." *Funk, supra* at 104. To be sure:

> 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. *Id*.

In the case sub judice, imposing liability upon Multi-Building for the injuries sustained by plaintiff by virtue of the intentional conduct undertaken by an employee of Multi-Building's subcontractor's contractor would not further this overarching policy in any respect. Thus, even if Multi-Building had a duty to plaintiff to implement reasonable safeguards against risks of injuries, plaintiff did not suffer an injury within the scope of the risks generally created in common work areas on construction projects. There is absolutely nothing in the record to suggest that the risk posed by defendant Christian was a "readily observable" indeed, an "avoidable danger" that created a heightened risk of injury to other workmen in common areas on the project and reasonable minds could not find otherwise. Accordingly, summary disposition in Multi-Building's favor would remain appropriate.

V. Defendant Christian's Status as Aspen's "Employee"

Finally, plaintiff argues that defendant Christian's status as a "sub-sub contractor," does not alter Aspen's responsibility to third persons. According to plaintiff, the law only recognizes contractors and subcontractors. Additionally, plaintiff contends that merely because Aspen did not consider Christian an "employee" or otherwise treat him as an employee, for purposes of the contractual arrangement between defendants Multi-Building and Aspen, the laborers that Aspen supplied for the project were its "employees" thus subjecting it to vicarious liability. We do not agree.

The common-law doctrine of respondeat superior is a legal mechanism which vicariously subjects a principle/employer to liability for the acts of its agent/employee. *Theophelis v Lansing General Hospita*l, 430 Mich 473, 508; 424 NW2d 478 (1988).

As a general rule, an employer may be vicariously liable for the intentional torts of an employee provided that the employee commits the tort "in the course" and "within the scope of" the employee's employment. *Leitch v Switchenko*, 169 Mich App 761, 765; 426 NW2d 804 (1988). The question in the case at bar then becomes whether defendant Christian was an independent contractor or Aspen's "employee" and if defendant Christian is considered an "employee," whether Aspen, as Christian's "employer," can be held vicariously liable for the intentional torts that he inflicted upon plaintiff.

By definition, an independent contractor is "`one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to

the method of work but only as to the result to be accomplished.'" *Candelaria, supra* at 73. See also *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992).

The language employed in the contract suggests that defendant Christian was not Aspen's employee but rather acted as an independent contractor. Although the contractual language unequivocally disavows any employer-employee relationship between Aspen and defendant Christian, the agreement between Aspen and defendant Christian is neither controlling nor dispositive. See *Kidder v Miller-Davis Co*., 455 Mich 25, 45-46; 564 NW2d 872 (1997). As our Supreme Court recognized in *Kidder*, "[p]arties enter into contracts to serve all kinds of purposes in delineating rights, responsibilities, and liabilities, whether for tax, insurance, or other reasons." *Id*. at 46. Consequently, there is a question of fact concerning whether defendant Christian and Aspen had an employer-employee or independent contractor relationship. See *Burch v A & G Associates, Inc*, 122 Mich App 798, 804; 333 NW2d 140 (1983).

However, even assuming that an employer-employee relationship existed between Aspen and defendant Christen, Aspen would nevertheless escape liability for the injuries inflicted upon plaintiff pursuant to the doctrine of respondeat superior. Although an employer is liable for the intentional torts committed by an employee, if the tort is committed in the course and within the scope of the employee's employment, "[a]n employer is not liable . . . if the employee does the act while engaged in the employer's work, but outside of his authority, `as where he steps aside from his employment to gratify some personal animosity or to accomplish some purpose of his own.'" *Id*. (Citations omitted.)

In the instant case, when defendant Christian intentionally assaulted plaintiff and thereby caused plaintiff's extensive injuries, defendant Christian was not engaged in furthering Aspen's purpose at the construction site. Indeed, at the very moment that defendant Christian assaulted plaintiff, defendant Christian "stepped aside from his employment to gratify some personal animosity." *Id*. On the facts herein presented, even if Christian were Aspen's employee, Aspen would not be vicariously liable for the extensive injuries defendant Christian inflicted upon plaintiff's person and no reasonable mind could find otherwise. Accordingly, we find that the trial court did not commit error requiring reversal by granting defendant Aspen summary disposition.

Affirmed.

/s/ Jessica R. Cooper
/s/ Harold Hood
/s/ Kirsten Frank Kelly