STATE OF MICHIGAN

COURT OF APPEALS

MARK WILLIAMS and DIANE WILLIAMS,

Plaintiffs-Appellants,

v

KIRCO REALTY & DEVELOPMENT, LTD.,

Defendant-Appellee.

UNPUBLISHED
September 17, 1996

No. 179726
LC No. 92-426421

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendant in this negligence action. We affirm.

Plaintiff Mark Williams was severely injured in a work-related accident at a construction site where defendant was the general contractor. On the date of the accident, the construction site was muddy. A crane operator, who was employed by a subcontractor, Morefield Construction Company, noticed that a crane was unsteady, and notified the foreman, who was also employed by Morefield. The foreman directed his workers to place buckets of backhoes on the outriggers of the crane to steady it. When a ladle of concrete was being lowered, the crane tipped, hurling the ladle at plaintiff. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted defendant's motion.

Plaintiffs argue that the trial court erred in finding no genuine issue of material fact as to retained control. We disagree. Because the trial court did not make a ruling on this issue, we need not review it. *Vugterveen Systems, Inc v Olde Millpond Corp*, 210 Mich App 34, 38; 533 NW2d 320 (1995). In any case, the general rule is that a general contractor or landowner is not responsible for injuries caused by the negligence of a contractor who has been hired to erect a structure. *Funk v General Motors Corp*, 392 Mich 91, 101; 220 NW2d 641 (1974); *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405-406; 506 NW2d 502 (1994). Plaintiffs have not shown any evidence of retained control beyond general oversight and safety inspection. As opposed to alleging that defendant retained

* Circuit judge, sitting on the Court of Appeals by assignment.

control by inspecting the work site for safety violations, plaintiffs contended the opposite before the trial court (and maintain that contention in their second issue on appeal): that defendant was guilty of complete dereliction of its responsibility for construction site safety. Plaintiffs did not attach to their Exhibit 6 the contractual provisions which they allege indicate defendant's retained control. Accordingly, there is no genuine issue of material fact that defendant retained control of the project. *Phillips, supra*, p 408.

Plaintiffs argue that the trial court erred in finding no genuine issue of material fact as to their negligence claim as a third-party beneficiary. We disagree. Plaintiffs argue that defendant's tort liability arises from its failure to perform its contractual duty to oversee safety. Although a negligence action may arise from the negligent performance of a contractual obligation, it cannot arise from the nonfeasance of that obligation. *Courtright v Design Irrigation,* Inc, 210 Mich App 528, 530; 534 NW2d 181 (1995); *Freeman-Darling, Inc v Andries-Storen-Reynaert Multi Group, Inc*, 147 Mich App 282, 285-286; 382 NW2d 769 (1986). Here, there has been no breach of duty distinct from a contractual duty. *Freeman-Darling, supra*, p 286.

Plaintiffs argue that the trial court erred in finding no genuine issue of material fact that the field conditions were hazardous and were in a common work area. We disagree. It is true that genuine issues of material fact existed that the accident occurred in a common work area, and that defendant knew of the muddy conditions. However, there are proper methods for coping with muddy, unstable conditions. There was no testimony that defendant had either actual or constructive knowledge of the real danger: the subcontractor's unconventional solution to a common problem. See *Plummer v Bechtel Construction Co*, 440 Mich 646, 668; 489 NW2d 66 (1992); *Funk*, *supra*, pp 103-104.

Finally, plaintiffs argue that there was no genuine issue of material fact that the unstable conditions were not inherently dangerous. We disagree. The activity which defendant contracted with Morefield to perform was the digging and pouring of foundations. There was no evidence which would create a genuine issue of material fact that this activity is inherently dangerous. Neither is there record evidence that defendant knew that, in the event of muddy conditions, Morefield would steady the crane using such an unconventional method. Accordingly, the inherently dangerous activity doctrine does not apply to these facts. *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich 541, 549; 536 NW2d 221 (1995).

Affirmed.

/s/ Marilyn Kelly
/s/ Myron H. Wahls
/s/ M. Richard Knoblock