

STATE OF MICHIGAN
COURT OF APPEALS

JAMES R. SHAWL and MARY B. SHAWL,
Plaintiffs-Appellants,

UNPUBLISHED
February 16, 2012

v

No. 301314
Saginaw Circuit Court
LC No. 06-060834-NO

SPENCE BROTHERS,

Defendant-Appellee,

and

J. RANCK ELECTRIC, INC. and TRI-CITY
ACOUSTICAL CO.,

Defendants.

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Plaintiff¹ appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm.

I. BACKGROUND

Plaintiff was employed by Boice Bird and Sons as a journeyman painter. Defendant² Spence Brothers, a general contractor, hired Boice Bird as a subcontractor to complete painting work on the renovation of the Saginaw County Event Center. In June 2003, Boice Bird assigned

¹ Plaintiff refers to James R. Shawl only unless otherwise noted because plaintiff Mary B. Shawl's claims are only derivative of James R. Shawl's claims.

² J. Ranck Electric, Inc. was dismissed with prejudice by stipulation of the parties after the trial court ruled on Spence Brother's motion for summary disposition. Tri-City Acoustical Co. was dismissed with prejudice by the trial court before Spence Brother's motion for summary disposition was decided because all the parties agreed that there was no evidence of negligence by Tri-City Acoustical. J. Ranck Electric and Tri-City Acoustical are not parties to this appeal.

plaintiff to paint the new ticketing and entry area at the theater entrance of the event center, referred to as the "Sense of Entry." On June 26, 2003, plaintiff was injured while he and his co-worker, Joe Finn, were painting a wall in the northeast corner of the Sense of Entry. As plaintiff was standing next to a ladder and reviewing his work, a temporary electrical panel³ that had been placed by a gang box (a large tool box) suddenly fell towards him and three screws protruding from the electrical panel punctured plaintiff's lower back. According to plaintiff, the accident occurred without warning:

Q. And how did this accident happen?

A. I don't know how it happened.

* * *

Q. And how far was your ladder from the gang box?

A. Maybe about three feet, three and a half feet, four feet.

Q. Were you standing on the ladder or were you standing on the ground when this accident happened?

A. I was – I believe I was standing on the ground at the time.

Q. Well, what were you doing when you were struck by this 4 x4?

A. I was looking up to see if I had gotten everything painted that I needed to up in the corner.

* * *

Q. Okay. What's in between you and the gang box and where this 4 x 4 is?

A. Nothing.

Q. And there's no other contractors there?

A. Two ceiling grid guys.

Q. Okay. The two ceiling grid guys, were they located in the vicinity of the gang box and this 4 x 4?

³ The temporary electrical panel consisted of a 4 x 4 piece of plywood into which an electrical box was secured at the center top portion of the plywood by three two inch drywall screws. The three screws protruded more than one inch from the panel.

* * *

A. No, the guy that was three or four feet away from me was the other painter [Finn]. Them guys [the ceiling grid guys] were down and around the corner starting somewhere where the steel ended and the drywall started or whatever – the drywall ceiling started.

* * *

Q. I mean, do you know how this – was this 4 x 4 – you don't have any personal knowledge if that 4 x 4 was leaning on a gang box or leaning on a wall or don't you know?

A. Well, it wasn't leaning on the wall because there was no wall there.

Q. So it was leaning – it was up against the gang box?

A. Gang box or there was a few five-gallon buckets stacked against the gang box along the edge where the guys had apparently cleaned up and it was sitting somewhere in that area.

* * *

Q. Okay. And you don't know how that panel came to be placed next to the gang box or this – where these – the compound was located, the drywall compound?

A. No, I don't.

Q. Well, what happened to cause this thing to hit you?

A. I have no idea. I believe somebody on the other side – there was a flexible conduit running up over the top of the wall, I think either somebody on the other side pulled on the conduit or –

Q. Well, I don't –

A. I have no idea.

Q. I don't want to guess, you didn't – you don't know –

A. Well, that's what I'm saying, I have no idea.

Q. You don't know if – anybody that grabbed onto the conduit and tugged it or anything, do you?

A. No, I have no idea.

* * *

Q. Yes, what happens – you’re facing the ceiling where it intersects with the wall, correct, and then the accident happens, right?

A. Correct.

Q. Without warning?

A. Yes.

Q. Joe Finn doesn’t say anything?

A. No.

Q. You don’t – you don’t come into contact with this 4 x 4 to cause it to fall, correct?

A. No.

* * *

Q. But you were the one closest to that 4 x 4?

A. Yeah, apparently, it hit me, yeah, so I was the closest one.

Q. You have no explanation how it fell?

A. No.

Q. Or why it fell?

A. Nope.

Plaintiff filed a complaint against defendant alleging that defendant breached its duty to guard against observable and avoidable dangers within the common work area. Thereafter, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that there was no genuine issue of material fact because causation was speculative and plaintiff failed to establish the elements of the common work doctrine. After reviewing the parties’ arguments, the trial court granted defendant’s motion for summary disposition. While the trial court found that causation was not speculative and there was factual support regarding three elements of the common work doctrine, it concluded that plaintiff failed to provide evidence that the temporary electrical panel presented a high degree of risk to a significant number of workers. The trial court reasoned:

Construction sites are replete with potential hazards – boards and other construction materials temporarily placed against walls or other structures may slide to the ground on their own or when handled by workers; the ground and work area may be littered with sawdust, oil, paint, tacks, nails, screws, boards, metal, and other materials; tools and machinery are a constant source of potential danger; ladders may slip, workers may trip and fall, materials may fall from work

benches or scaffolding – the list is endless. The instant panel presented no danger of electrocution. Although it was freestanding, it was clearly observable, leaning against a large sturdy object, in a stable position and in no danger of tipping over on its own. There is no evidence that the conditions present on the day of the accident were any different than existed on any of the other occasions the panel was detached to accommodate on-going work. The probability that at any given time someone or some force would come in contact with or cause the flexible metal cable along with the panel to move is extremely low. That anyone would be struck is even less probable given that one would need to be within close proximity of the panel for there to be any physical contact. The number of persons placed at risk is essentially limited to those within a 4 ft. range, and the likelihood that said person or persons would suffer an *aggravated* injury from such contact is similarly low. Under the circumstances, the risk of injury presented by the instant panel does not, in the view of this court, rise to the level of ‘high degree of risk’ necessary to impose liability. [Emphasis in the original.]

From this ruling, plaintiff now appeals as of right.

II. ANALYSIS

Plaintiff argues that the trial court erred in ruling that there was not a question of material fact regarding whether the temporary electrical panel presented a high degree of risk to a significant number of workers. The decision of a trial court pertaining to a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Under MCR 2.116(C)(10), summary disposition is proper when the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record reveals an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

“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). However, the common work area doctrine is an exception to this general rule. To establish liability under the common work area doctrine, the plaintiff must prove 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.” *Id.* at 54, citing *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974) overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982). All four elements in the common work doctrine must be satisfied before a general contractor can be held liable. *Latham*, 480 Mich at 115 n 25; *Ormsby*, 471 Mich at 59-60.

To determine whether the electrical panel created a high degree of risk, the focus is on the severity of the potential harm and not on the probability of the harm occurring. See *Funk*, 392 Mich at 103. This is because:

[m]ishaps and falls are likely occurrences in the course of a construction project. To completely avoid their occurrence is an almost impossible task. However, relatively safe working conditions may still be provided by implementing reasonable safety measures to prevent mishaps from causing aggravated injuries such as those suffered by Funk. [*Funk*, 392 Mich at 102-103.]

Plaintiff testified that a four foot temporary electrical panel with three two inch screws protruding out of the plywood that was leaning against a gang box suddenly fell on him. The electrical panel did not create a high degree of risk because there is no evidence that it would have caused severe harm. There was no evidence that the electrical panel could have electrocuted plaintiff, nor was there any suggestion that there was some danger associated with this panel that could have caused an aggravated injury. Indeed, the danger presented here – a 4 x 4 piece of plywood with an electrical box secured to it by three two inch screws – was one of those more ordinary dangers associated with working at a construction site, in stark contrast to those cases where the danger has been found to establish a high degree of risk. See *Funk*, 392 Mich at 100-103 (injury sustained from falling 30 feet); *Plummer v Bechtel Constr Co*, 440 Mich 646, 653-654; 489 NW2d 66 (1992) (injury sustained from falling 20 feet from a platform, striking a steel girder and then falling ten more feet onto a work shed); *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405; 516 NW2d 502 (1994) overruled in part on other grounds *Ormsby*, 471 Mich at 45 (decedent pinned by seven ton steel truss and cut in half when a column fell and threw decedent under the steel truss). Because the electrical panel did not create a high degree of risk, the trial court properly granted summary disposition in favor of defendant.

Additionally, a significant number of workers were not exposed to the danger. This Court has previously determined that four workers do not constitute a significant number. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 7-8; 574 NW2d 691 (1997). The calculation of whether a significant number of workers were exposed to the alleged danger is calculated at the time the plaintiff was injured. *Ormsby*, 471 Mich at 59-60 n 12. Plaintiff's testimony reveals that only two employees were exposed to the danger at the time of the accident, plaintiff and his co-worker. Thus, plaintiff also failed to establish a genuine issue of fact regarding whether a significant number of workers were exposed to the danger.

Affirmed.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray