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MAPPING LEGAL SOLUTIONS FOR THE CONSTRUCTION INDUSTRY

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Michigan Supreme Court Slashes Construction Claims

By Michael D. Crow

On July 23, 2004, the Michigan Supreme Court issued opinions in two cases that will significantly limit construction accident claims against property owners and general contractors. *See DeShambo v. Nielsen,* Nos. 122939-122940 (Mich. July 23, 2004), and *Ormsby v. Capital Welding, Inc.,* Nos. 123287 & 123289 (Mich. July 23, 2004). These decisions will have a far-reaching impact on the landscape of construction litigation in Michigan.

Under common law, property owners and general contractors could not be held liable for the negligence of independent subcontractors. However, Michigan courts have created several exceptions to this general rule over the last thirty years. Specifically, injured individuals have successfully claimed that owners and general contractors are responsible for construction site accidents under three different theories: (1) the contractor was engaged in an inherently dangerous activity; (2) there was a failure to take steps to guard against certain dangers in a common work area that created a high risk to a significant number of other workers; or (3) by retaining control over the construction project. The Supreme Court's recent decisions clarified these exceptions. In doing so, the Court limited the rights of a subcontractor's injured employee to bring suit against anyone other than the negligent party.

(1) Changes to the "inherently dangerous activity" doctrine

The Michigan Supreme Court addressed the "inherently dangerous activity" doctrine in *DeShambo v. Nielsen,* Nos. 122939-122940 (Mich. July 23, 2004). Under this doctrine, a landowner or general contractor can be held responsible for an independent subcontractor's negligence if the subcontractor was hired to perform an activity that posed a peculiar danger or risk of physical harm to others. Early cases giving rise to the "inherently dangerous activity" doctrine applied it solely to injured third parties, such as neighboring property owners and innocent bystanders.

In the last several decades, Michigan courts expanded the "inherently dangerous activity" doctrine to cover employees of subcontractors who were hired to perform inherently dangerous work. Under the expanded doctrine, an injured employee who was hired to perform inherently dangerous work could sue the general contractor or landowner even though he could not sue his employer because of the exclusive remedy provision of the Worker's Compensation Disability Act.

On July 23, 2004, the Supreme Court of Michigan rejected this notion. As a result, landowners and general contractors are no longer liable to employees of independent subcontractors who are injured in the course of performing inherently dangerous work. According to the Michigan Supreme Court, "the inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity." *See DeShambo, supra.* Thus, the "inherently dangerous activity" exception is only available to innocent third parties. The Supreme Court reasoned that the contractor who specializes in the dangerous activity is most able to perform the activity in a safe manner. That contractor is also in the best position to implement safety precautions for the protection of its employees who perform the dangerous work.

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Generally speaking, property owners and general contractors were never liable for the negligence of independent subcontractors. However, Michigan courts created several exceptions to this general rule over the last thirty years. Injured individuals were successfully claiming owners and general contractors were responsible for construction site accidents under theories of inherently dangerous activity, retained control and common work area. The Supreme Court's recent decisions clarified the otherwise murky waters of these exceptions. In doing so, the Supreme Court severely limited an injured party's right to bring suit against anyone other than the negligent party. Otherwise innocent property owners and general contractors can now breathe a sigh of relief.

On July 23, 2004, the Supreme Court of Michigan essentially cut in half the available claims against general contractors and property owners. The inherently dangerous activity doctrine now applies only to innocent third parties, not employees of subcontractors hired to perform the dangerous activity. Therefore, to establish a cause of action against a general contractor, injured employees of subcontractors must establish the four elements of the common work area doctrine. To establish a cause of action against the property owner, the injured employee must establish, in addition to the four elements of the common work area doctrine, the owner retained control of the work being performed.

The recent Supreme Court decisions will result in the prompt dismissal of numerous construction claims pending against property owners and general contractors. Looking to the future, the decisions will dramatically reduce the number of construction claims filed and the manner in which they are prosecuted. All in all, July 23, 2004 was a great day for property owners and general contractors suffering under the weight of litigation costs.

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(2) Clarification of the "common work area" doctrine and the "retained control" doctrine

On the same day that it issued the *DeShambo* decision, the Michigan Supreme Court addressed the other "two" exceptions to the common law rule that owners and general contractors are not liable for the negligence of independent subcontractors. *See Ormsby v. Capital Welding, Inc.,* Nos. 123287 & 123289 (Mich. July 23, 2004). In its opinion, the Supreme Court held the "retained control" doctrine is subordinate to the "common work area" doctrine and is not, in and of itself, an exception to the general rule of non-liability.

In *Ormsby,* the Supreme Court explained the history of the "common work area" and "retained control" doctrines starting with *Funk v General Motors Corp,* 392 Mich 91 (1974). In *Funk,* the Michigan Supreme Court held that a general contractor could be liable for injuries sustained by a subcontractor's employee under the "common work area" doctrine if the injured individual proved the following: (1) the defendant property owner or general 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. In order for the property owner to be held liable, however, the Court also required the injured party to establish that the property owner had "retained control in such a way that it had effectively stepped into the shoes of the general contractor and [had] been acting as such." S*ee Ormsby, supra* (citing *Funk,* 392 Mich at 104-5).

Over time, however, Michigan courts suggested that these were two distinct exceptions to the general rule of non-liability for the negligence of an independent contractor – the "common work area" doctrine and the "retained control" doctrine. On July 23, 2004, however, the Supreme Court resoundingly rejected this misinterpretation of the law. In doing so, the Supreme Court held:

> [T]he "common work area doctrine" and the "retained control doctrine" are not two distinct and separate exceptions. Rather, the former doctrine is an exception to the general rule of non-liability of property owners and general contractors for injuries resulting from the negligent conduct of independent subcontractors or their employees. Thus, only when the *Funk* four-part "common work area" test is satisfied may a general contractor be held liable for alleged negligence of the employees of independent subcontractors regarding job safety. The "retained control doctrine" is merely a *subordinate* doctrine, applied by the *Funk* court to the owner defendant, that has no application to general contractors.

Ormsby, supra (emphasis in original).

Thus, a general contractor can only be held liable for the negligent acts of an independent subcontractor when the four *Funk* elements are met; this is the "common work area" doctrine. The "retained control" doctrine has no application to general contractors. Instead, the "retained control" doctrine only becomes relevant when evaluating whether a property owner can be held liable for the negligent acts of an independent subcontractor. Under the "retained control" doctrine, a property owner can only be held liable if the four elements of the *Funk* "common work area" doctrine are met and the property owner retained control of the work in such a way that it effectively stepped into the role of the general contractor.

Thus, the Michigan Supreme Court has essentially cut in half the available claims against general contractors and property owners. In a case involving an injured employee of a subcontractor, the plaintiff's sole cause of action against the general contractor is based upon the four elements of the "common work area" doctrine. In order to establish a cause of action against the property owner, the injured employee of the subcontractor must also establish that the owner "retained control" of the work being performed. Accordingly, in both *DeShambo* and *Ormsby,* the plaintiffs' claims against the property owner and general contractor were barred.

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