

STATE OF MICHIGAN
COURT OF APPEALS

TODD KELLY,

Plaintiff-Appellant,

V

ALBERT KOHLER,

Defendant-Appellee,

and

ROSE ANN KOHLER, and NORTHERN
LUMBER COMPANY,

Defendants.

UNPUBLISHED

October 27, 2011

No. 298880

Leelanau Circuit Court

LC No. 08-007945

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted the trial court's order granting summary disposition in favor of defendant Albert Kohler. We affirm.

Defendant hired Charles Korson to finish construction on a residence defendant was having built. Korson arranged to have plaintiff assist him in this endeavor. Plaintiff was severely injured when he fell from scaffolding while installing siding on his first day at the site. Plaintiff brought suit against the property owners and the company that had provided the scaffolding. Defendant moved for summary disposition, which the trial court granted.

We review the decision of a trial court pertaining to a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We first address plaintiff's argument that the trial court improperly concluded the common work area doctrine was inapplicable in the instant case. At common law, property

owners and general contractors generally could not be liable for the negligence of independent subcontractors and their employees.” *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004). However, the common work area doctrine is an exception to this general rule. To establish liability under the common work area doctrine, the plaintiff must prove that “(1) the defendant, either the property owner or general 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 workmen (4) in a common work area.” *Id.* at 54, citing *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

We conclude plaintiff’s claim against defendant cannot succeed under the common work area doctrine because the plaintiff did not provide evidence of a risk to a significant number of workers. This Court has previously determined that four workers did not constitute a significant number. *Hughes v PMG Building, Inc*, 227 Mich App 1, 7-8; 574 NW2d 691 (1996). The testimony was that, at most, only plaintiff and one other person used the scaffolding and ladders in the configuration in place on the day of plaintiff’s injury or even worked in that area of the construction site. Accordingly, the trial court correctly found that the common work area doctrine was inapplicable in the instant case was correct.

In light of our conclusion that the common work area doctrine was inapplicable in the instant case, we need not address plaintiff’s claim that defendant should be held liable under the theory of retained control.

[T]he “retained control doctrine” . . . is subordinate to the “common work area doctrine” and is not itself an exception to the general rule of nonliability. Rather, it simply stands for the proposition that when the *Funk* “common work area doctrine” would apply, and the property owner has sufficiently “retained control” over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor. [*Ormsby*, 471 Mich at 49.]

Therefore, even if defendant retained control, he is still not liable for injury because of the failure to prove the existence of a common work area.

Plaintiff next argument, that the trial court improperly dismissed his general negligence claims, also fails.

The gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005). Where an injury arises out of a condition on the land, rather than out of the activity or conduct that created that condition, the action lies in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). Plaintiff has made no allegation that defendant personally engaged in conduct that contributed to the fall or that defendant breached a duty that was separate and distinct from those he owed either as the premises owner or because he was acting as the general contractor. Thus, plaintiff’s

general negligence claim is properly characterized as one for premises liability, and was properly dismissed.

A possessor of land owes an invitee a duty to exercise reasonable care to protect the invitee from unreasonable risks of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to the removal of open and obvious dangers. *Id.* In determining whether a condition presents an open and obvious danger, an objective test should be used to establish whether an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The owner however, must have actual or constructive knowledge of the condition and its risk. Korson testified that, based on his observation of the pick strapped to the scaffolding and the presence of 8x8 blocks at the site, the scaffolding was improperly supported. He also testified that the pad that he believed the ladder slipped off of had not been there very long. There was no evidence that defendant saw the small wood blocks, placed them under the ladder near the pads or appreciated the nature of the risk they posed. The only evidence of the duration of the condition, the placement of small blocks on the pad, came from Korson. Thus there is no evidence that the owner had actual or constructive knowledge of the condition or appreciated its risk. Just as the unfortunate plaintiff did not appreciate the danger, the record supports a finding that the owner did not either.

Finally, plaintiff argues that the trial court erred in its open and obvious finding. The record is devoid of competent evidence regarding whether anyone could observe the smaller than needed 8x8 blocks upon casual observation. However, since plaintiff cannot meet his burden regarding notice, any error is harmless.

We affirm.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly