IN THE SUPREME COURT

Appeal from Court of Appeals
Judge E. Thomas Fitzgerald, Presiding Judge

ROBERT F. DESHAMBO

Plaintiff-Appellee,

and,

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, and MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

DOCKET NO: 122939-40

Intervening Plaintiff-Appellee,

v

NORMAN R. NIELSEN and PAULINE NIELSEN,

Defendants-Appellants

and

CHARLES W. ANDERSON,

Defendant.

_____/

BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED

I. WHETHER THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE HAS BEEN APPROPRIATELY EXTENDED BEYOND ITS ORIGINAL APPLICATION TO ONLY THIRD PARTIES TO EXTEND LIABILITY TO LAND OWNERS AND GENERAL CONTRACTORS FOR INJURIES TO EMPLOYEES OF INDEPENDENT CONTRACTORS DOING DANGEROUS WORK?

APPELLANTS ANSWER "NO."

APPELLEES PRESUMABLY ANSWERED "YES."

THE TRIAL COURT AND THE COURT OF APPEALS DID NOT ADDRESS THIS ISSUE.

II. WHETHER THE RISK THAT IS INHERENT OR INTRINSIC WITH THE FELLING OF TREES CONSTITUTES A PROBABLE AND UNIQUE LIKELIHOOD OF SERIOUS INJURY FOR WHICH A CONTRACTEE OR PROPERTY OWNER MUST EXPECT OR ANTICIPATE THAT SPECIAL PRECAUTIONS WILL BE UNDERTAKEN IN ORDER TO AVOID THE RISK OF INJURY SO AS TO CONSTITUTE AN INHERENTLY DANGEROUS ACTIVITY?

APPELLANTS ANSWER "NO."

APPELLEES ANSWER "YES."

THE TRIAL COURT ANSWERED "NO."

THE COURT OF APPEALS ANSWERED "YES."

III. WHETHER, UNDER THE FACTUAL RECORD PRESENTED, A GENUINE ISSUE OF MATERIAL FACT EXISTED FOR A JURY'S DETERMINATION AS TO WHETHER DEFENDANT NIELSENS POSSESSED SPECIFIC OR SPECIALIZED KNOWLEDGE TO HAVE APPRECIATED OR EXPECTED, AT THE TIME OF CONTRACTING, THE PROBABLY RISK OF INJURY?

APPELLANTS ANSWER "NO."

APPELLEES ANSWER "YES."

THE TRIAL COURT ANSWERED "NO."

THE COURT OF APPEALS ANSWERED "YES."

FACTUAL BACKGROUND

Introduction

This cause of action involves a personal injury claim arising out of injuries sustained by Plaintiff Robert DeShambo on March 1, 1997 when he was struck by a tree fell by Defendant Charles Anderson on property owned by Appellants Norman and Pauline Nielsen. The Nielsens had permitted Mr. Anderson to enter onto their property to cut for firewood certain treetops that had remained from a prior logging project completed years earlier, and in doing so they also gave permission to Mr. Anderson to cut down some small standing poplar trees. (Appellants' Appendix K, p 127a; Appellants' Appendix L, p 158a.) Subsequently, Plaintiff Robert DeShambo was asked by Mr. Anderson to help split wood and clear some of the wood piles on the Nielsen property, and during the course of the work Mr. DeShambo was injured when a tree fell by Mr. Anderson struck Mr. DeShambo. (Appellants' Appendix J, p 122a; Appellants' Apendix K, p 132a.)

Statement of Facts

Norman Nielson permitted Charles Anderson to clean up the tops of some trees left by a previous logger. (Appellants' Appendix K, p 127a.) Mr. Anderson was to clean up tops that had been left on the ground and sell it for firewood, but Mr. Anderson was also allowed to take the pulp wood or small poplars that were left standing. (Appellants' Appendix K, p 127a.) The Nielsons' property had been timbered once in the 1970's and again sometime in 1995. (Appellants' Appendix L, p 158a.)

The farm in Northport where the incident took place had been in Mr. Nielsen's family since 1902. Mr. Nielsen was born there and lived there while he was growing up. (Appellants' Appendix L, p 150a.) After graduating from high-school, Mr. Nielsen moved downstate and began working for General Motors in 1952. (Appellants'

Appendix L, p 150a.) After his father died in 1958, Mr. Nielsen began managing the farm but continued to live downstate. (Appellants' Appendix L, p 150a.) He moved back to the farm permanently in 1987. (Appellants' Appendix L, p 150a.) However, on March 1, 1997, when the incident occurred, Mr. and Mrs. Nielsen were residing in the State of Arizona. (Appellants' Appendix L, p 128a.)

The farm is comprised of 130 acres. (Appellants' Appendix L, p 154a.) Approximately 30 acres of the farm are planted with cherry trees, six to eight acres are in corn, and roughly 100 acres are not in use. (Appellants' Appendix L, p 155a.) When Mr. Nielsen lived there as a child it was a working farm, and the family raised oats, wheat, corn, hay and potatoes. (Appellants' Appendix L, p 154a.) They also milked nine to ten cows. (Appellants' Appendix L, p 154a.) At the time of the incident, there were between 1,500 to 2,000 cherry trees on the farm. (Appellants' Appendix L, p 154a.) The cherry tree operation is run by Richard Deering, who conducts all aspects of the operation, but Mr. Nielsen would involve himself in making some marketing decisions. (Appellants' Appendix L, p 154a.) Mr. Nielsen does not have any equipment, does not spray, prune, mow or harvest. (Appellants' Appendix L, p 154a.) Except for cutting an occasional sucker, Mr. Nielsen never did any pruning of the cherry tree limbs (Appellants' Appendix L, p 154a.) Mr. Nielsen did not engage in any cutting of downfall or tops in the woods himself as he did not "have the ambition, the desire or the expertise to do it." (Appellants' Appendix L, p 159a.) His wife, Pauline Nielsen, was a nurse and also had no knowledge or expertise in the wood-cutting procedures. (Appellants' Appendix L, p 160a.)

When Mr. Nielsen and Charles Anderson arrived at their agreement regarding the tree cutting activities, there was no discussion as to how Mr. Anderson was going to cut the wood or what procedures or safety precautions would be taken; these decisions

were left to Mr. Anderson. (Appellants' Appendix L, p 160a; Appellants' Appendix K, p 128a.) Mr. Nielsen provided Mr. Anderson no direction and had no control over how the cutting was to be performed. (Appellants' Appendix L, p 159a; Appellants' Appendix K, p 128a.) With regards to the activities undertaken by Mr. Anderson, he testified that there was nothing unusual about the woodcutting activities, the wood being cut, or the nature of the terrain; everything was very routine and normal. (Appellants' Appendix K, p 129a.)

Mr. Anderson had began cutting wood and selling it to local residents at age 16. (Appellants' Appendix K, p 117a.) Cutting timber and firewood had been his main source of employment and income for at least ten years. (Appellants' Appendix K, p 117a.) At his deposition, Mr. Anderson described the various "levels" of expertise he had progressed through in the wood cutting business. He was at "level one" for about five to six years, which involved cutting trees down, trimming cherry trees and cutting and selling firewood. (Appellants' Appendix K, p 118a.) The next level he progressed to involved lot clearing. He engaged in this for approximately two to three years. (Appellants' Appendix K, p 118a.) Approximately ten years prior to the accident, Charles Anderson estimated that he began cutting "serious" wood for local sawmills and running a skidder. (Appellants' Appendix K, p 118a.) Mr. Anderson felt he had been at the top level of his profession utilizing technical wood-cuttung techniques for approximately 10 to 15 years prior to the accident. (Appellants' Appendix K, p 120a.)

Plaintiff-Appellee Robert DeShambo considered himself to be very experienced in the woods and made such representations to Charles Anderson. (Appellants' Appendix J, p 102a.) At his deposition Mr. DeShambo explained the routine methods involved in felling and delimbing trees. (Appellants' Appendix J, p 105a.) He testified

that if he and Charles Anderson had been following routine safety practices on March 1, 1997, he would not have been injured. (Appellants' Appendix J, p 105a.)

On March 1, 1997 Charles Anderson was directing the day's activities. (Appellants' Appendix J, p 100a.) On that day there was nothing unusual or out of the ordinary going on—the pair were just involved in routine tree felling, delimbing and log splitting activities. (Appellants' Appendix J, p 110a.) There was also nothing unusual or unsafe about the particular tract of land that they were working on. (Appellants' Appendix J, p 110a.) Robert DeShambo recalled that, at the time of the incident, he had just finished dropping some poplar trees and was delimbing them when he heard "someone yelling or screeching." (Appellants' Appendix J, p 98a.) He turned around and saw a tree coming down. (Appellants' Appendix J, p 99a.) He took off running, but the trunk of the tree hit him on the shoulder. (Appellants' Appendix J, p 99aa.) Mr. DeShambo believes that the tree then struck some logs lying on the ground, causing one of the logs to spin around, strike him in the back and pin him between the log and the fallen tree. (Appellants' Appendix J, p 99a.)

Mr. Anderson recalls that, on the day prior to the accident, he had cut down a row of poplar trees, approximately 100 to 150 trees roughly four inches to ten inches in diameter. (Appellants' Appendix K, p 131a.) On the day of the incident, when they arrived in the woods, he instructed Mr. DeShambo to begin delimbing the trees he had already fell, beginning at a location some distance away from where Mr. Anderson intended to resume felling trees. (Appellants' Appendix K, p 139a.) Mr. Anderson testified as to what transpired leading up to the accident, as follows:

> Q Now, when you started to cut the tree, did you take a check around to see where everybody was located?
>
> A Well, right when I dropped my hard hat on my head, I knew where everybody was. Everybody had

instructions, and we had a green light. We were going to go.

Q Now, the tree didn't fall into the direction that you intended, did it?

A Oh, yes, it did; fell right where I wanted it to fall.

Q It fell right where you wanted it?

A Yes, it did; right next to the very tree that I just dropped earlier - - or right on top of it, you know. I mean, it's - - and in Bob's deposition said that I had pinned him between two trees. There's - - you know, nothing of the sort, you know. It was just one top of the tree. And there was another one laying there that he was - - had been trimming on. But the way the deposition implies it is that I crushed him between two trees, and that's not what happened at all. He got hit by the top of the tree, and I had explained that earlier. And that was it.

When I put my hard hat on my head, Bob was walking in the direction he was supposed to walk. And I started cutting my tree, and then, when I looked up, there he was. And believe you me, if I could change that - - those two seconds today, I would. (Appellants' Appendix K, p 138a-139a.)

* * *

Q About how far was he from the area when you told him to go up there?

A Well, we were standing right here at the back of the pickup truck, and then that's when I gave him instructions. And, you know, we were right here (indicating) - - all three of us standing right here and fueling our saws up. And I gave him instructions. And I know I had walked over into here, because, you know, I'm not going to sit at the back of the pickup with my hard hat on my head. I just don't do that. I always peel it off, throw it in the truck so I can talk to people.

Q You didn't walk up to the area that you showed him? You just pointed?

A No. I pointed down here (indicating), you know. And here we're back to the experienced woodcutter

thing, you know. The guy's going to go down here and work, and he's going to work facing me, you know. That's just the way it's done. And it didn't happen that day.

Q Now, from where were you standing or positioned when you started to notch the tree?

A I was standing right here (indicating); just like that; you know, right in here, you know, on the side of the tree. I just slammed it once here, spun my saw around, slammed it on the back. And when I looked up to watch the tree go, there he was, standing right there. (Appellants' Appendix K, p 139a.)

Procedural History

On February 20, 2000, Robert DeShambo initiated action in the Leelanau County Circuit Court to recover for his injuries against Charles Anderson and Norman and Pauline Nielsen. Subsequently, on or about May 28, 2000, the State of Michigan and the Michigan Department of Community Health intervened, seeking to recover monies paid for Mr. DeShambo's medical treatment through Medicaid.

On July 31, 2000, Appellants filed a motion for summary disposition on the grounds that they were immune from liability for Plaintiff's injuries allegedly caused by the negligence of their independent contractor, Charles Anderson, and that Plaintiff could not establish liability under any recognized exception to Appellants' immunity including, *inter alia*, the inherently dangerous activity exception. Plaintiff responded to Appellants' motion for summary disposition, conceding that the inherently dangerous activity exception was the only theory upon which recovery could be based. (See Plaintiff's Brief in Response to Nielsens' Motion for Summary Disposition, page 4.)

A hearing on Appellants' motion for summary disposition was initially conducted in the Leelanau County Circuit Court before Leelanau Circuit Court Judge Thomas G. Power on September 25, 2000, at which time the Court adjourned the

hearing until such time as the deposition of Norman Nielsen could be completed by Plaintiff. (Appellants' Appendix H, pp 57a-59a.). The continued hearing on Appellants' motion was conducted January 8, 2001, at which time the Court indicated that it would grant Appellants' motion for summary disposition, finding that the activities leading to Plaintiff's injuries were not inherently dangerous, and, thus, Appellants were not liable for his injuries. (Appellants' Appendix I, pp 78a-89a.)

On January 29, 2001 an Order granting Appellants' motion for summary disposition was entered, dismissing Plaintiff's complaint with prejudice. (See Appellants' Appendix A, p 4a and D, p 21a.) Thereafter, on April 4, 2001 a Stipulation and Order for Voluntary Dismissal was entered dismissing those claims asserted against Defendant Charles Anderson without prejudice. (See Appellants' Appendix E, p 23a.)

On April 23, 2001, Plaintiff filed his Claim of Appeal with the Michigan Court of Appeals, and intervening Plaintiff filed a Claim of Appeal subsequently on April 24, 2001. Thereafter, following oral arguments conducted in the Michigan Court of Appeals before Judges E. Thomas Fitzgerald, P.J., Holbrook and Mark Kavanagh on September 9, 2002, the Court of Appeals issued its decision on October 22, 2002, reversing the trial court's grant of summary disposition to Appellants. (Appellants' Appendix F, p 25a.) Appellants' subsequent motion for reconsideration before the Court of Appeals was denied by its Order dated December 4, 2002. (Appellants' Appendix G, p 28a.)

Appellants' subsequent Application for Leave to Appeal to this Court was granted by Order dated November 6, 2003. In doing so, the Court requested the parties to address "whether the 'inherently dangerous activity' doctrine has been appropriately extended beyond its original application to only third parties to extend liability to

landowners and general contractors for injuries to *employees* of independent contractors doing dangerous work."

ARGUMENT

I. THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE, AS HISTORICALLY ADOPTED IN THE STATE OF MICHIGAN, DOES NOT EXTEND LIABILITY TO CONTRACTEES FOR INJURIES SUSTAINED TO EMPLOYEES OF INDEPENDENT CONTRACTORS ALLEGEDLY PERFORMING INHERENTLY OR INTRINSICALLY DANGEROUS WORK, AND PRIOR COURT DECISIONS HAVE ERRONEOUSLY EXTENDED THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE TO EMPLOYEES OF INDEPENDENT CONTRACTORS IN CONTRAVENTION TO THE ORIGINS OF THE INTENDED EXCEPTION THROUGH MISAPPLICATON OF OTHER NOTED EXCEPTIONS EXISTING PURSUANT TO SEPARATE AND DISTINCT DUTIES IMPOSED BY CONTRACT OR AT LAW.

Discussion

The inherently dangerous activity doctrine adopted as an exception to the general immunity granted from liability for injury caused by the negligent acts of an independent contractor has origins found since its recognition by the Court in *Ingles v Millenburg Driving Ass'n,* 169 Mich 311; 136 NW 443 (1912). However, the subsequent extension and application of this exception to impose liability for injuries caused to the employees or agents of independent contractors has improperly broadened the exception to imply separate duties running directly to the contractee that are distinct from the nature of the activities or work performed, including theories based upon retained control over the work or defects existing on the property upon which the work is to be performed.

A discussion must begin first with the Court's initial recognition and adoption of the general principle that one who employs an independent contractor is not responsible for injuries caused to person or property by the negligence of an independent contractor, in *DeForrest v Wright,* 2 Mich 368 (1852), wherein it stated "the rule now seems very clearly to be this, that where the person employed is in the exercise

of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoing of the former."

However, adoption of this principal of law also gave rise to noted exception. The immediately recognized exceptions included, as alluded to in *DeForrest, supra*, liability to third parties where the acts of the independent contractor were performed under the "control, direction, or supervision" of the contractee. See *City of Detroit v Corey*, 9 Mich 165 (1861) [City of Detroit's duty to repair and retain control sufficient to hold City liable for the acts of independent contractor], and *Darmstaetter v Moynahan*, 27 Mich 188 (1873) [Defendant's retention of authority and direction over ice contractors filing of icehouse imposed liability for injuries caused by the contractor's negligence in leaving ice blocks in street struck by plaintiff's sleigh].

As to the contractee's obligation to those employees of an independent contractor, it was further recognized that if the conditions of the premises upon which the work was to be performed created an unreasonable risk of injury, then the premise's owner or contractee in possession of the premises had the obligation to diminish the risk of injury by mere virtue of possession or retained control over the conditions of the property. *Lake Superior Iron Company v Catherine Erickson, Adm'x*, 39 Mich 492 (1878). In *Lake Superior Iron*, an employee of a mining contractor sustained fatal injuries when a large rock fell onto the plaintiff's decedent. *Id.* The plaintiff brought an action for recovery against the mining company which owned the mine. *Id.* The Court determined that, despite the fact that the decedent was an employee of an independent contractor, the mining company could be held responsible for the injuries caused as a result of its retained control over the premises and the scope of the work performed. *Id.* In reaching its decision, the Court in *Lake Superior Iron Company* indicated that the

determination of a contractor's liability for those injuries depended upon "whether any duty remained" with regards to the contractee's relationship to the claimed injuries, stating, in pertinent part:

> "No doubt the range of the owner's responsibility is very much less in most cases where contractors are employed and have their own servants at work, than where the servants are employed by the proprietors. ***The main question in such cases is whether any duty remained which sprang from the proprietor's own position, and from the violation of which the damage arose.***"
>
> * * *
>
> "By employing men to act for them in either way they hold out the assurance that they can work in the mine on the ordinary conditions of safety usually found in such places. ***They guaranty nothing more than is usual among prudent owners***, and they do not insure against that which is clearly accidental." (Emphasis added.) *Lake Superior Iron, supra.*

Subsequently, the Court recognized that a contractee or premises owner could not escape liability at "common law" for injury resulting from acts that had been performed by an independent contractor and which were, in and of themselves, inherently or intrinsically dangerous. *Rogers v Parker*, 159 Mich 278; 123 NW 1109 (1909). In *Rogers*, the plaintiff's farm was damaged by a fire that had escaped from the defendant's adjacent farm; the fire had been deliberately set by an independent contractor who had been hired to clear the defendant's farmland of "brush heaps and logs." *Id.* The defendant had moved for a directed verdict on the grounds that he was not liable for the damage to the plaintiff's property "because the negligence, if any, was that of an independent contractor who had exclusive control of the work." *Id.* The defendant's motion for directed verdict was denied. In reversing the trial court's denial of the defendant's motion for directed verdict, the Court noted at "common law" the existence of the exception to the immunity for work performed by an independent

contractor occurring from dangerous activities, but determined that this exception was not applicable to the plaintiff Rogers' cause of action as his claim had been specifically plead under Michigan Statute providing for double damages occurring as a result of a landowner's willful or negligent acts in allowing fires to spread to other property, "'being Chapter 320, Compiled Laws of the State of Michigan of 1897, particularly Sections 11653 and 11658 and all of the Sections intervening.'" *Id.*

Nonetheless, the Court in *Rogers, supra,* acknowledged the principles that would be applicable to a "common law" claim and present an exception to the recognized immunity resulting from dangerous activities, stating, in pertinent part:

> "It is true that it has been repeatedly held that the rule relieving the employer where the work has been committed to an independent contractor is subject to the well-established exceptions that: '***If the thing to be done* is in itself unlawful, or if it is per se a nuisance, or if it *cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen to third persons from the act done as though he had done the act in person.*** So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor. ***Of the same nature is the duty which the law imposes upon every person,* who for his own purposes, *brings on his lands, and collects or keeps there, anything likely to do mischief it is escapes,* to keep it at his peril; and if he does not do so, *he is prima facie answerable for all the damages which is the natural consequence of its escape.*'" (Emphasis added.) *Rogers, supra.*

Subsequently, in *Inglis v Millersburg Driving Ass'n, supra,* noting its decision in *Rogers, supra, inter alia,* the Court applied the recognized "common law" exception for inherently dangerous activities to an immunity defense asserted in response to a claim filed by the plaintiff for damages caused to his property by fires set by an independent contractor on the defendants' adjoining property. The defendants in *Inglis* had

employed an independent contractor for clearing of property to establish a "half mile race track." *Id.* The trial court had directed a verdict for defendants on the grounds that "defendants were not liable for damages caused by fires set by an independent contractor of his servants." *Id,* 169 Mich at 314. The Court reversed the verdict for the defendants, applying the principles of the inherently dangerous activity exception, to find that the setting of the fires presented a "condition of great danger" and were "set with utter disregard of consequence, which, under the conditions, naturally resulted from such conduct." *Id,* 169 Mich at 322.

In reversing judgment, the *Inglis* Court set forth the parameters of the recognized exception for inherently dangerous activities, stating:

> "The court erred in instructing a verdict for defendants, for the reason that under the circumstances and known conditions, and the warnings of defendant, ***it was their duty to use all reasonable precautions to prevent damage by fire, and they were not only bound to stipulate in the contract that proper precautions should be taken, but also to see that they were observed, otherwise they would be liable for consequences; that there are exceptions to the general rule that the principal is not liable for damages arising from the wrongful acts of an independent contractor.*** We agree with this contention. It is founded upon reason and authority. Judge Cooley, in his work on Torts, says: '***If I employ a contractor to do a job of work for me which in the progress of its execution obviously exposes others to unusual perils, I ought, I think, to be responsible, * * * for I cause acts to be done which naturally expose others to injury.***' Cooley on Torts (ed Ed.) p. 1091, note 20. This exception was recognized in a recent case by this court (*Rogers v Parker,* 159 Mich. at pages 282 and 283, 123 N. W. at page 1111, 34 L.R.A. [N.S.] 995, 18 Ann. Cas. 753), where the following quotation taken from an eminent author is quoted: '***So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape his duty by turning the whole performance over to a contractor,*** etc. *Mechem on Agency,* § 747, and cases cited.' In 26 Cyc. pp. 1559, 15560, this rule is recognized, and the case there cited amply sustain it: '***Where the work is dangerous of itself, or***

as often termed, 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employment of an independent contractor. Stated in another way, *where injuries to third persons must be expected to arise, unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief. The injury need not be a necessary result of the work, but the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken.'*

* * *

The Supreme Court of Ohio in a well-considered case has approved this doctrine, quoting from the leading English cases: *'The doctrine of independent contractor, whereby one who lets work to be done be another, reserving no control over the performance of the work, is not liable to their persons for injuries resulting from negligence of the contractor or his servants, is subject to several important exceptions. One of these, applicable, as we think, is where the employer is, from the nature and character of the work, under a duty to others to see that it is carefully performed.* It cannot be better slated than in the language by Cockburn, C.J., in *Bower v Peate*, 1 Q. B. Div. 321, 326, a leading and well-considered case. It is *'that a man who orders a work to be executed, from which, in the natural course of things injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see to the doing of that which is necessary to prevent mischief, and cannot relieve himself of his responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person, as to what is necessary to prevent the act he has ordered done from becoming unlawful'* It was suggested by Lork Blackburn in *Hughes v Percival*, 8 App. Cas. 443, that this was probably too broadly stated. But in the recent case of *Hardaker v Idle Dist.* (1896) 1 Q.B. 347, the doubt expressed by Lord Blackburn was regarded as unwarranted, and the principle as formulated by Cockburn was adopted and applied. This does not abrtogate the law as to independent contractor. It still leaves abundant room for its proper application. *'There is,' as stated by Cockburn, 'an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary*

> ***measures are adopted.' The weight of reason and authority is to the effect that where the party is under a duty to the public or third person to see that work he is about to do, or has done, is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another.'*** *Covington & Cin. Bridge Co. v Steinbrock,* 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, and cases cited. The principle involved cannot be better stated than it is in the sentence last quoted, supra. ***It is not applied to those cases where the injuries occur which are collateral to the employment, like the dropping of material by the servant of a contractor upon a person passing by, but where a duty is imposed upon the employer in doing work necessarily involving danger to others, unless great care is used, to make such provision against negligence as may be commensurate with the obvious danger.*** It is this duty which cannot be delegated to another so as to avoid liability for its neglect." (Emphasis added.) *Inglis,* 169 Mich at 319-322.

The Court's subsequent application of the exceptions to a contractee's immunity for injuries as recognized in *Rogers, supra, Lake Superior Iron, supra,* and *Inglis, supra,* continued with reference to the existence of a contractee's liabilities for any residual duties stemming as the result of the work conditions, retained control and/or an inherently dangerous activity. See *Collias v Detroit & Northern Michigan Bldg. & Loan Ass'n,* 220 Mich 207; 189 NW 866 (1922) [Owner retained control over excavation]; *Olah v Katz,* 234 Mich 112; 207 NW 892 (1926) [Digging a hole near a sidewalk presenting an unusual danger to passing children]; *Wight v HG Christman Company,* 244 Mich 208; 221 NW 314 (1928) [Whether the operation of steam shovel constituted an inherently dangerous activity]; *Watkins v Gabriel Steel Company,* 260 Mich 692; 245 NW2d 801 (1932) [Regarding whether the safety of steel joists upon which planks were placed gave rise to an unusual danger in the performance of work on planking]; *Grinnell v Carbide & Carbon Chemicals Corporation,* 282 Mich 509; 276 NW2d 535 (1937) [Installation of pyrofax gas stove constituted an inherently dangerous activity]; *Tillson v Consumers Power Company,*

269 Mich 53; 256 NW2d 801 (1934) [Excavation created "unusual" danger to plaintiff's adjacent building]; *Barlow v Krieghoff Company*, 310 Mich 195; 16 NW2d 715 (1944) [Use of hot tar in roofing project not inherently dangerous and no retained control by defendant]; *Cary v Thomas*, 345 Mich 616; 76 NW2d 817 (1956) [Fumigation of home not inherently dangerous activity and homeowner retained no control over method or process of fumigation.]

The Court in *Cary v Thomas, supra* summarized the recognized exceptions to a contractee's non-liability for acts performed by an independent contractor as follows:

> "We approve the following taken from 39 C.J. 1324:
>
> > 'Although the rule is stated in decisions in many different ways, and although there is a considerable conflict of authority as to whether a particular state of facts brings the case within the general rule relieving the contractee from liability, or causes it to fall within one of the exceptions which render him liable, the general rule deducible from the decisions and the one now universally recognized is that, where the relation of an independent contract exists, and due diligence has been exercised in selecting a competent contractor, and the thing contracted to be done is not in itself a nuisance, nor will necessarily result in a nuisance if proper precautionary measures are used, and an injury to a third person results, not from the fact that the work is done, but from the wrongful or negligent manner of doing it by a contractor or his servants, the contractee is not liable therefor.'" *Cary, supra*, 345 Mich at 629-630.

Under the early recognized authorities addressing the exception to immunity related to inherently dangerous activities, application of the exception did not include injury sustained by the employees or agents of an independent contractor, but addressed the risk of injury to third persons by the work performed. See *Barlow, supra; Cary, supra; Grinnell, supra; and Watkins, supra.* In *Mulcahy v Argo Steel Construction Company*, 4 Mich App 116; 144 NW2d 614, the plaintiff, a contractor, brought a claim for

injuries against the general contractor and steel subcontractor for injuries sustained on a construction site while present at the job to discuss other "business dealings" with the owner of the property. *Id.*, 4 Mich App at 120.) Plaintiff's injuries occurred when "an arc of electricity" struck the plaintiff while standing near a crane that came into contact with an overhead power line. (*Id*, 4 Mich App at 120.)

In charging the jury, the trial court instructed the jury under the inherently dangerous activity doctrine, which was not plead or claimed by plaintiff. In addressing the instructional error, the Court of Appeals summarized the rule of law with regards to the recognized immunity and exception for inherently dangerous activities as follows:

> "The rule in this state, which is not questioned by Great Lakes and was correctly stated by the trial judge, is that '[a] general contractor is not liable for the negligent acts of an independent contractor in the absence of the right to control. See *Utley v Taylor & Gaskin, Inc.*, 305 Mich. 561; 9 N.W. 2d 842, and authorities therein cited.
>
> One of the exceptions to this rule is that there is no immunity from responsibility when the work to be done is of such character that it necessarily subjects third persons to unusual danger.' *Barlow v Krieghoff Co.* (1944), 310 Mich. 195, 198, 16 N.W. 2d 715, 716. Under this theory, commonly referred to as the 'inherently dangerous activity' theory, the general contractor or employer is held liable not for his own culpable negligence, but for the negligence of the independent contractor engaged in an activity of such a character that it necessarily subjects third persons to unusual danger. Thus, the general contractor is made vicariously liable for the negligent acts of the independent contractor. See *Prosser on Torts* (3d ed), s 70." *Mulcahy*, 4 Mich App at 126-127.

The first decision to apply the inherently dangerous activity exception to extend liability for injuries sustained by an independent contractor's employee arose in *Vannoy v City of Warren*, 15 Mich App 158; 166 NW2d 486 (1968). In *Vannoy*, the plaintiff's decedent was overcome by gas while working for his employer "'which had contracted with the defendant City of Warren to do certain work in connection with the installation

of a sewer.'" *Vannoy*, 15 Mich App at 161. The trial court instructed the jury, over the City of Warren's objections, under the inherently dangerous activity exception. On subsequent appeal, the City of Warren challenged the trial court's instruction on the grounds that the exception did not "apply to servants or employees of independent contractors engaged in the inherently dangerous activity." *Id.*, 15 Mich App at 163. The Court of Appeals, in a conclusory fashion, summarily rejected the City of Warren's arguments stating:

> "A distinction, as argued by the City, based upon the legal designation of injured parties, e.g. 'third' persons or 'others' as opposed to employees of independent contractors, violates the absolute character of the duty and is contrary to the Court's rationale set forth in *Olah v. Katz, Supra; Watkins v. Gabriel Steel Co.* (1932), 260 Mich. 692, 245 N.W. 801; *Utley v. Taylor & Gaskin, Inc.* (1943), 305 Mich. 561, 9 N.W.2d 842 and *McCord v. United States Gypsum Co.* (1966), 5 Mich. App. 126, 145 N.W.2d 841." *Id.*, 15 Mich App at 164.

A close reading of those authorities cited by the panel of the Court of Appeals in *Vannoy* clearly indicates that the panel of the Court of Appeals mistakenly intertwined or failed to recognize the distinction with regards to the exception to immunity for "retained control" and the exception for an inherently dangerous activity. The panel of the Court of Appeals in *Vannoy* concluded that it was "ludicrous to intimate that working in an atmosphere of deadly, tasteless, odorless and colorless gas without any protective devices is not a dangerous activity", and, as such, "the factual questions regarding the presence of such a gas and other circumstances surrounding decedent's employment prompted consideration of the issue by the jury." *Id.*, 15 Mich App at 164. However, in review of the historically recognized exceptions to a contractee's immunity, as noted above, the *Vannoy's* court's conclusion that the inherently dangerous activity exception applied simply because the work performed was dangerous was erroneous without evidence that there existed some separate residual

duty by the contractee, the City of Warren, to act for the benefit of or protection of the decedent. Admittedly, a reading of the *Vannoy* decision suggests that possibly the panel of the Court of Appeals in its deliberations considered the existence of remaining duties by the City of Warren to act for the benefit of the decedent, by alluding to "other circumstances surrounding the decedent's employment," as the *Vannoy* court's subsequent discussions of the remaining claimed errors provided evidence that the City or its engineer was responsible to supervise, inspect and direct the work, including the detection of gas. See *Vannoy, supra,* 15 Mich App at 164-167.

Nonetheless, a review of the authority cited and relied upon by the panel of the Court of Appeals in *Vannoy* reveals that it erroneously concluded that the exception created under the inherently dangerous activity doctrine was necessarily intended to apply to independent contractors, as well as third persons. A review of the Court's historical adoption of the stated exceptions to a contractee's immunity for injuries caused by an independent contractor, as cited above, indicates that the inherently dangerous activity exception serves the protection of third persons, whereas the other noted exceptions, i.e. duties arising from the retained control over the work or existing defects in the property, would serve to benefit all foreseeable persons, including employees or agents of the independent contractor. These later exceptions to a contractee's immunity stem from separate residual duties that the contractee and/or landowner <u>may</u> possess, as noted by the Court in *Lake Superior Iron Company, supra,* based upon "whether any duty remained which sprang from the proprietor's own position, and from the violation of which the damage arose." *Id.*, 39 Mich 492. The historical origins of the stated exceptions for inherently dangerous activity, read in accord with the Court's analysis as set forth in *Lake Superior Iron Company,* clearly indicate that, with respect to injuries sustained by employees or agents of an

independent contractor, the appropriate analysis does not concern whether the employed party was involved in inherently dangerous activity, but whether the injuries were "due to the fault of the [contractree] in not doing what they were bound to do for the protection of those working . . ." *Lake Superior Iron Company,* 39 Mich 492.

The foregoing conclusion as to the *Vannoy* court's misinterpretation is supported by a reading of the Court's subsequent decision in *Funk v General Motors Corp.,* 392 Mich 91; 220 NW2d 641 (1974). However, in the meantime, the blur in the distinction between the noted exceptions to immunity under the analysis of *Vannoy, supra,* went uncorrected, and was further compounded by the Court's decision in *McDonough v General Motors Corp.,* 388 Mich 430; 201 NW2d 609 (1972).

In *McDonough, supra,* the Court addressed the liability of General Motors and its architect/engineer's liability for the fatal injuries sustained by a sub-contractor's employee while working to erect the steel frame work for construction of an additional floor to GM's Flint assembly plant. *McDonough, supra,* 388 Mich at 436. The plaintiff's decedent was struck by a "'boom'" attached to a "'still-legged derrick'" that was owned and operated by the decedent's employer.

The Court reversed the trial court's grant of a directed verdict to defendant General Motors by issuance of separate and non-majority concurring opinions resulting in what has been subsequently referred to as a "2 - - 2 - - 1 - - 2 vote." *McDonough, supra,* see *Funk, supra,* 392 Mich at 116, [J. Colemen.] A review of the concurring opinions of the *McDonough* Court which voted to reverse the trial court's directed verdict, purported to set forth the standard for review under the inherently dangerous activity exception, but the crux of the analysis appeared to relate to whether General Motors retained such control over the project that it was required to act to diminish the

risk of injury to the plaintiff's decedent. The opinion authored by Justice Black and concurred by Justice Swanson, presented the question for review as follows:

> "The first question whether plaintiff made out, as against defendant General Motors' motion below, a case which tended to show that this contract of construction involved 'danger to others unless great care is used' and that defendant General Motors failed to see that such 'great care' attended execution of the contract [FN2].
>
> * * *
>
> . . . [FN2] 'Great care', in cases as at bar, means some sort of a safety precaution program, initiated and maintained by the contracting owner. Whether that was done became upon the record a question for the jury." *Id.*, 388 Mich at 439.

Similarly, in reversing and remanding, Chief Justice T. M. Kavanagh, in which Justice Adam concurred, stated, in pertinent part:

> "The inherently dangerous activity doctrine, however, does not encompass the factual situations presented by the majority of the cases. More typically, the employee of an independent contractor is injured by some cause not arising out of or related to the contractual relationship. * * *
>
> . . .Of course, the determination of whether the risk is in fact separate and distinct from those created by the defects to be repaired must be resolved by the jury.
>
> Under the facts of the instant case, sufficient proofs and reasonable inferences therefrom were presented and give rise, at least, to a jury submissible question of whether the work to be performed by plaintiff's decedent's employer is an inherently dangerous activity, and whether that degree of care was used which an ordinarily prudent person would use under the same or similar circumstances." *Id.*, 388 Mich at 450-451.

However, the dissenting opinion issued by Justice Brennan and joined by Justice T. G. Kavanagh, concluded that the inherently dangerous activity exception <u>did not</u> extend to impose liability for injuries sustained by the employees of an independent contractor, wherein it was reasoned:

dangerous activity exception suggesting that the inherently dangerous activity exception might apply "on occasion" to extend liability for injuries to employees for independent contractors, stating as follows:

> "The inherently dangerous activity doctrine is an exception to the general rule that an employer of an independent contractor is not liable for the contractor's negligence or the negligence of his employees. 2 Restatement Torts, 2d, § 409, p. 370; 41 Am.Jur.2d, Independent Contractors, § 41, p. 805.
>
> ***Michigan*** has recognized the exception for activities which reasonably can be foreseen as dangerous to third parties, and ***has, on occasion, allowed the doctrine to be applied to employees of the contractor performing the dangerous work.***" *McDonough v. General Motors Corp.*, 388 Mich. 430, 201 N.W.2d 609 (1972); *Vannoy v. City of Warren*, 15 Mich.App. 158, 166 N.W.2d 486 (1968) lv.den. 382 Mich. 768 (1969).

In *Bozak*, a subcontractor's employee was injured on a construction project while assembling a crane to be used on the project. *Bozak, supra,* 422 Mich at 721-722. In affirming the trial court's denial of the plaintiff's motion for new trial, the Court concluded that the asserted danger of assembling a crane after hours did not constitute a "dangerous activity", but rather the work was "a fairly routine job as construction jobs go." 422 Mich at 729.

Under the historical authority for the Court's adoption of the inherently dangerous activity exception, it is clear that the exception, as intended, would not apply to employees of independent contractors, but that any such liability arises directly from separate identifiable duties in connection with either the premises or retained control and authority over the scope of the work performed. *Ingles, supra, Lake Superior Iron, supra* and *Funk, supra.* The evolution of the recognized exception for inherently dangerous activities to extend liability to employees of independent contractors under the pronouncements of *Vannoy, supra, McDonough, supra* and *Bozak, supra,* is contrary to

the legal underpinnings of the exception; these broad pronouncements have expanded the scope of the inherently dangerous activity doctrine by merging the distinct exceptions to the general rule of immunity and the relevant analysis to be addressed with each. If relevant, a separate analysis, aside from the inherently dangerous activity exception, must be employed in determining whether the contractee has any potential liability for injuries related to any existing duties as the possessor of defective property that causes injury or with regards to contractual or statutorily imposed responsibilities to regulate, direct or supervise the scope of the work being performed. Even these latter exceptions, however, are intended to impose no greater obligations than "is usual among prudent owners" [*Lake Superior Iron Company, supra*] or those imposed by law and/or contract. See *Lenderink v Village of Rockford*, 135 Mich 531; 98 NW2d 4 (1904); *City of Detroit v Corey*, 9 Mich 165 (1861); *Barlow v Krieghoff*, 310 Mich 195; 16 NW2d 715 (1944); *Wright v Big Rapids Door & Blind Mfg. Co.*, 124 Mich 91; 82 NW2d 829 (1900); and *Munson v Vane-Stecker Company*, 347 Mich 377, 392; 79 NW2d 855 (1956) [no legal duty existed upon which injured subcontractor's employee could impose liability against general contractor in absence of legally contractually imposed obligations.] Certainly, a sufficient duty may exist to give rise to an exception of the generally recognized immunity such to impose an obligation for liability to the employees of independent contractors, but such an obligation may not be premised under the inherently dangerous activity doctrine as it would relate to injuries that stem directly from that activity contracted for. The authority and rationale of such a conclusion is readily born out by reference to the commentary cited by Justice T. M. Kavanagh in *McDonough*, citing "the general rule stated in 31 A.L.R. 2d 1375 at 1381 - - 1384:

> "There is a line of cases supporting the proposition that, as an exception to the general rule requiring the owner or occupier of premises (contractee) to furnish a safe place of

> work to an independent contractor and the latter's employees, the owner or occupier is under no duty to protect them against risks arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon, which the contractor was undertaken to repair.
> 'Closely related to the exception stated above is the rule that the owner is not liable for death or injury of an independent contractor or one of his employees resulting from dangers which the contractor, as an expert, has known, or as to which he and his employees 'assumed the risk.'
> 'In support of the exception to the 'safe place' doctrine, it has been pointed out that, before repairs of any kind can be made to a structure or thing, it is first necessary to find out what is wrong with it, that it is the responsibility of the repairman to determine what that defect is, that the contractor, under his contract to repair, has the duty of discovering any latent defect, and if he fails to do so he fails not only to fulfill (sic) his contract but also to perform his duty to his employee, and that the contractor has an equal or even a better opportunity to discover any defects than has the contractees. * * *
> 'On the other hand, ***where a risk separate and distinct from those created by the defects to be repaired under the contract,*** resulted in the injury or death of a contractor or an employee of the latter, it has been held that a contractee cannot successfully invoke the defense of assumption of risk, and that the general rules (which are not the same in all jurisdictions) governing the extent of his duty to furnish an independent contractor and his employees a safe place of work and to warn them of hidden dangers are applicable.'" (Emphasis added.) *McDonough*, 388 Mich at 450-451.

It is noted that a panel of the Michigan Court of Appeals in *Muscat v Khalil,* 150 Mich App 114; 388 NW2d 267 (1986) [Hood, J.H. Gillis and Batzer], which concluded that the inherently dangerous activity exception did not apply <u>directly</u> to the independent contractor, has theorized a distinction in application of the exception between the independent contractor and an independent contractor's employees, stating:

> "We note from each of the passages quoted above [referring to *Bozak, supra,*] that the independent contractor himself is not mentioned as a party intended to benefit from the inherently dangerous activity doctrine. Rather, the passages

> refer to "third parties" or, more generally, "others", and employees of the contractor. We do not believe that these references were inadvertent since none of the cases cited by the plaintiff involves a recovery by the independent contractor himself for damages sustained as a result of his own negligence in performing the work of the employer. ***We believe that an important distinction exists between employees of an independent contractor and the independent contractor himself. Since an employee has no control over the manner in which the work is to be performed and must simply carry out the orders and directions of his employer, he stands in position more closely akin to the innocent bystander, or "third party".*** The independent contractor himself, on the other hand, was hired specifically for his ability to perform the work properly and is given complete control over the manner in which the job is to be completed. Thus, where harm occurs as a result of the failure to take "special" precautions in work" 'necessarily involving danger to others, unless great care is used'", * * * employees and third parties, not having the authority to ensure that the necessary care is used, are rightfully excepted from the general rule which immunizes the employer of the independent contractor from liability." (Emphasis added.) (Citations omitted.) *Id.*, 150 Mich at 119.

The *Muscat* panel's rationale in making a distinction between an independent contractor and an independent contractor's employee is flawed. Certainly, an employee of an independent contractor who performs an activity that may be perceived to present inherent dangers, has an election whether to pursue such work and presumably any associated risks would be contemplated in negotiating or establishing the employee's wage or rate of pay commensurate with the potential risk. Also, considering the likely experience, background, training and other qualifications that would be necessary to qualify the employee to carry out such work, in furtherance of the contractor's business operations, the employee would be in a position to exercise discretionary functions with regards to the manner in which the activity is conducted or carried out, and, thus, is not in a position "more closely akin to the innocent bystander of 'third party'."

Under any analysis employing the *Muscat* panel's rationale to distinguish between the contractor and its employees, would require the assumption that the employee of a contractor would be ***without*** the ability to direct the work, consciously assume the risk and request that more qualified individuals, either employed or otherwise, be assigned to complete the task. An employee carrying out the business operations of an independent contractor is not analogous to a third party who is unaware of the proximity to danger or unable to appreciate the extent of the danger. Therefore, any distinction as suggested by the Court of Appeals in *Muscat* cannot justify extension of the doctrine.

Based upon the foregoing discussion, Appellants respectfully request issuance of an Opinion by the Court clarifying that a contractee's liability for injuries caused to the employees of an independent contractor may not be extended under the principles of the inherently dangerous activity exception; any liability for the injuries to employees of independent contractors can arise only separate and independent from the nature of the contractual work being performed and can exist only under some separate duty imposed by law and/or by contract upon the contractee from which the injury to the independent contractor's employee occurred as a result of a breach of that duty.

II. THE POTENTIAL RISK ASSOCIATED WITH THE FELLING OF TREES DOES NOT CONSTITUTE A RISK SO PECULIAR, SPECIAL OR UNIQUE TO CREATE A CIRCUMSTANCE OF FORESEEABLE SERIOUS INJURY, PER SE, FOR WHICH A CONTRACTEE MUST BE DEEMED LIABLE, AS A MATTER OF LAW, FOR ANY RESULTING INJURY WHICH OCCURS TO A CONTRACTOR'S EMPLOYEE OR AGENT DURING THE PERFORMANCE OF CONTRACTUAL WORK CALLING FOR THE REMOVAL OF TREES. THE NATURE OF POTENTIAL RISK ASSOCIATED WITH THE FELLING OF TREES IS INSUFFICIENT TO CONCLUDE THAT A LANDOWNER MUST HAVE EXPECTED, AT THE TIME OF CONTRACTING FOR THE TREE REMOVAL, THE WORK REQUIRED SPECIAL PRECAUTIONS TO BE UNDERTAKEN IN ORDER TO AVOID OR DIMINISH THE SPECIFIC RISK OF INJURY CONNECTED WITH THE CUTTING OF TREES. ACCORDINGLY, THE NATURE OF THE ACTIVITY INVOLVED IS NOT, AS A MATTER OF LAW, INHERENTLY DANGEROUS.

Discussion

Assuming the inherently dangerous activity exception to a contractee's general immunity could be extended to employees or agents of independent contractors, see Argument I, supra, the inherent or intrinsic risks in the cutting of trees or removal of timber from land, presented by potential injury caused by falling trees, do not constitute risks so peculiar, special or unique as to create the foreseeable risk of serious injury, per se, for which a contractee must be deemed liable.

As noted by the Court in *Inglis v Millersburg Driving Ass'n*, 169 Mich 311, 319-320; 136 NW 443 (1912), in order to constitute an inherently dangerous activity, the activity or work must "'obviously expose others to unusual perils" and be of the variety that "will probably, and not which merely may, cause injury'", rather than simply work that can produce injuries if improperly done:

> "It is 'that a man who orders a work to be executed, from which, in the natural course of things injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see to the doing of that which is necessary to prevent mischief, and cannot relieve himself of his

> responsibility by employing some one else, whether it be the contractor employed to do the work from which the danger arises, or some independent person, as to what is necessary to prevent the act he has ordered done from becoming unlawful.' *Inglis, supra,* 169 Mich at 319-320.

The cutting and removal of trees, as involved here, is not activity that obviously exposes one to probably injury or to risks that are unusual, unique or unavoidable. Rather, the risk of injury can be avoided through either recognized safety measures or application of simple common sense. In fact, this point was conceded by Plaintiff's counsel at the time of oral arguments at the initial hearing on Defendants' motion:

> "THE COURT: Well, the safety precautions that could have been used here, I think you have attached to your brief somewhere reference or somewhere reference to a couple of things that should be done when you fell a tree, nobody should be within twice the height of the tallest tree in the hope that when it falls over it won't hit somebody, for instance, and obviously Mr. DeShambo must have been too close because he got hit by a tree when it fell over and another tree bounced.
>
> MR. FULCHER: Yes, but not only that, but the - - but not even referring to that, but in addition to that, your honor, when the tree, before the tree was cut, it is the obligation of a feller to check to be sure that there is nobody, no person or other object within anywhere within the vicinity of where the tree may fall.
>
> * * *
>
> ***It really does not take any particular expertise to realize what these precautions are, that is, that nobody should be anywhere within the falling distance of a tree.***
>
> ***This is something that anyone can contemplate.*** It does not take any special knowledge, whereas, if we go back to the *Justice v Swope,* plaintiff is injured because of the fact that he does not release the rope at the proper time that the section of the tree is being lowered. Landowner does not know anything about that kind of procedure. ***All we need here, Your Honor, is common sense.*** (Emphasis added.) (Appellants' Appendix H, pp 54a-56a.)

Quite obviously, the activity involved in cutting down trees with a chainsaw is not of the variety from which injury would "probably" occur or "obviously expose others to unusual perils." As the Court noted in *Cary v Thomas*, 345 Mich 616; 76 NW2d 817 (1956), when injury "results, not from the fact that the work is done, but from the wrongful or negligent manner of doing it by a contractor or his servants, the contractee is not liable therefor." *Id.*, 345 Mich at 629-630, quoting 39 C.J. 1324., also see *Watkins v Gabriele Steel Company*, 260 Mich 692, 695; 245 NW2d 801 (1932) [Placement of planks on steel joist not inherently dangerous but the neglect of contractors to securely fasten planks "subjected plaintiff to unusual danger."]; *Barlow v Krieghoff Company*, 310 Mich 195, 198; 16 NW2d 715 (1944) [Installation or repair of roof with use of hot tar "was neither inherently or intrinsically dangerous."]; and *Rasmussen v Louisville Ladder Company, Inc.*, 211 Mich App 541, 549; 536 NW2d 221 (1995) [Use of hanging scaffolding to construct multistory building not inherently dangerous.]

Here, Plaintiff may not avail himself to the exception or invoke the doctrine in an attempt to circumvent Defendants' immunity, as the work contracted for was not inherently dangerous, as a matter of law. *Inglis, supra*. The work being performed at the time of Plaintiff's injury was not unusual, and the risks were not so unique that reasonable safety measures could not have been taken to have avoided the injury. The description of the events that transpired leading up to Plaintiff's injury, and the parties concession that the injury could have easily been avoided, establishes that Plaintiff's injury arose solely from the manner in which the work was completed and not the nature of the work. Plaintiff conceded that improved communications and/or observation would be the only necessary precautions to ensure that trees could be simultaneously cut and trimmed in a safe manner:

"Q Well, just I guess I'm just getting your opinion. What do you think is - - based on your training and based on your experience, I just want to know what you think. What's your belief, if you have one, on a safe way to have trees cut and trimmed and whatever else? Can you explain that for me?

A Well, take and let everybody know where you're cutting and stuff. And then wherever them trees are going to be falling at so that they can take and be aware when that tree is falling or where that tree is going to be falling at so that they can take and be out of the way or to stand back behind you when that tree is falling so that in case that tree does happen to go the wrong way, everybody is in one spot to get out of there.

(Appellants' Appendix J, pp. 94a-95a.)

* * *

Q Have you ever been directly hit by a tree being felled like you were in this particular case?

A No.

Q You have a reason for that in your mind why you think you've never been directly hit before like you were in this particular case?

A Well, whenever I was working with all my other ones and stuff, we were always told as soon as - - when somebody is cutting down a tree and that, get out of there. Get a safe distance away from it and wait until that tree is down before going in and doing anything else.

Q You certainly have much more experience than I do in this type of thing. But I've heard - - maybe you can help me out. I've heard that a safe distance is not necessarily one tree length away, but it's going to be in some people's opinion it's two tree lengths away. In other words, if you get one - - and the reason you do that, so if a tree that happens to be a good tree happens to be hit by the tree being felled, it could knock that tree over also and, therefore, it's a recognized safety measure to be at least two tree lengths away.

A Yeah. Or standing back behind where that tree is getting cut at right behind the person that is operating that chain saw. Be on the sides of him, somewheres behind him, where then

everybody can go. You don't stand out in front of that tree or on the sides of that tree - -

Q And you - -

A - - and be looking at it to watch which way that tree is coming. You stand right there by where that person is cutting that tree at so that, if you can see which way that tree is going, you know you go backwards.

(Appellants' Appendix J, p 104a.)

* * *

Q In your opinion, ***is it possible to have some people delimbing and some people felling at the same time***?

A ***Oh, we used to take and have it happening all the time.***

Q ***All right. And how would that be done safely***?

A Well, the people that are delimbing the trees and stuff, they're cutting. And the ones that are using the chain saws and that, ***when they're getting ready to drop the tree, let the rest of the people know that that tree is going to be coming down so that they can quit their delimbing at the time to get out of that way so them trees went - - that tree or trees when they're falling ain't going to take and come in by where they're at.***

Q All right. I guess that's getting back to what I was asking you before. Then you would consider it the safe way to have those that are delimbing or anywhere in the immediate are to get well away of the - -

A Yea.

Q - - area of where that tree's going to fall?

A Take and quit doing what they're doing where they're at and stuff and get out of there or go back and, like I say, stand behind the person where they're cutting that tree at and stuff. And let him do his thing and then go back to what you're doing.

* * *

Q This practice of having those delimbing getting out of the way when a tree is about to be felled, is that a routine practice?

A Well, it's supposed to be.

Q *It's routine*?

A *Yeah*. A lot - - there's different loggers have different techniques that they use.

Q Tell me about some of those.

A Well, ***some loggers, they'll take and only just go in at one area where there are no other laborers at. And they'll drop everything that needs to be dropped for one day***. Then the next day, the laborers come in and they cut all the limbs and everything off of them trees that need to be cut or that were already dropped the day before. They do this job. And the one that done the cutting or the dropping of the trees, if he's going to take and be the main one cutting them trees in lengths, then he does that while they're doing their delimbing. That way then everybody is on the ground. The limbs ain't dropping any high distances and you've got your workers that are there or just even one worker, as you cut them limbs, they're throwing them out of there out of the way so he can get at the logs.

Q So that's one routine way of doing it?

A Yeah.

Q Okay. ***What would be another routine way of doing it***? You said some loggers do it different ways.

A Yeah. ***Some loggers will take and drop the tree. And as soon as they drop it, the other person goes down and he starts delimbing it. They'll take and be dropping another tree, but they'll let that worker know before he gets out there to delimb to be on the alert and keep an eye out, cut a limb or tow, do what you can cut, look back, see which way he is dropping that tree***, and then take and go back to what you're doing with the delimbing, delimb a few, turn around, look back, and be either listening - - but, no they can't - - you can't heat too well now because they required the ear muffs on the helmets and stuff. I used to take and not wear them, because you can hear it a little bit. If there is something going to be happening, once in awhile you can at least catch a little whistle out of it or something and be ready.

Q And ***is the second method that you've now described, is that safe if it's done properly***?

A ***Oh, yeah.***

Q All right.

A Then ***if you got the right type of a system and who you're working with, as long as - - as long as everybody knows what everybody else is doing and kind of going*** in a - - I don't know- - like a numerical matter or whatever you want to call it like, but you get a system there developed between the ones that you're working with.

Q You described two different methods for me now of felling and delimbing trees. ***Is there another routine method that loggers use in doing this***?

A Those are basically the two I've always - - I don't know if there's any other ways. I imagine there probably are. ***Everybody has their own system.***

* * *

Q All right. Getting back again to the two routine methods you've talked about, delimbing and felling, were either one of these two methods being followed by you and Riz when your accident occurred?

A At that moment we hadn't really tooken [sic] and talked about which method we were going to be using. I only - - he was supposed to just be on that loader dragging his logs out of the woods and stuff.

Q So it's your testimony you didn't know that any felling was going to take place by anybody other than yourself?

A Not right offhand I didn't, no.

Q All right.

A Because I was out - - I was cutting my own trees up and stuff.

Q Here's a question I want you to think about. If you had - - you and Riz had followed this practice that you've already told me about, this routine practice of the feller letting the delimber know that a tree was going to be felled, the second

practice or the second way you've described it - - are we clear so far?

A Uh-huh (affirmative).

Q All right. That's a "yes"?

A Yes. I keep on forgetting I've got - -

Q Had you and Riz been following this second routine practice you talked about, do you think you would have been hurt that day?

A Oh, I would have probably tooken [sic] my saw and I'd have shut it off and I would have stepped behind that machine or whatever was out near or past that. I'd have gotten into an area where it was safe. I'd have found me cover.

Q ***So had you followed that routine safety practice that you've described, the second method and you've described, you would not have been hurt that day?***

A ***No.***

* * *

Q ***There was*** nothing unusual about you - - ***nothing unusual about the way you were delimbing these particular trees when you were hurt that caused you to get hurt, was there?***

A ***No.***"

(Appellants' Appendix J, pp. 105a-106a.)

In granting Defendant-Appellants' motion for summary disposition, the trial court similarly concluded, stating, in pertinent part:

> "And cutting wood is not unusual, it's standard procedure when you got a wood lot, it's what everybody does and should do, that's a policy thing we want people to do; and, obviously, the risk could be avoided by keeping people clear when the tree is falling." (Appellants' Appendix I, pp 85a-86a.)

Furthermore, the task of felling a tree is not the type of activity from which injury is to be expected. As noted by the Court in *Inglis, supra,* quoting Justice Cockburn in

Bower v Peate, 1 Q. B. Div. 321, the inherently dangerous activity doctrine was intended to apply to "work to be executed, from which, in the natural course of things injurious consequences . . . *must be expected to arise*, unless means are adopted by which such consequences may be averted." (Emphasis added.) *Id.*, 169 Mich at 320-321. The Court went on, in citing Justice Cockburn, to recognize a distinction "between committing work to a contractor to be executed, to which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary measures are adopted." *Id.*

With regards to the nature of any potential risk associated with tree removal, the work is not one from which injury is an expected, natural "course" or "consequence." The simple task of cutting down a standing tree, which if not done properly, may cause injury, but it is not in and of itself inherently dangerous.

The remarks of Chief Justice T. M. Kavanagh in his concurring opinion in *McDonough v General Motors*, 388 Mich 430; 201 NW2d 609, 617, (1972) are also noteworthy wherein he alluded to the fact the nature of the potential injuries associated with the analogous acts of tree stump removal did not stem from the routine removal process, but from the methods and tools utilized by the contractor:

> "On the other hand, I find as quite cogent the reasoning of Justice Brennan's opinion, relating to reliance upon the independent contractor's and likewise his employees' expertise to perform the job and/or repairs for which they were hired. It is fair to assume that the landowner retains the independent contractor because of the latter's expertise to perform the task properly and carefully. Absent special factors, such as supervening control by the landowner, the method and means of executing the task are entrusted to the independent contractor and his employees. Thus, there is little basis for shifting liability upon the landowner where for example and modifying Justice Brennan's analogy slightly, the landowner engaged the independent contractor to remove a tree stump and the latter's employee, while using a chain saw - - certainly a dangerous instrumentality

> in the hands of the inexperienced - - injures himself or another lawfully on the premises. Whether the contractor uses a double-edged ax or cross-cut saw or chain saw, ***one can presume, leaving aside the factors of landowner's control and direction, that the contractor not only has the familiarity and experience with his tools, but also will use them in such fashion as to avoid injury to himself or others.***" *McDonough, supra,* 388 Mich at 448-450.

A general inference that the possibility of injury may exist with felling a tree, does not support a conclusion that the probability for injury must have been expected at the time of contracting for such services. Moreover, the mere possibility of risk simply does not give rise to the "expectation" of injury so as to justify, as a matter of law, application of the inherently dangerous activity exception. Such application would unduly broaden the exception so as to encompass many routine tasks contracted for and performed during normal activities of daily living and extend liability beyond what it was intended in adopting the exception to a contractee's general immunity.

Based upon the foregoing discussion, Appellants respectfully request issuance of an Opinion vacating the decision of the Court of Appeals and reinstating the trial Court's grant of summary disposition.

III. ASSUMING PLAINTIFF COULD AVAIL HIMSELF TO THE INHERENTLY DANGEROUS ACTIVITY EXCEPTION, PLAINITFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO PRESENT A GENUINE ISSUE OF MATERIAL FACT, SO AS TO AVOID SUMMARY DISPOSITION, AS TO WHETHER DEFENDANTS NIELSEN POSSESSED ANY SPECIFIC OR SPECIALIZED KNOWLEDGE AS TO "WHAT WOULD BE EXPECTED" IN PERFORMANCE OF THE CONTRACT SO AS TO MAKE THEM "FULLY CAPABLE OF RECOGNIZING THE POTENTIAL DANGER" OF THE PARTIES' CONDUCT AND HAVE APPRECIATED OR EXPECTED, AT THE TIME OF CONTRACTING, A PROBABLE RISK OF INJURY.

Discussion

In reversing the trial court's grant of summary disposition to Appellants, the Court of Appeals concluded that a question of fact existed, in application of the inherently dangerous activity exception, under the factual circumstances of this case, with regards to "defendants' knowledge of the risk of logging at the time that the agreement was made [with Charles Anderson]." (Appellants' Appendix, p 27a.) Specifically, the panel of the Court of Appeals stated:

> As a general rule, an employer of an independent contractor is not liable for the contractor's negligence or the negligence of his employees. However, there is an exception to the general rule of non-liability where the contracted work is considered to be inherently dangerous. ***For the inherently dangerous activity doctrine to apply, "the risk involved must be recognizable in advance,*** at the time of the contract, and must be inherent in the work itself or normally expected in the ordinary course of doing the work." ***A risk is recognizable if it is reasonably anticipated.***
>
> The trial court held that defendant could not have reasonably anticipate the risks inherent in logging, on the basis of *Justus v Swope*, 184 Mich App 91; 457 NW2d 103 (1990). In *Justus*, we declined to apply the inherently dangerous activity doctrine to impose liability on a homeowner who had hired a tree removal service to cut down a single tree near a building because a "mere homeowner" could not have anticipated the risks involved in this procedure.
>
> However, the instant case is distinguishable. Defendants had previously hired logging companies to conduct for-profit tree removals on twenty-acre parcels of land, and defendant Norman

> Nielsen, who entered into the logging contract, agreed that logging was risky. Viewing these facts in a light more favorable to plaintiffs, ***a material question of fact existed with respect to defendants' knowledge of the risks of logging at the time the agreement was made.*** Therefore summary disposition was improperly granted. [Citations omitted] (Appellants' Appendix F, pp 25a-27a.)

The panel of the Court of Appeals erred in reversing the trial court's grant of summary disposition by finding that Plaintiff had presented sufficient evidence, under the factual record presented, to establish that Appellants Nielsen possessed the ***requisite*** knowledge to have appreciated a recognizable danger or risk at the time of contracting.

In *Bozak v Hutchinson*, 422 Mich 712; 375 NW2d 333, the Court, in referring to the definitions of an inherently dangerous activity as set forth in the Restatement of Torts, 2d, held that the activity must relate to "work 'necessarily involving danger to others, unless great care is used' to prevent injury . . . or where the work involves a 'peculiar risk' or 'special danger' which calls for 'special' or 'reasonable' precautions." *Bozak,* 422 Mich at 727-728. The Court in *Bozak* went on to note that "it must be emphasized, however that the risk or danger must be 'recognizable in advance,' *i.e.*, at the time the contract is made, for the doctrine to be invoked." *Id.*

Here, the only testimony that exists on the record relating to Norman Nielsen and his perception of "the risk of logging", as alluded to by the Court of Appeals' Opinion, is presented by way of the following inquiry at the time of his deposition:

> "(Examination by Mr. Fulsher:)
>
> Q Let me ask you a question, Mr. Nielsen. If you were going to cut down a tree and there were other people in the area nearby, do you think it would be a wise thing to do to be sure that they're clear from the area?
>
> A (Mr. Nielsen:) What?

Q If there were other people working in the area where you were cutting down a tree, do you think that would be a wise thing to do to be sure everybody's clear before you cut?

A Well, yeah. I guess the way it would - - if I was going to cut a tree down, number one, I wouldn't want to cut one down in the woods with anybody around, period, including myself. But if I was cutting in the open, if I had any kids around there, I'd say, "Get away. Get way away," you know. Sure, out in the open – but in a woods, I guess if I knew how to – I mean, these timber guys that cut these big trees down, they know where to – if the tree's going to go over there (indicating), they'll know it's going to go there. And I guess they do the right thing before they make the tree fall in a certain way. But –

Q One of the reasons why you don't have anybody – I think you – it's kind of a risky thing, isn't it.?

A What? Cutting wood?

Q Cutting trees, yeah.

A Sure; certainly." (Appellants' Appendix L, pp 160a-161a.)

Mr. Nielsen's testimony on the record as to his general inference of the possible results is insufficient to establish a serious question of fact as to his appreciation of a peculiar or unusual danger, when viewed in the context of his entire testimony. First and foremost, the line of questioning is clearly based upon a hypothetical question posed to Mr. Nielsen, assuming that he was going to involve himself directly in cutting the tree. Moreover, Mr. Nielsen's deposition testimony clearly establishes that he lacked any knowledge or experience that involved cutting trees:

"Q (By Mr. Menkes:) . . . Do you have any knowledge or expertise, when it comes to what procedures or policies should be followed when hardwoods are being timbered or cut down? Do you have any knowledge concerning what practices are followed?

A (Mr. Nielsen:) No; no. You mean, I could cut a tree like this (indicating) down, you know.

Q But the type of lumbering or timbering –

A Oh, No; no; no.

Q -- that was going on at the time that this accident took place,

A No, sir.

Q -- do you have any knowledge or expertise when it comes to those types of policies or practices?

A No, sir.

Q What about your wife, does she?

A Absolutely not. I don't mean it sarcastically, but she's never out there." (Appellants' Appendix L, p 160a.)

In addition, Mr. Nielsen clearly stated that he did not have any discussions with Ronald Anderson as to how he would undertake cutting the wood from his land or precautions that he would take or should be taken in connection with his activities:

"Q (By Mr. Menkes:) Did you ever have any discussion with Mr. Anderson, in terms of how he was actually going to cut the wood, or did you have any discussions with him concerning procedures or any safety precautions that were going to be taken or that should be taken?

A No."

(Appellants' Appendix L, p 160a.)

The factual record presented herein is devoid of any evidence to suggest that Mr. Nielsen possessed specialized knowledge or information that would allow him to be aware of or appreciate the specific risk of the activities being carried out or to conclude that the risk was "peculiar" or "special", necessary for application of the inherently dangerous activity doctrine, as noted by the Court in *Bozak, supra*.

Under very similar facts, a panel of the Court of Appeals in *Justus v Swope*, 184 Mich App 91; 457 NW2d 103 (1990) concluded that a homeowner was not liable for

injuries sustained by independent contractor's employee while removing a tree from the homeowner's yard. *Justus,* 457 NW2d at 104. Citing the Court's holding in *Bozak, supra,* the panel of the Court of Appeals in *Justus* noted the necessity of specific knowledge as to "what would be expected" and being "fully capable of recognizing the potential danger." *Justus, supra,* 457 NW2d at 104. In *Justus,* the panel of the Court of Appeals noted that the defendant Swope had little information or knowledge regarding tree removal other than the obvious facts of the activity itself. In *Justus* the Court stated:

> "Here, we have mere homeowners that purport to know nothing about tree removal. They ***had little knowledge as to what would normally be expected in usual course of tree removal,*** much less what deviations from the ordinary were necessary in this case to avoid the neighbor's shed. Although defendants knew of the existence of the shed and were concerned about damaging it, they could not have been expected to know, at the time of the contract, whether its existence created additional risk to the employees of the independent contractor in removing the tree." (Emphasis added.) *Justus, supra,* 184 Mich App at 96.
>
> The inherently dangerous activity doctrine has, thus far, been found to ***impose liability in cases involving owners fully capable of recognizing the potential danger.*** Although liability cannot be imposed simply because the defendant happens to be a large corporation or municipality rather than an individual, see *id.,* p. 108, 220 N.W.2d 641, clearly where an entity has access to the expertise to recognize the risks and dangers in an activity, not to mention the expertise and resources in order to recognize and enforce the safety precautions necessary to make an activity safer, the application of the doctrine does not work an injustice.
>
> * * *
>
> It is not reasonable, nor in the public interest, to expect a mere homeowner to be cognizant of, or liable for, the "special dangers" or "peculiar risks" to employees of an independent contractor where he ***has no knowledge of the normal procedures involved in the activity, he has no knowledge of, or capability to provide proper safety precautions*** and where the independent contractor and his employees are more knowledgeable than the homeowner about the activity, risks and necessary safety precautions. It is not reasonable to expect that a homeowner be required to educate

> himself as to the procedures and risks involved in activities such as tree removal, furnace maintenance, carpentry, or the like, to be performed at his home by an independent contractor. In essence, we must make a policy determination on whether the public interest is best served by imposing liability in a case such as this on a private homeowner, as opposed to the "expert" he hired to carry out the task at hand. We do not believe that imposing such liability on a private homeowner would be in the public interest.
>
> In this case, defendants knew of the possibility of damage to the neighbor's shed and the possibility of danger if a neighborhood child suddenly ran onto their property, as shown by defendants' request for Szeve to sign a release after the tree removal operation had begun. ***However, there is no factual support for the proposition that defendants had any knowledge of tree removal procedures or the "peculiar risks" involved for plaintiff.*** *Justus, supra.*

Similarly, Norman Nielsen did not have any specialized experience, information or expertise which made him fully capable of recognizing the potential risks, including knowledge as to the procedures to be utilized in connection with the work. The risk or danger presented by Plaintiff DeShambo working in an area where he was not instructed to work or by Charles Anderson in not looking to see where Mr. DeShambo was working at the time that he fell the tree, was not recognizable by Appellants in advance or at the time that the contract was made. Accordingly, the risk or likelihood of injury caused by the parties' conduct in this case could not be foreseen or anticipated at the time that the agreement was made to allow Mr. Anderson onto the property, and thus, a genuine issue of material fact <u>does not exist</u> to warrant a jury's consideration of liability under the inherently dangerous activity exception. *Bozak, supra,* and *Justus, supra*. Accordingly, Defendant-Appellants Nielsens are entitled to judgment as a matter of law. MCR 2.116 (C)(10).

Based upon the foregoing discussion, Appellants respectfully request issuance of an Opinion vacating the decision of the Court of Appeals and reinstating the trial court's grant of summary disposition.

RELIEF REQUESTED

For the foregoing reasons, Defendants-Appellants respectfully request issuance of an Opinion reversing the October 22, 2002 Opinion of the Michigan Court of Appeals and reinstating the trial court's grant of summary disposition.

Respectfully submitted,

BENSINGER, COTANT & MENKES, PC

DATED: 12/30/03

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