STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

MELISSA BARGY, as Personal Representative of the Estate of Wade Bargy, Deceased,

Plaintiff,

v

File No. 00-7672-NO
HON. PHILIP E. RODGERS, JR.

GREAT LAKES PACKING, CO., a Michigan Corporation,

Defendant.
/

Jon R. Garrett (P25777)
Attorney for Plaintiff

Mark P. Bickel (P28903)
Attorney for Defendant

DECISION AND ORDER DENYING
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

This is a wrongful death action. Wade Bargy, deceased, ("Bargy") was an employee of Pine-Aire Building Company. Pine-Aire was hired by the Defendant to finish construction on a new cherry processing plant. On July 27, 1997, Bargy was installing a ceiling and fell into an excavated pit containing a cherry tank. He died as a result of his injuries.

The Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). The Defendant claims that there is no genuine issue of material fact and it is entitled to judgment as a matter of law on all three alleged theories of liability. The Plaintiff filed a response to the motion. The Court heard the arguments of counsel on Monday, May 14, 2001 and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendant's motion.

STANDARD OF REVIEW

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was recently set forth in *Smith v Globe Life Ins Co*, 460 Mich. 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

ISSUES PRESENTED

The Defendant contends that, as the owner of the property where this incident occurred, it cannot be liable. The Defendant relies on the general rule that a premises owner is not liable to an employee of an independent contractor for injuries sustained while performing work on the property. Since none of the three exceptions to this general rule applies, the Defendant argues that it is entitled to judgment as a matter of law. The three exceptions are: (1) the injury arises out of a defect in the

premises; (2) the owner retains control over the work; and (3) the contractor's activities or the work is inherently dangerous. *Portelli v IR Construction Products Co, Inc*, 218 Mich App 591, 596; 554 NW2d 591 (1996).

In response, the Plaintiff asserts that a material issue of fact upon which reasonable minds may differ exists as to whether the Defendant took reasonable care to prevent the harm that befell Bargy. The Plaintiff argues that the Defendant breached its duty to furnish Pine-Aire and its employees with a safe place to work and to warn them of hidden dangers. *Nemeth v Detroit Edison Co*, 26 Mich 481; 182 NW2d 617 (1971). The Plaintiff points out that Bargy did not arrive on the construction site until after the pit was excavated and the steel tank was in place, so that the risk which he faced was separate and distinct from those created by the defects to be dealt with under his employer's contract with the Defendant. Further, the Plaintiff argues that there is a genuine issue of material fact regarding whether the Defendant retained control which "had some actual effect on the manner or environment in which the work was performed." *Candelaria v BC General Contractors, Inc*, 236 Mich App 67; 600 NW2d 348, lv den 462 Mich 852; 611 NW2d 799 (1999). Finally, the Plaintiff argues that there is a genuine issue of material fact regarding whether the work being performed by Bargy was an inherently dangerous activity that involved a peculiar risk or special danger of harm. *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265; 480 NW2d 330 (1992). Each theory or exception to the general rule will be discussed separately.

PREMISES LIABILITY

A landowner is not liable for injuries sustained by the employee of an independent contractor if the injuries arise out of the manner in which the contractor's work was performed. *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974). Consequently, the Defendant argues that Bargy's injuries arose out of the manner in which he and his employer chose to perform the work.

The Plaintiff contends, however, that the injuries arose out of a dangerous condition that existed on the construction site (e.g., the open pit above which Bargy had to install the ceiling) and not out of the work that Bargy was required to perform. The Plaintiff points out that Pine-Aire was hired after several others had worked on the project and the pit into which Bargy fell had already been installed. The presence of the pit and the dangers it presented (e.g., inability to use preferred

scaffold with hand rails) were separate and distinct from the risks inherent in the construction that Pine-Aire had been hired to perform.

Whether Bargy was injured because of the manner in which he and his employer chose to perform the work or whether Bargy was injured because of a defect or risk at the construction site separate and distinct from those to be repaired under the contract are questions for the jury to decide.

RETAINED CONTROL

Generally, an employer of an independent contractor is not liable for the contractor's negligence or the negligence of its employees. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985). An exception exists where the employer or landowner retains control of the work being performed by the independent contractor. *Funk v General Motors Corp*, 392 Mich 91, 101; 220 NW2d 641 (1974); *Miller v Great Lakes Steel Corp*, 112 Mich App 122, 125; 315 NW2d 558 (1982).

In *Funk*, the Court found that the defendant, General Motors Corporation, exercised an "unusually high degree of control" over the construction project on which the plaintiff was injured. *Funk, supra* at 105. The Court considered General Motors' supervision over some aspects of accident prevention, its extensive supervision of compliance with other contract specifications, and its overall day-to-day dominance of the project, and found that such factors supported "a finding of, if not actual, at least tacit control by General Motors of safety in the highly visible common work areas." *Funk, supra* at 107.

In *Szymanski v K-Mart Corp*, 196 Mich App 427; 493 NW2d 460 (1993), the evidence did not support such a finding of control. There was no indication from the testimony that K-Mart directed Cadillac regarding the manner in which the job was to be performed or that K-Mart had any control with regard to the manner in which the scaffold was assembled and used. The absence of evidence on these factors made *Szymanski* distinguishable from *Funk* and *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 427; 468 NW2d 64 (1991).

The issue in *Jenkins* was whether defendant Ford Motor Company retained the right to control the activities of its independent contractor, a truck driver, and therefore could be held responsible for the improper loading of his truck that allegedly caused the plaintiff's death. In

Jenkins, the independent contractor worked exclusively for the defendant without a written contract. However, in *Jenkins*, Ford not only told the independent truck driver what to haul and where to haul it, but, more importantly, Ford loaded the truck. *Jenkins, supra* at 428-429. Thus, there was evidence that the defendant in *Jenkins*, unlike defendant in *Szymanski* and *Funk*, had retained control over the independent contractor's activities, particularly those that allegedly caused the accident.

The Defendant argues that it did not retain control of the work and, therefore, cannot be liable for the injuries suffered by Bargy. The Plaintiff counters that there is a fact issue regarding whether the Defendant retained control. Recognizing the standard of review for this motion and the several photographs and deposition transcript excerpts presented by Plaintiff, this Court may not state as a matter of law and undisputed fact that a jury could not find that Defendant retained control and that its control "had some actual effect on the manner or environment in which the work was performed." *Candelaria, supra.* For this reason, the Defendant's motion must be denied.

INHERENTLY DANGEROUS ACTIVITY

The inherently dangerous activity doctrine provides an exception to the general rule of nonliability by the employer of an independent contractor. Under the doctrine, liability may be imposed when "the work contracted for is likely to create a peculiar risk of physical harm or if the work involves a special danger inherent in or normal to the work that the employer reasonably should have known about at the inception of the contract." *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 268; 480 NW2d 330 (1991), citing employees. *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985). The risk or danger must be recognizable in advance, i.e., at the time the contract is made. The Court in *Bosak* emphasized that liability should not be imposed where a new risk is created in the performance of the work and the risk was not reasonably contemplated at the time of the contract. *Bosak, supra* at 728.

The Defendant argues that it cannot be liable because the work being performed by Bargy was not inherently dangerous. The Defendant cites several cases involving falls or working at heights where the courts have concluded that it is not inherently dangerous, including *Szymanski v K-Mart Corp*, 196 Mich App 427, 431; 493 NW2d 460 (1992), vacated 442 Mich 912 (1993), readopted 202 Mich App 348; 509 NW2d 801 (1993).

The Plaintiff, likewise, cites several cases in which workers falling from heights were found to be engaged in an inherently dangerous activity, including *Oberle, supra. Oberle* is on point. In that case, the defendant contracted with a company to dig and construct a press pit. Following construction of the pit, the defendant contracted with Commercial Contracting Corporation to erect a press inside the pit. There were no guardrails or barriers around the pit. The plaintiff fell into the pit and was injured. He brought an action against the defendant based on theories of negligence and liability pursuant to the inherently dangerous activity doctrine. The trial court dismissed all claims against the defendant, except for the inherently dangerous activity claim. The jury returned a verdict in favor of the plaintiff and the defendant brought a motion for judgment notwithstanding the verdict or for new trial. The court denied the motions. The defendant appealed, arguing that the plaintiff failed to prove that the installation of a press is an inherently dangerous activity. The Court of Appeals reversed, saying:

> In this case, plaintiff presented evidence indicating the installation of a press in a 13-foot-deep press pit involved a peculiar risk or special danger of physical harm given the serious injuries likely to result from someone falling into the pit, especially where the pit is unprotected by guardrails or other barriers and the activity contracted for specifically involves the area of the pit. Further, plaintiff presented testimony that Hawthorne was aware the work was inherently dangerous because it prepared the blueprints for the job and knew constructing the press would involve work around an unguarded pit. Viewing this evidence in a light most favorable to plaintiff, we conclude plaintiff submitted sufficient evidence to create a question of fact for the jury to determine whether or not the installation of the press into the press pit was an inherently dangerous activity. *Stoken v J E T Electronics & Technology, Inc*, 174 Mich App 457; 436 NW2d 389 (1988).
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> Because the pleadings and deposition revealed a factual question regarding the inherent dangerousness of the work, summary disposition also was properly denied. *Jesson v General Telephone Co of Michigan*, 182 Mich App 430; 452 NW2d 836 (1990).

For similar reasons, the Defendant's motion for summary disposition on this issue must also be denied.

CONCLUSION

As a general rule, a premises owner is not liable for injuries to the employee of an independent contractor. The owner may be liable, however, if the injury arises out of a defect in the

premises, if the owner retains control over the work, or the work being performed is inherently dangerous. In this case, there are genuine issues of material fact. First, there is a genuine issue of material fact regarding whether the injury arose because the pit and cherry tank interfered with a safe ceiling installation or because of unsafe practices used by Bargy based and his employer in performing their work. There is also a genuine issue of material fact regarding whether the Defendant retained control of the work. And, finally, there is a genuine issue of material fact regarding whether working on makeshift scaffolding above a 13 foot-deep cherry tank is inherently dangerous.

Therefore, the Defendant's motion for summary disposition is denied.

IT IS SO ORDERED.

This decision and order does not resolve the last pending claim nor close the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/04/01