STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellant,

v

CURTIS W. LIBEY, d/b/a LIBEY EXCAVATING,

Defendant/Third Party Plaintiff-Appellee,

and

DAVID BROOKS and FARM BUREAU GENERAL INSURANCE COMPANY,

Third Party Defendants.

UNPUBLISHED
July 18, 2006

No. 259443
Mecosta Circuit Court
LC No. 03-015919-ND

Before: Talbot, P.J., and Owens and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from the grant of summary disposition in favor of defendant. This case stems from the collision of defendant's excavator with a bridge in Mecosta County while it was being hauled on a trailer to a repair shop. We affirm.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party must specifically identify the matters that have no disputed factual issues. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must support its position with affidavits, depositions, admissions, or other documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Once the moving party has met this burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). When the burden of proof at trial would rest on the opposing party, the opposing party may not rest on mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts to show that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451

Mich 358, 362; 547 NW2d 314 (1996). The existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A mere promise to offer factual support at trial is insufficient. *Maiden, supra* at 121. A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden, supra* at 120.

Plaintiff argues that summary disposition was improper because defendant was liable to it under MCL 257.719(1). We disagree.

MCL 257.719(1) provides:

> A vehicle unloaded or with load shall not exceed a height of 13 feet 6 inches. The owner of a vehicle that collides with a lawfully established bridge or viaduct is liable for all damage and injury resulting from a collision caused by the height of the vehicle, whether the clearance of the bridge or viaduct is posted or not.

This Court has held that section 719(1) creates absolute liability for damages caused by breach of the statutory duty. *Dep't of Transportation v Christensen*, 229 Mich App 417, 424, 427; 581 NW2d 807 (1998). The plain language of the statute imposes a duty upon the "owner of a vehicle" which exceeds the height of 13 feet 6 inches "unloaded or with load." MCL 257.719(1).

Here, plaintiff has failed to provide any evidence that defendant owned or drove the vehicle which transported the excavator. Although defendant owned a truck and trailer capable of transporting the excavator, he affirmatively testified that he did not transport the excavator to Doyle's Equipment because his truck was broken down. Defendant testified that he instead hired an unknown man to transport the excavator with his own truck and trailer. We recognize both that circumstantial evidence can be considered in determining whether a genuine issue of material fact exists for purposes of summary disposition, *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004), and that this Court will look at the evidence in a light favorable to the non-movant when determining if a genuine issue of material fact exists. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). However, speculation and conjecture are not enough to establish a genuine factual issue. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). "A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Id*. at 98 (citation omitted).

In this case, defendant testified that he had equipment which could haul an excavator and that he had hauled the excavator in the past, but that he had also paid a friend to haul the excavator in the past. Accordingly, it is not inferable that defendant always hauled the excavator with his equipment. Admittedly, defendant's account of the events appears somewhat

contradictory.[1] Nonetheless, defendant was consistent in that he hired an unknown man to haul the excavator. Plaintiff offered no evidence to place defendant's testimony in doubt. Therefore, we cannot conclude that there is enough evidence for a jury to reasonably infer that more likely than not defendant lied to cover up that his own truck was used to haul the excavator. Submitting the facts to the jury in this case would simply invite speculation.

Next, plaintiff argues that summary disposition was improper because defendant was liable to it under MCL 230.7. Plaintiff also argues that defendant is liable for the acts of the man who hauled the excavator because hauling the excavator was inherently dangerous and illegal. We disagree with both arguments.

MCL 230.7 provides:

> Whoever shall injure any bridge maintained at the public charge, or any public road, by drawing logs or timber on the surface of any such road or bridge, or by any other act, shall be liable in damages to 3 times the amount of the injury, to be recovered in an action of trespass or on the case, by the commissioner of highways of the township within which the injury was done, in his name of office, to be expended by him in the repair of roads in his township.

Generally, a person who hires an independent contractor is not liable for injuries that the contractor negligently causes. *DeShambo v Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004). "An independent contractor is defined as one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 73; 600 NW2d 348 (1999) (citations omitted). However, a party may be liable for the negligence of an independent contractor where the work is inherently dangerous. *Schoenherr v Stuart Frankel Dev Co*, 260 Mich App 172, 177; 679 NW2d 147 (2003). This exception can apply 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. *Id.* Liability should not be imposed where the activity involved was not unusual, the risk was not unique, and reasonable safeguards against injury could readily have been provided by well-recognized safety measures. *Id.* (citations omitted).

Here, there is no indication that defendant retained supervisory control over the man he hired to transport the excavator. Defendant paid an unknown man $200 to transport his excavator. Defendant testified that he did not help the man load the excavator onto the trailer, did not direct the man to take any particular route to the equipment repair shop, and did not follow him to the repair shop. Thus, based on the undisputed facts submitted with the summary

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[1] Defendant testified that the excavator was hauled from his home to Doyle's Equipment. However, Deputy Purcell averred that defendant told him the excavator was hauled directly from the job site on Meceola Road to Doyle's Equipment.

disposition motion, the man who hauled the excavator was an independent contractor responsible for the method of completing the job of transporting the excavator and is the party responsible for any injury caused along the roadway while hauling it to the repair shop. In addition, plaintiff has failed to point to any act of defendant which caused damage to the bridge. Michigan has not recognized a duty requiring an employer to exercise care in the hiring of independent contractors. *Reeves v Kmart Corp*, 229 Mich App 466, 472; 582 NW2d 841 (1998) (recognizing that people generally hire independent contractors to do work that they do not have the time or expertise to do themselves and that it would be inefficient to require the hiring party to oversee the independent contractor's performance and supervise safety procedures).

Plaintiff also argues that hauling the excavator was an inherently dangerous activity. Plaintiff has failed to cite any authority for the proposition that hauling equipment such as an excavator is inherently dangerous. MCL 257.719(1) provides no support for this proposition and merely states that a vehicle, loaded or unloaded, shall not exceed a height of 13 feet 6 inches. We find here that hauling the excavator was not unusual and did not create a peculiar risk of harm. *Schoenherr, supra* at 177. Persons hauling such equipment can reasonably safeguard against injuries to bridges or third parties by undertaking safeguards such as measuring and securing the load. In addition, plaintiff argues that defendant cannot turn liability over to an independent contractor because hauling the excavator was in itself unlawful because it exceeded 13 feet 6 inches when loaded. However, the act of hauling an excavator of any height is not unlawful. The fact that the independent contractor performed the act in an unlawful and negligent manner does not make it an inherently dangerous activity.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Christopher M. Murray