

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS J. NAGY,

Plaintiff-Appellee,

v

CONSUMERS POWER COMPANY,

Defendant,

and

GOCON CORPORATION,

Defendant-Appellant,

and

VENCHURS PACKAGING, INC.,

Defendant/Third Party Plaintiff-
Appellee,

and

DUNDEE DECK, INC.,

Third Party Defendant.

UNPUBLISHED

May 15, 2001

No. 212550

Lenawee Circuit Court

LC No. 96-006803-NO

CHERYL MILLER, Personal Representative of the
Estate of GLEN A. MILLER, JR., Deceased,

Plaintiff-Appellee,

v

VENCHURS PACKAGING, INC.,

Defendant/Third Party Plaintiff,

No. 212551

Lenawee Circuit Court

LC No. 96-0068973-CK

and

GOCON CORPORATION,

Defendant/Third Party Plaintiff-
Appellant,

and

CONSUMERS POWER COMPANY,

Defendant,

and

DUNDEE DECK, INC.,

Third Party Defendant.

NORMAN SEILER, Personal Representative of
the Estate of THOMAS I. SEILER, Deceased,

Plaintiff-Appellee,

v

CONSUMERS POWER COMPANY,

Defendant,

and

GOCON CORPORATION,

Defendant/Third Party Plaintiff-
Appellant,

and

VENCHURS PACKAGING, INC.,

Defendant/Third Party Plaintiff,

and

No. 212552
Lenawee Circuit Court
LC No. 96-006804-NO

DUNDEE DECK, INC.,

Third Party Defendant.

THOMAS J. NAGY,

Plaintiff-Appellee/Cross-Appellant,

v

CONSUMERS POWER COMPANY,

Defendant,

and

GOCON CORPORATION,

Defendant-Appellant,

and

VENCHURS PACKAGING, INC.,

Defendant/Third Party Plaintiff-
Appellee,

and

DUNDEE DECK, INC.,

Third Party Defendant.

CHERYL MILLER, Personal Representative of the
Estate of GLEN A. MILLER, JR., Deceased,

Plaintiff-Appellee/Cross-Appellant,

v

VENCHURS PACKAGING, INC.,

Defendant/Third Party-
Appellant/Cross-Appellee,

No. 213905
Lenawee Circuit Court
LC No. 96-006803-NO

No. 213906
Lenawee Circuit Court
LC No. 96-006897-CK

and

CONSUMERS POWER COMPANY,

Defendant,

and

GOCON CORPORATION,

Defendant/Third Party Plaintiff,

and

DUNDEE DECK, INC.,

Third Party Defendant.

NORMAN SEILER, Personal Representative of
the Estate of THOMAS I. SEILER, Deceased,

Plaintiff-Appellee/Cross-Appellant,

v

CONSUMERS POWER COMPANY,

Defendant,

and

GOCON CORPORATION,

Defendant/Third Party Plaintiff,

and

VENCHURS PACKAGING, INC.,

Defendant/Third Party Plaintiff-
Appellant/Cross-Appellee,

and

No. 213907
Lenawee Circuit Court
LC No. 96-006804-NO

DUNDEE DECK, INC.,

Third Party Defendant.

Before: Whitbeck, P.J., and McDonald and Collins, JJ.

PER CURIAM.

Defendant Gocon Corporation appeals by leave granted the trial court's denial of its motion for summary disposition. Defendant Venchurs Packaging, Inc., appeals and plaintiffs cross appeal by leave granted the trial court's partial grant and partial denial of Venchurs' motion for summary disposition. These consolidated cases arise out of a construction site accident that occurred on property owned by defendant Venchurs. Two construction workers were killed and one injured; plaintiffs sought liability against defendants Consumers Power Company, Gocon Corporation, and Venchurs Packaging, Inc. Consumers Power eventually settled with plaintiffs and is not involved in this appeal. We reverse in part, affirm in part and remand.

Both defendants argue that the trial court erred in finding a question of fact existed whether an exception applied to the general rule that neither a general contractor nor a landowner is liable in negligence for injuries to an independent subcontractor's employees. On a motion for summary disposition, the trial court considers the pleadings, affidavits, depositions, and other documentary evidence available to it and grants summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Frankenmuth Mutual Ins Co v Masters*, 225 Mich App 51, 55-56; 570 NW2d 134 (1997), rev'd on other grounds 460 Mich 105 (1999). On review, this Court makes all reasonable inferences in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

In general, only the independent subcontractor is immediately responsible for the safety of its employees on the job. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999). Three exceptions provide for liability if: (1) the property owner or contractor retains control over the work done and the contractor's or subcontractor's activities, (2) the work is inherently dangerous – the work can be reasonably foreseen as dangerous to third parties, or (3) reasonable steps within its supervisory and coordinating authority are not taken to guard against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen. *Plummer v Bechtel Constr Co*, 440 Mich 646, 659, 666; 489 NW2d 66 (1992); *Samodai v Chrysler Corp*, 178 Mich App 252, 255; 443 NW2d 391 (1989), citing *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985).

The first of these exceptions applies where the landowner or contractor retains some control and direction over the actual day-to-day work. *Little v Howard Johnson Co*, 183 Mich App 675, 681; 455 NW2d 390 (1990). It is not enough that the owner retained mere contractual control, the right to make safety inspections, or general oversight. *Id.*; *Miller v Great Lakes Steel Corp*, 112 Mich App 122, 127; 315 NW2d 558 (1982); *Erickson v Pure Oil Corp*, 72 Mich App 330, 339; 249 NW2d 411 (1976). In this case, there was nothing in the pleadings that showed

either defendant retained control to the extent required by the above standard. We find the evidence insufficient to create a genuine issue of material fact that defendants' acts rose above "mere contractual control, the right to make safety inspections, or general oversight." *Little, supra*.

Under the second exception, the owner or contractor is held liable for resulting harm if the work contracted for is "inherently dangerous," that is, it 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 which the employer reasonably should have known about at the inception of the contract." *Kulp v Verndale (On Remand)*, 193 Mich App 524, 529-530; 484 NW2d 699 (1992), quoting *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 268; 480 NW2d 330 (1991). That risk or danger must be recognizable *before* the accident occurs. *Kulp, supra*; *Samodai, supra* at 255, citing *Bosak, supra* at 728. "[L]iability 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." *Szymanski v K Mart Corp*, 196 Mich App 427, 431-432; 493 NW2d 460 (1992), vacated and remanded on other grounds 442 Mich 912 (1993), quoting *Funk v General Motors Corp*, 392 Mich 91, 110; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc.*, 414 Mich 29; 323 NW2d 270 (1982). In cases where the injury results because well-recognized safety measures are not taken by the workers, the risk is not inherent to the work being done but rather is created by the failure to take ordinary precautions. *Szymanski, supra* at 432.

In this case, although the trial court found a question of fact existed concerning whether the activity was inherently dangerous, nothing in the pleadings indicated that there was any peculiar risk or special dangers beyond the normal level of care workers would need to take when working with power lines nearby. The accident occurred not while the men were working close to the lines but when plaintiffs inexplicably decided to push their scaffold directly toward the wires. Well recognized safety precautions could have been taken to avoid injury from so obvious a hazard – a hazard that was indeed well known to the three plaintiffs. It was not that the work was inherently dangerous, but that plaintiffs themselves chose to perform the work in an unexpected and unforeseeably dangerous manner. That fails to bring the claim within the inherently dangerous activity doctrine. See *Parcher v Detroit Edison Co*, 209 Mich App 495, 498-499; 531 NW2d 724 (1995), *aff'd sub nom Groncki v Detroit Edison Co*, 453 Mich 644, 657-658; 557 NW2d 289 (1996).

The third exception to nonliability occurs when an owner or general contractor fails to take reasonable steps within its supervisory and coordinating authority against readily observable, avoidable dangers in common work areas which create a high degree of risk to a significant number of workers. See *Plummer, supra* at 666; *Hughes v PMG Building, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997), citing *Funk, supra* at 104. Each of four elements must exist: "(1) a general contractor or owner with supervisory and coordinating authority over the job site, (2) a common work area shared by the employees of more than one subcontractor, (3) a readily observable and avoidable danger in a common work area, and (4) that creates a high degree of risk to a significant number of workers." *Groncki, supra* at 662. The area to be considered is narrowly proscribed to distinguish between a situation where employees of a subcontractor are

working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors are all subject to the *same* risk or hazard. *Groncki, supra* at 663.

In this case, plaintiffs failed to plead facts proving that employees of any other subcontractor worked in the same area and were exposed to the same risk of electrocution. Therefore, there is no question of fact regarding the presence of a common work area, and because all four elements must be met, liability on the basis of status as a general contractor is precluded. *Erickson, supra* at 336-337.

The trial court erred in finding that a question of fact concerning the issue of liability was sufficiently raised by the pleadings. Because none of the three exceptions apply in this case, neither defendant is liable in negligence for plaintiffs' injuries. Thus, Venchurs' argument that the trial court erred in finding it to have acted as a general contractor is moot; even if it were a general contractor, it would not be liable under these circumstances.

Plaintiffs' issue on appeal is that the trial court erred in concluding that Venchurs was not liable for the injuries as the owner of the premises on which the accident occurred. A landowner has a duty to protect invitees such as plaintiffs from harm caused by a condition on his land only if he knows or should know of the condition and should realize that it involves an unreasonable risk of harm that the invitees either will not discover or against which they will fail to protect themselves. *Bertrand, supra* at 609. Thus, a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless* the possessor should anticipate the harm despite such knowledge or obviousness. *Id.* at 610, emphasis added. If the risk of harm remains unreasonable, *despite* its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the landowner is required to undertake reasonable precautions. *Id.* at 611. The question of unreasonableness of the risk is a matter of law for the courts to decide. *Singerman v Municipal Service Bureau*, 455 Mich 135, 142-143; 565 NW2d 383 (1997).

There is no dispute that plaintiffs were aware of the risk and did not need to be warned. However, no facts support the theory that the danger was so unreasonable that plaintiffs would be unable to protect themselves. Plaintiffs knew of the danger, knew how to protect themselves, and chose not to take extra precautions because experience indicated that the distance from the wires was safe. The trial court did not err in concluding that defendant Venchurs could not be held liable for failing to take steps to protect plaintiffs against this normally safe condition on its premises that was made dangerous only by plaintiffs' own acts.

The trial court's grant of Venchurs' motion for summary disposition on the issue of liability as a landowner is affirmed; the remainder of the trial court's order denying summary disposition is reversed. Upon remand, the trial court should enter an order granting summary disposition in favor of defendants. Jurisdiction is not retained.

/s/ William C. Whitbeck
/s/ Gary R. McDonald
/s/ Jeffrey G. Collins