STATE OF MICHIGAN

COURT OF APPEALS

TODD S. YEREBECK and DIANA YEREBECK,

Plaintiffs-Appellants,

v

CONSUMERS POWER COMPANY and MUELLER PIPELINERS, INC.,

Defendants-Appellees.

UNPUBLISHED
June 6, 1997

No. 193127
Wayne Circuit Court
LC No. 94-434351 NO

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

In this tort action to recover for injuries sustained in an accident at a construction site and loss of consortium, plaintiffs appeal by right from an order granting defendant Consumers Power Company's motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that defendant owed no duty to protect plaintiff Todd Yerebeck from the negligence of independent contractors. Plaintiffs also challenge the trial court's order granting defendant Mueller Pipeliners' motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that plaintiffs' claims did fall within the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). We affirm.

On June 8, 1994, plaintiff Todd Yerebeck was injured while working as a drain and pipe fitter for defendant Mueller Pipeliners. Defendant Consumers Power contracted with Mueller Pipeliners to lay underground pipe in the area of Michigan Avenue and Venoy Road in the City of Westland, and Mueller Pipeliners assigned Yerebeck to work on the project. While working on the project, Yerebeck attempted to remove a cable from an air compressor unit, but an unguarded fan caught the cable and yanked his hand into the fan blade, severing two of his fingers. Prior to the accident, defendant Mueller Pipeliners' safety inspector and foremen knew that there was no guard over the fan blade and that the compressor needed to be repaired, but did not shut down the machine in order to make the necessary repairs.

Plaintiffs contend that the trial court erred in granting defendant Mueller Pipeliners' motion for summary disposition pursuant to MCR 2.116(C)(10) because they provided sufficient factual support for an intentional tort claim that fell within the exception to the exclusive remedy provision of the WDCA, MCL 418.131(1); MSA 17.237(131)(1). We disagree. We review a trial court's decision with regard to a summary disposition motion de novo. *Borman v State Farm Fire & Casualty Co,* 198 Mich App 675, 678; 499 NW2d 419 (1993). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a valid claim. The nonmoving party must be given the benefit of any reasonable doubt and the court must be liberal in finding a genuine issue of material fact. *Buczkowski v Allstate Ins Co,* 198 Mich App 276, 278; 502 NW2d 343 (1993). The court must consider all affidavits, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). To grant the motion, the court must find that the record that might be developed will leave open no issues upon which reasonable minds may differ. *Wolfe v Employers Health Ins Co (On Remand),* 194 Mich App 172, 175; 486 NW2d 319 (1992).

The exclusive remedy provision of the WDCA provides as follows:

> The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. *An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge*. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law. [MCL 418.131(1); MSA 17.237(131)(1) (emphasis added).]

The issue whether the facts alleged by the plaintiff are sufficient to constitute an intentional tort is a question of law for the court, while the issue whether the facts are as alleged is one of fact for the jury. *Travis v Dreis & Krump Mfg Co,* 453 Mich 149, 188; 551 NW2d 132 (1996).

In *Travis,* the Court interpreted the above-emphasized statutory language, and concluded that in order to establish an intentional tort for purposes of the exception,

> an employer must have made a conscious choice to injure an employee and have deliberately acted or failed to act in furtherance of that intent. The second sentence then allows the employer's intent to injure to be inferred if the employer had actual knowledge that an injury was certain to occur, under circumstances indicating deliberate disregard of that knowledge. [*Id.* at 180.]

When the plaintiff seeks to prove his employer's intent by means of circumstantial evidence, it is not enough to show that the employer knew that a dangerous condition existed or should have known that injury was certain to occur. The employer must have been aware that injury was certain to occur from

the actor's conduct or decision. *Id.* at 174-176. Where, such as in the instant case, an employer is a corporation, a particular employee must possess the requisite state of mind. *Id.* at 171.

Upon review of the evidence and giving plaintiffs the benefit of any reasonable doubt, we find that reasonable minds could not differ on whether defendant Mueller Pipeliners possessed the requisite intent to injure Yerebeck. Plaintiffs presented sufficient evidence to show that defendant had "actual knowledge" because defendant's safety inspector and supervisory employees admittedly knew that there was no guard over the fan blade and that the compressor needed to be repaired, but did not shut down the machine in order to make the necessary repairs. See *Id.* at 181. However, plaintiffs failed to present sufficient evidence to establish that one of defendant's employees knew that an injury was certain to occur because all of its employees, including Yerebeck, believed that the cable could be carefully removed from the compressor without causing injury. Moreover, since Yerebeck knew about the unguarded fan blade, defendant did not conceal a known danger from him. See *Id.* at 181-182. Accordingly, the trial court properly granted defendant's motion for summary disposition of plaintiff Todd Yerebeck's intentional tort claim because plaintiffs merely demonstrated that defendant negligently failed to protect Yerebeck from a known dangerous condition. Since Yerebeck's claim is barred by the exclusivity provision, plaintiff Diana Yerebeck's derivative claim is also barred. *Bowden v McAndrew*, 173 Mich App 591, 596; 434 NW2d 195 (1988).

Next, plaintiffs contend that the trial court erred in granting defendant Consumers Power Company's motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that defendant did not owe Yerebeck a duty of care. Again, we disagree. To establish a prima facie case of negligence, the plaintiff must initially prove that the defendant owed a duty to him. *Jenks v Brown*, 219 Mich App 415, 417; 557 NW2d 114 (1996). An employer of an independent contractor is generally not liable for the contractor's negligence. *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 405-406; 516 NW2d 502 (1994). However, there are exceptions to this rule. Applicable in this case is the exception for circumstances where the employer does not truly delegate the work but rather retains control over the contractor. *Id.* at 408; *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 428; 468 NW2d 64 (1991).

In order for the exception to apply, there must be a high degree of actual control. *Phillips, supra* at 408.

> As set forth in comment (c) to § 414 of volume 2, the Second Restatement of Torts, an owner or general contractor who "has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed" would not be deemed to have retained control.
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> The line drawn in the Restatement commentary seeks to differentiate between a situation where the subcontractor "need not" follow the suggestions or

> recommendations of the owner/general contractor, as the case may be, or persons monitoring the work for the owner/general contractor, and a situation where the right of supervision retained by the owner/general contractor is such that the subcontractor is not "entirely free" to ignore suggestions and recommendations. [*Plummer v Bechtel Construction Co*, 440 Mich 646, 660-662; 489 NW2d 66 (1992) (footnotes omitted) (plurality opinion).]

Defendant initially argues that under *Munson v Vane-Stecker Co*, 347 Mich 377; 79 NW2d 855 (1956), and *Royal v McNulty*, 17 Mich App 713; 170 NW2d 313 (1969), it did not owe a duty with respect to any equipment owned and controlled by Mueller Pipeliners. In *Munson*, the plaintiff was an employee of a subcontractor who fell from scaffolding erected by another subcontractor. The Court held that the general contractor did not owe a duty with respect to the scaffolding because it did not have authority to exercise control over it and did not hold itself out as controlling the equipment. *Munson, supra* at 391-392. In *Royal*, this Court followed *Munson* and held that a general contractor did not owe a duty of care with respect to scaffolding because it did not have a right to exercise control over it. *Royal, supra* at 714-715.

However, both of the aforementioned cases were decided before the Court's decision in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641(1974) overruled in part 414 Mich 29 (1982), and subsequent decisions by the Court and this Court's holding that a general contractor may be liable for hazardous conditions in common worker areas and both the general contractor and landowner may be liable if they retain control over an independent contractor's work. E.g. *Plummer, supra,* and *Phillips, supra.* In light of these decisions, *Munson* does not relieve a general contractor or landowner of liability for hazardous equipment brought to the job site by a subcontractor if they retained control over the contractor's work. See *Plummer, supra* (the owner of project may be liable for unsafe scaffolding if it retained control over the work).

In this case, defendant Consumers Power entered into a written contract with Mueller Pipeliners, which provided that Mueller Pipeliners would perform the work with its own equipment and according to its own means and methods. Per the terms of the contract, defendant Consumers Power could not control Mueller Pipeliners work. However, Mueller Pipeliners agreed to comply with defendant's safety policies and all applicable laws. Defendant assigned an employee, Douglas Pasco, to inspect the work on a daily basis and discuss possible changes in the project with Mueller Pipeliners' employees. Defendant also contracted with Manpower of Lansing, Michigan, Inc., for personnel to inspect the work performed on its gas distribution system. An inspector, Harold Palmer, was at the job site whenever work was performed, and had the authority to approve or reject completed work, but did not have the authority to exercise control over the Mueller Pipeliners' work.

Upon review of the evidence and giving plaintiffs the benefit of any reasonable doubt, we find that reasonable minds could not differ on whether defendant retained control over Mueller Pipeliners' work. The contractual provisions setting the safety standards that Mueller Pipeliners had to adhere to at the job site are insufficient evidence to support a finding of retained control. *Johnson v Turner Construction Co*, 198 Mich App 478, 481; 499 NW2d 27 (1993). Unlike *Phillips, supra,* defendant

had only a few employees at the job site and none of its employees or agents had authority to enforce safety standards or control the work of Mueller Pipeliners' employees. Although there is a dispute with respect to whether Palmer gave general safety tips, he was not responsible for safety at the job site. Similarly, Palmer did not direct Mueller Pipeliners' employees in the specifics of their work but rather, at most, made general suggestions and inspected the work to make sure that it met Consumers Power Company's specifications. Therefore, defendant did not have the high degree of actual control over the independent contractor's work that is necessary for application of the retained control exception. *Phillips, supra* at 408.

Plaintiffs additionally argue that defendant owed a duty of care arising out of its contract with Mueller Pipeliners. We disagree. Plaintiffs correctly note that a common law duty of care may arise out of a contractual relationship. *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967); *Osman v Summer Green Lawn Care, Inc.*, 209 Mich App 703, 708; 532 NW2d 186 (1995). The duty is to "perform with ordinary care the things agreed to be done." *Osman, supra* at 707-708. Here, the alleged duty is premised on the contractual provision regarding safety at the job site. Under the contract, Mueller Pipeliners agreed to comply with all applicable safety codes and laws, as well as defendant's safety manual. Mueller Pipeliners specifically agreed to furnish and maintain all safeguards relating to tools, materials, and equipment. Defendant, however, did not incur a concomitant obligation to supervise safety at the job site. Therefore, because defendant did not contractually agree to do anything with respect to safety at the job site, it did not owe Yerebeck a duty of care in this case. *Id*.

Finally, plaintiffs argue that they supported a claim for negligent selection of a contractor. Again, we disagree. Initially, we note that it is unclear whether Michigan recognizes the tort. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 155; 536 NW2d 851 (1995); *Janice v Hondzinski*, 176 Mich App 49, 56; 439 NW2d 276 (1989). However, assuming *arguendo* that Michigan recognizes the tort, we find that Yerebeck has not supported his claim. Plaintiffs do not assert that defendant should have been aware of Mueller Pipeliners' alleged incompetence at the time they hired the contractor, but rather argue that defendant owed a continuing duty of care to act if notified of Mueller Pipeliners' incompetence. Even if this Court were to formally recognize the tort, it would not impose a continuing duty on an employer to investigate an independent contractor's work because to do so would be contrary to the general rule that an employer is not liable for an independent contractor's negligence. See *Phillips, supra* at 405-406. The extension of the tort would render meaningless the recognized exception that an employer may be liable for an independent contractor's negligence where the employer retains control over the work involved, *id*. at 408, because the employer would owe a continuing duty of care whether or not he retained control. In this case, because defendant did not retain control over the independent contractor's work, it did not owe a duty of care to Yerebeck. Because plaintiff Todd Yerebeck failed to support his negligence claim, plaintiff Diana Yerebeck's claim for loss of consortium is also barred. See *Oldani v Lieberman*, 144 Mich App 642, 647-648; 375 NW2d 778 (1985). Accordingly, the trial court properly granted defendant Consumers Power Company's motion for summary disposition.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy