

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

DUANE SMITH,

Plaintiff-Appellant,

v

MICHIGAN CONCRETE SAWING AND  
DRILLING, INC. and APPROVED PLUMBING  
& HEATING CO., INC.,

Defendants-Appellees.

---

UNPUBLISHED

January 3, 2003

No. 233875

Wayne Circuit Court

LC No. 00-009605-NO

Before: Kelly, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the orders granting summary disposition to defendant Approved Plumbing & Heating, Co., Inc. (“Approved Plumbing”) and defendant Michigan Concrete Sawing and Drilling, Inc. (“Michigan Concrete”) pursuant to MCR 2.116(C)(8). We affirm.

The present case involves a construction site injury. Plaintiff was working as a general laborer for his employer, an independent contractor, performing demolition work on the premises when he fell from a ladder. In his complaint, plaintiff alleges that he suffered injuries when he fell from the ladder because Approved Plumbing and Michigan Concrete, subcontractors also working at the site, failed to exercise due care to prevent water from accumulating near the ladder from which plaintiff fell. Specifically, plaintiff’s complaint states, in relevant part:

Defendants’ [sic] failure to exercise due care in common work areas under its active control[,] Plaintiff was injured when its failure led to water accumulation under a ladder [that] Plaintiff was on resulting in its coming down with him on it.

In response to plaintiff’s complaint, defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(8). After a hearing, the trial court granted defendants’ motions for summary disposition on the basis of this Court’s decision in *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 12-13; 574 NW2d 691 (1997).

This Court reviews de novo a trial court’s decision to grant summary disposition. *Madejski v Kotmar Ltd*, 246 Mich App 441, 443; 633 NW2d 429 (2001). Motions brought under MCR 2.116(C)(8) test the legal sufficiency of a claim on the basis of the pleadings alone. *Id.*,

443-444. All well-pleaded facts are accepted as true and are construed in the in the light most favorable to the nonmoving party. *Id.*, 444. Summary disposition under MCR 2.116(C)(8) is proper when the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

On appeal, plaintiff first claims that the trial court misapplied *Hughes* in granting defendants' motions for summary disposition. We disagree.

The issue whether a defendant owes a duty to a plaintiff in a negligence action is a question of law for the court to determine. *Hughes, supra*, 221 Mich App 5. "In determining whether a duty exists, courts examine a wide variety of factors, including the relationship pf the parties and the foreseeability and nature of the risk." *Id.* "To determine whether a common-law claim has been validly pled [sic], reference must be made to the common-law obligation which would expose the defendant to liability." *Madejski, supra*, 246 Mich App 448, citing *Millross v Plum Hollow Golf Club*, 429 Mich 178, 179; 413 NW2d 17 (1987). Whether a plaintiff has stated a valid independent cause of action under the common law, a court must examine "whether the situation is one in which there is a recognized duty at common law, that is, 'whether the actor was under any obligation to exercise reasonable care under the circumstances . . .'" *Madejski, supra*, 246 Mich App 446. Generally, with respect to construction site injuries, the immediate employer of a construction worker is responsible for job safety. *Funk v General Motors Corp*, 392 Mich 91, 102; 220 NW2d 641 (1974), overruled in part on other grounds, *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29, 70-71; 323 NW2d 270 (1982); *Hughes, supra*, 227 Mich App 12. However, a general contractor may be held liable to employees other than his own in a situation where the contractor retains supervisory and coordinating authority over the job site, the accident occurs in a common work area, the danger is readily observable and avoidable, and there is a high risk of injury to a significant number of workers. *Funk, supra*, 392 Mich 104; *Hughes, supra*, 22 Mich App 5-6.

In *Hughes*, the plaintiff suffered injuries when he fell twenty feet after stepping onto a porch overhang that collapsed. *Hughes, supra*, 227 Mich App 1-2. The porch overhang was constructed by a company that was acting as both an independent contractor and a subcontractor. *Id.* at 3. In *Hughes*, the plaintiff brought negligence claims against both the independent contractor/subcontractor that constructed the overhang and the owner/general contractor of the premises. *Id.* at 3-4. On appeal, this Court reversed the grant of summary disposition to the owner/general contractor of the premises on the ground that the owner/general contractor had a duty to make the premises safe for invitees from unreasonable risks of harm. *Id.* at 11. However, this Court affirmed the grant of summary disposition to the independent/subcontractor on the basis that the independent contractor did not invite the plaintiff to the property, nor did the plaintiff use the independent contractor/subcontractor's equipment. *Id.* at 12-13. Specifically, the *Hughes* Court held:

The 'common work area' exception under *Funk*, which can impose liability on a general contractor, does not apply where the employee of one subcontractor seeks to recover from another subcontractor. Instead, the immediate employer of a construction worker is generally responsible for job safety. (Citations omitted).[227 Mich App 12].

In this case, the trial court properly applied *Hughes* in granting defendants' motions for summary disposition, correctly rejecting plaintiff's invitation to extend the "common work area" exception to subcontractors. Contrary to plaintiff's contention, *Hughes* does not provide subcontractors at a work site with blanket immunity from tort liability. As our Supreme Court recognized in *Hardy*:

The *Funk* Court concluded that, from a practical viewpoint, the general contractor was in the best position to coordinate work and bear the expense of safety equipment and programs. Thus, placing ultimate responsibility for job safety in common work areas on the general contractor was an attempt to foster job safety and accident prevention. [*Hardy, supra*, 414 Mich 63.]

In any event, we note that subcontractors remain liable, as employers, for their own employees' safety. See e.g., *Portelli v IR Construction Products Co, Inc*, 218 Mich App 591, 597-598; 554 NW2d 591 (1996). Because neither defendant owed a legal duty to plaintiff in this case, summary disposition was proper in favor of defendants under MCR 2.116(C)(8).

Nevertheless, plaintiff contends that the trial court, in granting summary disposition in favor of defendants, ignored that a duty may be imposed by contract. There is no merit to this claim, as plaintiff concedes that he failed to plead or establish the existence of a contract.

Finally, plaintiff contends that the trial court improperly denied him the opportunity to amend his complaint to add a claim that Michigan Concrete was involved in an inherently dangerous activity. We disagree.

A trial court's decision regarding a motion to amend a pleading is reviewed on appeal for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

The inherently dangerous activity doctrine is an exception to the general rule that an employer of an independent contractor is not liable for the contractor's negligence or the negligence of his employees. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985). Michigan has recognized the exception for activities which reasonably can be foreseen as dangerous to third parties . . . and an employer is liable for harm resulting from work "necessarily involving danger to others, unless great care is used" to prevent injury, or where the work involves a "peculiar risk" or "special danger" which calls for "special" or "reasonable" precautions. *Id.*, 727.

In this case, plaintiff's proposed amendment was not legally sufficient on its face to warrant the amendment of his claim. We note that plaintiff's claim focused not so much on the fact that saw cutting was inherently dangerous, but that defendants failed to stop the accumulation of water, which is analogous to performing in an unexpected and unforeseeable dangerous manner. Work performed in an unexpected and unforeseeable manner is not a proper claim under the inherently dangerous activity doctrine. See *Bosak, supra*, 422 Mich 728-729; *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; 557 NW2d 289 (1996). Because the trial court properly concluded that a second amended complaint would have been futile, it did not

abuse its discretion in denying plaintiff's motion for leave to amend. *Hakari, supra*, 230 Mich App 355; *Parcher, supra*, 209 Mich App 498-499.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Pat M. Donofrio