Order

Michigan Supreme Court
Lansing, Michigan

April 30, 2010

Marilyn Kelly,
Chief Justice

140051

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

RANDY ALDERMAN,
Plaintiff-Appellee,

v

SC: 140051
COA: 285744
Oakland CC: 2007-082233-NO

J.C. DEVELOPMENT COMMUNITIES, L.L.C.,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the August 25, 2009 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and we REINSTATE the Oakland Circuit Court's May 16, 2008 order granting summary disposition. The Court of Appeals erred by holding that the common-work-area doctrine applies to this case. The risk of injury at issue here was the risk of electrocution from a subcontractor's crane coming into contact with power lines above the construction site. The only employees exposed to the risk of electrocution were two to six employees of one subcontractor, including the plaintiff, and therefore there was not a high degree of risk to a significant number of workers. *Ormsby v Capital Welding, Inc*, 471 Mich 34 (2004).

KELLY, C.J., and HATHAWAY, J., would deny leave to appeal.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 30, 2010

Clerk

0427

STATE OF MICHIGAN

COURT OF APPEALS

RANDY ALDERMAN,

Plaintiff-Appellant,

v

J C DEVELOPMENT COMMUNITIES, LLC,

Defendant-Appellee.

UNPUBLISHED
August 25, 2009

No. 285744
Oakland Circuit Court
LC No. 2007-082233-NO

Before: Owens, P.J., and Servitto, and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff initiated this action against defendant, the general contractor of a subdivision project, when he was injured on the subdivision job site. Plaintiff was employed by J. S. Trudeau, a subcontractor engaged to pour concrete basements for the subdivision project encompassing over 200 homesites, including 13 homesites that ran along and parallel to electric power lines. Trudeau used a 65-foot crane to lift forms from trucks and set them in place around each home's future basement. The forms would be set one day, concrete would be poured, and the forms would be removed by the crane the next day and replaced on the trucks. The crew would then move to the next site, and other subcontractors would continue with the next steps in the building process.

On October 9, 2006, plaintiff was part of a crew of six men working for Trudeau on homesite 273, one of the sites adjacent to the power lines. As the crane lowered one of the forms onto the foundation, it contacted a power line. A jolt of electric current flowed through the crane and down the chain to the form and the metal "whaler" plaintiff was using to control the form from the ground. Plaintiff was knocked unconscious and his hands and feet were severely burned, requiring skin grafts.

Defendant moved for summary disposition and the trial court, finding that the accident did not occur in a common work area, entered an order granting summary disposition in defendant's favor. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the pleadings, admissions

and other evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). The only issue for resolution in this matter is whether the common-work-area doctrine is applicable to the facts of this case.

When a worker is injured on a construction site, the general rule is, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee; instead, the immediate employer of a construction worker is responsible for the worker's job safety. *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008), 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). The *Funk* Court created the common-work-area doctrine to discourage those in control of the worksite from ignoring or being careless about unsafe working conditions resulting from the negligence of subcontractors or the subcontractors' employees, and requiring them to take reasonable steps to prevent injury. *Latham*, *supra* at 107.

To establish the liability of a general contractor under the common-work-area doctrine, a plaintiff must prove four elements: (1) that the defendant 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; and, (4) in a common work area. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004) citing *Funk*, *supra*, at 102.

Here, the trial court determined that the area where the accident occurred was not a common work area, as only workers from plaintiff's own crew were present at the site and exposed to danger from the possibility of the crane touching the overhead wires. The court opined, "[a]t most, six employees of one subcontractor were exposed to the risk of electrocution. This is not sufficient to establish a common work area." Essentially, the trial court found that plaintiff failed to establish a question of fact with respect to elements (3) and (4), above. We disagree.

Plaintiff presented evidence that this construction project was rather large and that his employer was not the only subcontractor working in the vicinity of the power lines on the date of this accident. Carpenters were working on the lot directly next to the lot on which plaintiff was injured. In fact, it was one of the carpenters that called 911 when plaintiff was injured. Plumbers were also working on the lot across the street from plaintiff, and cars were driving up and down the street, as at least 20 homes were under construction at the same time on the project. Testimony was also presented that workers performing construction on other homes in the project would sometimes stop to speak to workers at other lots, and that they occasionally used their equipment to help other crews.

While defendant focuses on the fact that the crane hit the power lines and endangered only plaintiff's crew and only electrocuted plaintiff, the risk associated with the crane hitting the power line extended far beyond the specific lot where plaintiff was injured. Plaintiff's crew may have been the only subcontractors working on lot 273 when the accident occurred, but the power lines did not merely run along the one lot. They ran along several lots under active construction, and electricity is commonly understood to be hazardous. The crane could easily have torn down the power lines, creating a hazard to anyone within striking distance of the fallen lines, or could

have caused a fire. The risk of harm associated with a crane hitting the power lines is high and is not as narrow as defendant would suggest. The risk at issue is the potential harm to be had if the crane hit the power lines—not merely the harm to be had if the crane made contact with the power lines and someone was involved in the electrical circuit between the power lines the crane.

Defendant also narrowly defines the "site" as lot 273. It appears, however, that workers of other subcontractors were present on several other lots adjacent to or near lot 273 at the same time plaintiff's crew was working on lot 273 (and specifically when plaintiff was injured), and these other subcontractors were engaged in various aspects of the same general construction project. The common-work-area doctrine "distinguish[es] 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." *Hughes v PMG Bldg*, 227 Mich App 1, 8-9; 574 NW2d 691 (1997). Furthermore, "it is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area." *Id*. at 6. Where, as here, there were several workers of many different subcontractors in close proximity to the power lines when the accident occurred (and they and others would continue to work in the area), a question of fact exists as to whether the area could be construed as a common work area.

There is also a question of fact as to whether the risk was posed to a significant number of workers. Defendant suggests that the risk was to a very narrow class of individuals, i.e., only those in immediate contact with metal when the crane touched the wires. As indicated above, the risk could have extended to anyone working on the project within the immediate vicinity of the power lines. It is not only a question of fact whether six constitutes a "significant" number of workers for purposes of the common-work-area doctrine, but the evidence suggests that there were several employees of many subcontractors working within the area beneath or in close proximity to the power lines. These other workers should be considered by the trier of fact in determining whether or not plaintiff was injured in a common work area.

Moreover, it appears from the record that the lot upon which plaintiff was injured was only one of thirteen lots in close proximity to the power lines, and that the remaining twelve lots either already had or would require a crane operating near the power lines to build foundations. The workers involved in the use of a crane on these remaining lots (and workers present on adjacent or nearby lots) would be exposed to the same risk of harm. The number of workers at risk over the course of the project could be determined to be far more than six.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher