STATE OF MICHIGAN

COURT OF APPEALS

REX D. SHINDELDECKER and CONNIE M. SHINDELDECKER,

Plaintiffs-Appellants,

v

EDI ENGINEERING & SCIENCE, a/k/a WW ENGINEERING & SCIENCE, INC.,

Defendant-Appellee,

and

WHIRLPOOL CORPORATION, YERINGTON CONSTRUCTION COMPANY, METRO WRECKING COMPANY, and K & D ENVIRONMENTAL SERVICES, INC.,

Defendants.

UNPUBLISHED

No. 170444
LC No. 91-3853 NO

REX D. SHINDELDECKER and CONNIE M. SHINDELDECKER,

Plaintiffs-Appellants,

v

METRO WRECKING COMPANY,

Defendant-Appellee,

and

EDI ENGINEERING & SCIENCE, a/k/a

No. 180624
LC No. 91-3853 NO

WW ENGINEERING & SCIENCE, INC., METRO WRECKING COMPANY, K & D ENVIRONMENTAL SERVICE, WHIRLPOOL SERVICES, INC., and ABC COMPANY,

Defendants.

Before: O'Connell, P.J., and Bandstra and J.M. Batzer,* JJ.

BATZER, J. (dissenting).

I respectfully dissent. While it is not clear to me at this point that defendants, or either of them, had the kind of duty toward plaintiff from which he can make out a claim, neither is it clear that they did not. Given that discovery had not yet concluded, I believe plaintiff should have been given the opportunity for further factual development and the opportunity to argue those facts more fully with respect to § 5(a) of the Occupational Safety and Health Act of 1970, 29 USC § 654(a), and the relevant CFR provisions.

I do not agree that under the applicable CFR plaintiff was not an employee of defendant or either of them and therefore was owed no duty by them. Demolition of the plants was being conducted under CERCLA and other environmental statutes, because manufacturing activities on the premises had left behind paint wastes, oil and other contaminants in the soil. While it is obviously not true in a primary sense that plaintiff was the employee of either defendant Metro Wrecking Co., or defendant K & D Environmental Services, Inc., (clearly he was an employee of Whirlpool), he may well have been an ostensible employee of each defendant pursuant to 29 USC 654(a) which provides:

> (a) Each Employer --
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees;
>
> (2) shall comply with occupational safety and health standards promulgated under this act.

In *Teal v E I duPont de Nemours & Co*, 728 F2d 799, 804 (CA 6, 1984) an employee of an independent contractor was injured while working on duPont's premises when he fell from a ladder that did not meet OSHA specifications and that was owned and furnished by duPont. The Court concluded:

> [I]f the special duty provision [§ 654(a)(2)] is logically construed as imposing an obligation on the part of employers to protect <u>all</u> of the employees who work at a particular job site, then the employees of an independent contractor who work on the

> premises of another employer must be considered members of the class that Sec. 654(a)(2) was intended to protect.

Expressly left open by the Court in *Teal* is the issue of whether the *general duty* clause of § 654(a)(1) is for the sole benefit of an employer's employees.[1] See *Teal, supra,* 804, n 8.

Moreover, it is also possible that defendants' failure to be mindful of the risk of histoplasmosis from pigeon droppings on this pigeon-infested site and take appropriate protective actions may indeed be below standard so as to render them liable. See e.g., *Continental Oil Co v Occupational Safety and Health Review Comm, 630 F2d 446 (CA 6, 1980), cert den* 450 US 965; 101 S Ct 1481; 67 L Ed 2d 613 (1981).

Plaintiff's lawsuit is based on the damage caused by defendants' actions in disturbing dust suffused with pigeon droppings infected with Histoplasma capsulatum. Plaintiff notes that at least as early as 1982 Histoplasma capsulatum was recognized as a statistically significant risk to construction site workers in situations where birds' roosts were disturbed during a construction project. Barlette, Weeks & Ajello, "Decontamination of Histoplasma Capsulatum Infested Bird Roost in Illinois," 37 Archives of Environmental Health No. 4 (1982); see also Ajello, Kaufman, et al, "A Winter Outbreak of Acute Histoplasmosis in Northern Michigan," 117 American Journal of Epidemiology No. 1 (1983); J A Merchant, Ed, *Occupational Respiratory Diseases*, 699-701 (US DHHS Pub 86-102) (1986).

While defendants claim that they had no substantial appreciation of the danger, this claim runs directly into the doctrine of Restatement of Torts 2d, § 299A:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession of trade in good standing and similar communities.

Defendants may well have had an obligation to inform themselves of the dangers of Histoplasma capsulatum that are inherent in work of this type. Plaintiff has submitted the affidavit of his expert to the effect that pigeon droppings are hazardous waste under federal regulations and that a competent site manager would have identified them as such. Though I agree that the dust itself that was raised in the course of demolition operations was open and obvious, there is certainly no information that would make the danger of histoplasmosis from the contaminated dust an "open and obvious danger" to someone in plaintiff's shoes. The trial court's application of the open and obvious danger doctrine was erroneous in my view.

It also seems a warning would have been effectual, and may well have absolved defendants of liability. Restatement of Torts 2d, § 301 provides:

> (1) Except as stated in subsection (2), a warning given by the actor of his intention to do an act which involves a risk of harm to others does not prevent the actor from being negligent.

(2) The exercise of reasonable care to give reasonably adequate warning prevents the doing of an action from being negligent, if

(a) the law regards the actor's interest in doing the act as paramount to the other's interest in entering or remaining on the area endangered thereby, or

(b) the risk involved in the act, or its unreasonable character, arises out of the absence of warning.

Defendants argue that while Whirlpool as landowner might have liability, they were themselves merely business invitees, and do not owe plaintiff the duty of a landowner. This argument is also incorrect. Section 383 of the Restatement 2d of Torts provides:

> Once who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon the outside of the land as though he were the possessor of the land.

In defendants' posture as possessors of the land under restatement 2d Torts 383, defendants' duty to warn arises by virtue of § 341A of the Restatement 2d of Torts:

> A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.

Here defendants or either of them might well be legally responsible for having some expertise in appreciating the danger of histoplasmosis resulting from disturbing dust suffused with pigeon droppings. Plaintiff is not expected to have any similar expertise, because his trade or profession does not involve demolition work generally, or even construction work. Plaintiff is therefore entitled to assert liability on this principle.

Finally, defendants owed a duty toward plaintiff who was required by his employer to be on site to not conduct their operations in a negligent fashion such as would unreasonably endanger his well being. *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967). Yet, it seems to me, plaintiff's expert says that defendants were negligent in the conduct of their operations and unreasonably exposed plaintiff to the dangers of histoplasmosis.

To dismiss defendants at this point because their only obligations were contractual seems to me too facile in light of *Clark*. I would vacate the order of summary disposition in favor of defendants and remand for completion of discovery without prejudice to any of the parties seeking summary disposition at that time.

/s/ James M. Batzer

[1] Without deciding the issue, it would seem that the same rationale that led the *Teal* Court to conclude that the Special duty of § 654(a)(2) runs to any person who could reasonably be expected to be on the job site is also a powerful argument that the general duty provisions of § 654(a)(1) also runs to non-employees who could reasonably be expected to be on the job site. The Occupational Safety and Health Act of 1970 is firmly established as safety legislation that is to be liberally construed to effectuate the Congressional purpose. *Whirlpool Corp v Marshall*, 445 US 1, 13; 100 S Ct 883; 63 L Ed 2d 154 (1980).