

STATE OF MICHIGAN
COURT OF APPEALS

DAVID WALLACE,

Plaintiff-Appellant,

v

R.J. PITCHER, INC.,

Defendant-Cross Defendant,

and

FISHER DEVELOPMENT, INC.,

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

and

MEP SERVICES, L.L.C.,

Third-Party Defendant.

UNPUBLISHED
December 4, 2008

No. 280620
Oakland Circuit Court
LC No. 2006-076900-NI

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant Fisher Development, Inc.,¹ and dismissing plaintiff's workplace personal injury action. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

¹ R.J. Pitcher, Inc., and MEP Services, L.L.C., are not parties to this appeal. References to "defendant" in the singular throughout this opinion are to Fisher Development, Inc., only.

Plaintiff, who worked for subcontractor MEP Services, L.L.C., installing sheet metal ducts at a Williams-Sonoma store in the Somerset Mall, was injured when he fell through a second-story floor. Plaintiff had previously been warned, both orally and by signage, to not walk on the floor until its construction was completed. On the day of his injury, plaintiff allegedly saw two plumbers working on the second floor so he assumed it was safe to walk on. Plaintiff told a co-worker he was going to go onto the floor but was not warned against doing so. According to plaintiff, the floor looked finished and felt solid when he stepped on it. Plaintiff also claimed there were no warning signs stating that he should not walk on the floor, although the defendant's foreman disputed this.

Plaintiff fell through the floor, striking his head on some studs and breaking his left ankle when he landed on the concrete floor below. Plaintiff had to wear a cast for 4-6 weeks and could not work for approximately six months. Although plaintiff is physically capable of doing all his prior activities, he gave up sheet metal work because he feared re-injuring the leg. Plaintiff received worker's compensation due to his injuries but was unsure of his total economic damages.

On appeal, plaintiff claims the trial court erroneously granted summary disposition to defendant because he was injured in a common work area through the negligence of defendant. We disagree.

A general contractor is not ordinarily liable for a subcontractor's negligence. *Signs v Detroit Edison Co*, 93 Mich App 626, 632; 287 NW2d 292 (1979). However, the so-called "common work area" exception permits liability when the following conditions exist: "(1) . . . the defendant 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." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004). "[A] plaintiff's failure to satisfy *any* one of the four elements of the 'common work area doctrine' is fatal . . ." *Id.* at 59 (emphasis in original).

The primary issue in this appeal concerns element three, i.e., whether plaintiff presented evidence showing that enough workers were exposed to a high risk of harm so as to be "significant." We hold that he did not.

In his deposition testimony, plaintiff stated only that he observed two plumbers on the second floor of the store at the time he fell through the floor. Although plaintiff claims there were no warning signs to stay off the floor, he does not allege, and has not presented proof, that any workers other than the two plumbers accessed the floor and, therefore, were exposed to the dangerous condition. Under the circumstances, plaintiff did not establish a genuine issue of

material fact that the worksite conditions created a high degree of risk to a significant number of workers.² *Ormsby, supra; Hughes v PMG Bldg, Inc*, 227 Mich App 1; 574 NW2d 691 (1997).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski

² Plaintiff claims the trial court applied an incorrect legal standard because it considered the actual number of workers on the second floor at the time of his accident, as opposed to the number of workers who were exposed to the dangerous condition. Any misstatement by the trial court as to the correct legal standard was harmless error given our holding that plaintiff failed to establish a genuine issue of material fact that a significant number of workers were exposed to a high risk of harm. MCR 2.613(A).