

Order

Michigan Supreme Court
Lansing, Michigan

June 30, 2021

Bridget M. McCormack,
Chief Justice

161098

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

SUSAN MOORE, Guardian/Conservator for the
ESTATE OF JOSEPH DANIEL VELEZ, JR.,
Plaintiff-Appellee,

v

SC: 161098
COA: 345101
Macomb CC: 2017-002389-NO

RICHARD SHAFER, KAREN SHAFER,
R. SHAFER BUILDERS, REVOCABLE LIVING
TRUST AGREEMENT DATED 12/14/89, by
trustees RICHARD N. SHAFER and KAREN J.
SHAFER,

Defendants-Appellants,

and

HENSELY MANUFACTURING, INC.,
Defendant.

On April 8, 2021, the Court heard oral argument on the application for leave to appeal the January 30, 2020 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals and REINSTATE the Macomb Circuit Court's June 6, 2018 order granting the Shafer defendants' motion for summary disposition. Even assuming that knowledge of a lack of safety features can create an unreasonably dangerous condition, for the reasons explained in Judge SAWYER's opinion dissenting in part, the Court of Appeals majority relied on nothing but speculation regarding the Shafer defendants' knowledge of Lawrence Gill's failure to provide fall-protection equipment. The majority therefore erred by finding a genuine issue of material fact for the jury to resolve.

MCCORMACK, C.J. (*concurring*).

I agree with the Court's order reversing the judgment of the Court of Appeals for the reasons stated in the partial dissent and write separately to offer additional reasons why the plaintiff's premises-liability claim must be dismissed. In *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 19 (2002), we held that the Court of Appeals had confused general-contractor liability with the liability of the premises possessor and noted that "[t]he fact that defendant may have additional duties in its role as general contractor, however, does not alter the nature of the duties owed by virtue of

its ownership of the premises.”¹ The Court of Appeals made the same error in this case by confusing the duties of a contractor with the duties of a premises possessor. It then improperly relied on the lack of safety equipment and precautions as a basis for sustaining a premises-liability claim despite the fact that the hazard itself—the roof—was open and obvious and lacked any special aspects rendering it unreasonably dangerous.

Moreover, the complaint does not allege that the roof alone constituted a dangerous condition on the property or that the absence of safety measures rendered the roof more dangerous. Thus, the plaintiff’s allegation is not that Joseph Velez was injured due to a dangerous condition on the land (the roof); it is that the Shafer defendants’ omission in not ensuring that fall-protection measures were provided caused the injury.

The plaintiff therefore seeks to hold the property owners liable on the basis that they knew that fall-protection measures were not being provided and didn’t do anything about it. But that doesn’t make anything about the fall hazard any less open and obvious—and an unguarded flat roof approximately 20 feet off the ground (with or without fall-protection measures) does not contain any “special aspects” making it unreasonably dangerous. The plaintiff also pled general-contractor liability under the common work area doctrine, but the lower courts dismissed that count, and the plaintiff did not cross-appeal that dismissal in this Court.

Because the Court of Appeals erred by concluding that the Shafer defendants’ knowledge of the lack of safety precautions could be the basis of a premises-liability claim, I concur in the Court’s order. See *Estate of Velez v Shafer*, unpublished per curiam opinion of the Court of Appeals, issued January 30, 2020 (Docket No. 345101), p 4 n 3, citing *Perkoviq*, 466 Mich at 18-19.

VIVIANO, J., joins the statement of MCCORMACK, C.J.

¹ Although *Perkoviq* implied that a premises possessor could be held liable in a premises-liability case if he or she had a reason to believe the contractor wasn’t taking fall-safety precautions, I am not certain that it was correct to do so, and I would reconsider the issue in an appropriate case. See, e.g., *Perkoviq*, 466 Mich at 18 (“In its status as owner, defendant had no reason to foresee that the only persons who would be on the premises, various contractors and their employees, would not take appropriate precautions in dealing with the open and obvious conditions of the construction site.”).



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 30, 2021

Clerk