STATE OF MICHIGAN

COURT OF APPEALS

KELLY SINE,

Plaintiff-Appellant,

v

EAST JORDAN IRON WORKS, INC.,

Defendant-Appellee.

UNPUBLISHED
March 21, 1997

No. 188668
Charlevoix Circuit Court
LC No. 94-003617-NO

Before: Hoekstra, P.J., and Markey and J.C. Kingsley,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was injured while employed by CSI Industrial Systems (hereinafter "CSI"), an independent contractor with which defendant had contracted to install a dust collection system in defendant's foundry. Plaintiff, while positioned on a narrow catwalk above the foundry floor, was welding a stretch of sheet metal wall adjacent to a molding machine and a mold cart conveyor. Plaintiff's injury occurred when his left hand became caught under the wheel of a mold as it was moving down the conveyor and was crushed.

Plaintiff brought this action alleging negligent failure by defendant to guard against the dangers that led to his injury, contending that defendant's duty toward him arose under exceptions to the general rule that an employer is not liable for the tortious acts or omissions of its independent contractor. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985) (citing 2 Restatement Torts, 2d, § 409, p 370; 41 Am Jur 2d, Independent Contractors, § 41, p 805). Plaintiff specifically alleged that defendant's duty arose under the recognized exceptions of (1) inherently dangerous activity; (2) common work area; and (3) retention of control over plaintiff's work. We review de novo a decision granting summary disposition pursuant to MCR 2.116(C)(10), considering all pleadings, admissions,

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

depositions, affidavits and other documentary evidence to determine whether a record could be developed upon which reasonable minds could differ. *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996). We affirm.

I

Initially, plaintiff contends that the trial court improperly assumed that the question of whether defendant owed a duty to plaintiff under any of the three theories was solely one of law, and that the trial court mistakenly treated plaintiff's claims as involving no issues of fact. We disagree. Plaintiff attempts to support his contention by parsing a single, isolated sentence from the trial court's statement at the motion hearing. However, that sentence, when examined in light of the trial court's statement as a whole, clearly reveals that the trial court concluded on the particular facts presented that plaintiff had not alleged sufficient facts to present to a jury.

II

We now turn to the merits of the three theories of defendant's duty on which plaintiff based his negligence claim.

A

Plaintiff argues that the conditions on the narrow catwalk area on which he worked were hot, noisy, dusty, cramped, and in close proximity to the moving mold cart conveyor, and that these conditions give rise to a duty by defendant under the inherently dangerous activity doctrine. We disagree.

The inherently dangerous activity doctrine was stated by this Court in *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541; 536 NW2d 221 (1995):

> Under the doctrine, liability may be imposed when 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. * * * The risk or danger must be recognizable in advance, i.e., at the time the contract is made. . . .
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> * * *
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> Similarly, *liability should not be imposed where the activity involved was not unusual, the risk was not unique, reasonable safeguards against injury could readily have been provided* by well-recognized safety measures, and the employer selected a responsible, experienced contractor.

Here, the evidence established that the conditions inherent in plaintiff's work of welding a sheet metal wall in a hot, dusty foundry were typical for that type of work and that the work itself was not

necessarily dangerous. Furthermore, the evidence, including plaintiff's own deposition testimony, established that there was no need for plaintiff to come into contact with the mold cart conveyor in order to accomplish his task. Consequently, plaintiff has no basis on which to claim that defendant owed a duty to him on the basis of an inherently dangerous activity.

B

Next, plaintiff claims that he was working in a common work area because two electrical subcontractors were employed by defendant to work on the same dust collection system project on which plaintiff was working. We disagree.

The common work area doctrine was set forth by this Court in *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 407-408; 516 NW2d 502 (1994):

> The common work area rule provides that a general contractor may be liable for a subcontractor's negligence where the general contractor fails to take reasonable precautions against "readily observable, avoidable dangers in *common work areas which create a high degree of risk to a significant number of workmen*." It is not necessary for other subcontractors to be working on the same site at the same time. Rather, the common work area concept merely requires that employees of two or more subcontractors eventually work in the area. [*Phillips, supra* at 407-408.

Because there is no evidence in the record to indicate that employees of the other subcontractors worked anywhere near plaintiff's work area on the catwalk, the common work area doctrine is inapplicable to the instant circumstances. *Phillips, supra* at 407-408. Indeed, plaintiff's own testimony was that he never even saw any such employees.[1]

C

Finally, plaintiff contends that defendant retained control over his work sufficient to subject defendant to liability for plaintiff's injuries. Again, we disagree.

The retained control doctrine holds that:

> A general contractor or landowner may be held liable for a subcontractor's negligence where the general contractor retains control over the work involved. There must be a high degree of actual control; general oversight or monitoring is insufficient. *Phillips, supra* at 408.

Here, none of the evidence presented indicated that defendant exercised a "high degree of actual control" as required by law. *Phillips, supra* at 408. Rather, the testimony indicated that defendant retained the right to review the overall quality of CSI's work, but did not exercise any actual control over plaintiff's work. To the extent CSI's employees occasionally borrowed equipment from defendant, or that defendant's employees provided limited, ad hoc assistance to CSI's employees, such

interactions were insufficient to establish actual control of plaintiff's work. *Id.*[2] Consequently, the retained control doctrine was also inapplicable to the instant circumstances.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ James C. Kingsley

[1] We reject plaintiff's attempt to analogize generally the catwalk in this case with the catwalk in *Plummer v Bechtel Construction Co*, 440 Mich 646; 489 NW2d 66 (1992). In that case, our Supreme Court noted that the record clearly indicated that employees from at least two other subcontractors used the catwalk in question, and indeed were working on the catwalk in question at the time of the plaintiff's accident. *Id*. No such evidence exists in the instant case.

[2] Plaintiff suggests that defendant retained contractual control over various "safety and work tasks" with regard to the dust collection system; however, we find nothing in the record to support this contention. We do note that CSI's original *project estimate* indicated that CSI would not be responsible for such aspects of the project. However, nothing in that document pertained in any way, as plaintiff implies, to the *contractual* assumption of safety control by defendant.