

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

---

GEORGE VENESS,

Plaintiff-Appellant,

v

TOWN CENTER DEVELOPMENT, LLC, D & T  
CONSTRUCTION COMPANY, and MOUNTAIN  
SERVICE CORPORATION,

Defendants-Appellees.

---

UNPUBLISHED

July 31, 2007

No. 273298

Macomb Circuit Court

LC No. 2004-004347-NO

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motions for summary disposition of plaintiff's claims of common work area liability, premises liability, and nuisance. We affirm.

Plaintiff fell from a balcony while he was working as a vinyl siding installer on a construction project owned by defendant Town Center Development and run by defendants D&T Construction and Mountain Service. At the time of the fall, plaintiff had finished working for the day and had detached his safety line, or lanyard, from the roof. He coiled it up and descended to a balcony that he was using as a work platform. The balcony was partially guarded on either side by adjacent awning roofs, but its outside edge lacked a guardrail or any other barrier. Still in his safety harness, which was still connected to the lanyard, he put down his coiled safety line and continued collecting his tools. He walked back and forth across the balcony, dragging his safety lanyard behind him while he packed up. After he had gathered his tools and picked up his lanyard, he stood up and turned to descend to the ground by way of a ladder that was leaning against the unguarded edge of the balcony. However, his lanyard had become entangled in an encumbrance, causing him to lose his balance and fall over the unguarded edge of the balcony. Although plaintiff was only about twelve feet off the ground, his impact with the ground tragically rendered him a paraplegic. Later, plaintiff insisted that he did not know what snagged his lanyard, but while on the ground after the fall, he told his fellow workers, who were also his son and his brother, that the safety lanyard had tangled with a loose electrical cord that led from an outside power source, lay across the balcony, and ran into the apartment building through the balcony doors.

Plaintiff first claims that the trial court erred by failing to find that a material question of fact existed regarding defendants' liability under the common work area doctrine. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). At common law, neither a landowner who enters a contract for the construction of an improvement to the land, nor a general contractor overseeing the construction project's completion, could ordinarily be found negligent for injury to a subcontractor's employee. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). However, in *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), our Supreme Court held that a general contractor, and even an owner, could be held liable if a subcontractor clearly failed in its duty to provide proper safeguards to its employees in common work areas. Our Supreme Court framed the issue as follows:

The question now presented is whether, in the circumstances of this case, the immediate employer having conspicuously failed to provide any safety equipment, this general contractor and this owner, fully knowledgeable of the employer's dereliction, had the responsibility either to require the employer to implement a meaningful safety program or to themselves supply the obviously necessary safety equipment. [Id. at 102.]

From *Funk*, our courts have gleaned the following elements of the "common work area" exception to nonliability:

To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that 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, supra* at 57, citing *Funk, supra* at 104.]

We agree with the trial court that plaintiff's case fails to meet the third prong of the exception as a matter of law. On the day in question, plaintiff was the only individual on any of the building's several balconies. It was a Sunday, and only a few subcontractors had any workers at the site. Although plaintiff provided evidence that many workers used the balconies as work platforms throughout the construction project, this fact only serves to demonstrate that the balconies were, generally speaking, a common work area. The danger to a significant number of workmen is generally calculated at the time when the plaintiff is injured. *Ormsby, supra* at 59-60, n 12. Moreover, plaintiff fails to demonstrate that the open edge of the second-floor balcony represented a high degree of risk to a significant number of workers who used the balconies. Unlike the plaintiff in *Funk*, plaintiff's subcontractor had provided him with a fall-arrest system, which substantially decreased the degree of risk posed by the unguarded edge of the balcony. The record also reflects that other workers would use an internal staircase, rather than an external ladder, to access the balconies, thus keeping them safely away from the outermost, unguarded edge. Even plaintiff conceded in his deposition that the balcony's unguarded condition did not appear to pose any significant threat to his safety. Therefore, plaintiff has failed to present a material issue of fact about whether the lack of a guardrail on the second-floor balcony posed a high degree of risk to a significant number of workers, and his common work area claim fails as a matter of law. *Ormsby, supra*.

Plaintiff next argues that the trial court erred by granting summary disposition to defendant Town Center on his premises liability claim. Specifically, plaintiff argues that the trial court misapplied the open and obvious doctrine to preclude his claim. We disagree. We are guided in our analysis by the Supreme Court's case of *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002). In *Perkoviq*, the plaintiff was a roofer who brought suit against a combination landowner/general contractor for damages that resulted from his slip and fall from an icy roof. *Id.* at 13. Although the slipperiness of the roof made the risk of falling more likely, and the height of the roof made the fall more treacherous, the Court held that the roof did not have any special aspects to it that made it an unreasonably dangerous hazard. *Id.* at 18-19. The court reasoned, "In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site." *Id.* at 18.

In this case, and viewing the facts in the light most favorable to plaintiff, the hazards that combined to injure plaintiff were the unguarded balcony, the electrical cord, and his own safety lanyard. Plaintiff's son testified that he saw no special danger posed by the electrical cord, and its potential interference with plaintiff's lanyard was not the type of hazard that "would give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . ." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001). Furthermore, the evidence demonstrated that the balconies lacked guardrails to make it easier to load materials and equipment into the second-floor units. Therefore, the lack of a guardrail did not create an extremely dangerous condition that existed for no sensible reason, especially considering the alternative safety measures available to plaintiff. *Id.* at 518-519, n 2; *Perkoviq, supra* at 18.

Last, plaintiff argues that the trial court erred by dismissing his nuisance claim. We disagree. Plaintiff's complaint clearly stated the claim as an action for private nuisance in fact, but plaintiff never presented any evidence of that defendants interfered with any property right of his regarding "use and enjoyment" of Town Center's land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). On the basis of remarkably similar facts, our Supreme Court held that nuisance law did not provide a laborer with a remedy against the owner of a defective tower that caused the laborer to fall to his death while he worked on it. *Kilts v Kent Co Supervisors*, 162 Mich 646; 127 NW 821 (1910). The Court held, "His rights under such employment, such as the right to a safe place to work, and to warning of danger, are to be measured by the ordinary rules of negligence cases, and grow out of his contract of employment, whether the tower was a private nuisance as to other persons or not." *Id.* at 653. Because the rules of negligence do not afford plaintiff any more relief than the law of nuisance, the trial court did not err by granting summary disposition to defendants.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell