METODI DONCHEV and FAITH DONCHEV, Plaintiffs-Respondents,

v.

DENNIS DESIMONE, Defendant-Appellant.

No. A-0395-11T3.

Superior Court of New Jersey, Appellate Division.

Argued September 12, 2012.
Decided September 24, 2012.

Edward L. Thornton argued the cause for appellant (**Methfessel** & **Werbel**, attorneys; Mr. Thornton, of counsel and on the brief; Amanda J. Sawyer, on the brief).

Respondents have not filed a brief.[1]

Before Judges Simonelli, Accurso and Lisa.

NOT FOR PUBLICATION

PER CURIAM.

Defendant Dennis DeSimone appeals from the September 8, 2006, and January 5, 2007 Law Division orders, which denied his motions for summary judgment. Defendant also appeals from the July 8, 2011 judgment entered in plaintiffs' favor, and the September 6, 2011 order, which denied his post-trial cross-motion for remittitur or, in the alternative, a new trial. We conclude that summary judgment should have been granted, and reverse.

The following facts are derived from evidence submitted by the parties in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Defendant was the president of D.N. DeSimone Construction Company, Inc. (DND), a New Jersey corporation. Although he had approximately thirty-two years of construction experience, he did not usually supervise DND's construction projects. Instead, DND had three work crews, each of which was supervised by a foreman.

Defendant hired DND to complete several projects at his home, including garage roof repairs. DND usually hired subcontractors for roofing work, but defendant decided to use DND's employees because the job was minor. DND paid for all of the project materials and labor and billed defendant.

On June 16, 2003, plaintiff Metodi Donchev (Donchev) and two other DND employees reported to defendant's home to make the garage roof repairs. When they arrived, defendant told them that the roof had been leaking, and pointed out a soft-spot in the rear of the garage "right of center." Defendant left the work site approximately ten minutes after the employees had arrived. No foreman was present at the time, and no employee was "in charge" of the work site; however, at least one of the employees had prior roofing experience.

Donchev had been employed by DND since 1996. Prior thereto, he worked for another construction company as well as independently in the field, and had experience with framing and carpentry work, and installing sheathing for walls and roofs. He purportedly had no experience replacing roofs, and his role on the day of the accident was limited to stripping the existing garage roof.

While working on the garage roof on June 16, 2003, Donchev fell through a soft spot in the "back rear corner" and landed on his groin on a wooden beam, injuring his perineal area and right shoulder. He continued working, and went to his family physician the next day. On June 18, 2003, he went to the hospital for treatment. He later suffered complications related to his perineal injury, and was hospitalized from June 26 to July 2, 2003. On September 9, 2003, his doctor determined that his injuries had healed, and cleared him to return to work. In June 2004, Donchev filed a claim petition with the Division of Workers'

Compensation (Division), seeking benefits for his injuries.

At his deposition, Donchev admitted that defendant had warned him and his co-workers that the garage roof had been leaking; however, he claimed it was difficult to determine the extent of the water damage because insulation covered the roof. Nonetheless, he also admitted that: (1) he saw water stains on the insulation; (2) the specific spot he fell through had not looked unsafe or unstable; (3) he and his co-workers had walked around the roof "all morning long" without incident; and (4) he knew that wood could rot if exposed to water.

On June 7, 2005, Donchev and his wife, plaintiff Faith Donchev[2] filed a complaint against defendant individually. Defendant filed a summary judgment motion, which the trial judge denied in a September 8, 2006 order and oral opinion. The judge acknowledged that "in normal circumstances," defendant would not be liable for Donchev's injuries in his capacity as landowner because defendant hired DND to fix the roof, Donchev was injured while performing the work for which DND was hired, and defendant did not control the work. Nonetheless, the judge found defendant liable, concluding as follows:

> In our case, we have [defendant] that clearly has the superior knowledge wearing two hats. He's the guy that owns the property and he's the guy that is hired to actually come on-site to fix the problem. And I say that because he's the owner of the company that comes on-site to fix it and specifically, it's he that allocates responsibility for who would actually do the work. And in that process, he picks a person that's never done it before.
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> It seems to me that under those set of facts, the policy that I just described; i.e., assigning responsibility to the person who has most knowledge would be defeated if I didn't assign it to the property owner, [defendant]. He's the one that has superior knowledge to everybody, including the [p]laintiff.
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> He's the company. He's the owner. He's the one that knows this particular individual has not participated in this activity before. He's the one who arguably has control over how the job is done because it's his employees, in the sense that he's the principal plaintiff the company that's actually performing the work.
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> And so because of the duplication of roles, the fact that this person wears a couple different hats, it seems to me that normally applied removal of responsibility doesn't apply to this particular case. It's a very unique set of facts but I think it's a set of facts that basically doesn't allow the spirit or the policy behind the rule to be utilized.

Defendant later filed a second summary judgment motion arguing that the New Jersey Workers' Compensation Law (WCL), N.J.S.A. 34:15-70 to-142, barred plaintiffs' claims. In a January 5, 2007 order and oral opinion, the judge denied the motion. The judge acknowledged that the WCL barred plaintiffs' claims against defendant as DND's principal but held that the bar did not apply to defendant as the landowner.

Donchev died on November 17, 2006, of causes that remain in dispute. Thereafter, the complaint was amended to substitute his estate as a plaintiff and assert a wrongful death claim. In addition, in February 2008, the estate filed a dependency claim petition with the Division. On July 28, 2008, the Division approved a settlement between DND and the estate for $30,000. The settlement contained the following language:

> This is a lump sum settlement between the parties... which has the effect of a dismissal with prejudice, being final as to all rights and benefits of the petitioner and is a complete and absolute surrender and release of all rights arising out of this... claim petition[].
>
> The parties agree that this settlement does contemplate a complete and absolute surrender and release of any and all rights by the petitioner's dependents as defined by N.J.S.A. 34:15-13 arising out of this... claim petition[].

I.

Defendant contends that the judge erred in denying the first summary judgment motion. He argues that, as a landowner, he was not liable for Donchev's injuries because he owed no duty to Donchev, an employee of an independent contractor, to prevent injury from a risk which was incident to the very work Donchev was hired to perform. Defendant also argues that he is not liable because he was not the general contractor for the project, did not oversee or supervise the workplace, and exercised no control over the manner and means by which DND's employees performed the roofing work.

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 491 (2005); Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 261 (App. Div. 2011), certif. denied, 209 N.J. 98 (2012). Thus, we consider, as the trial judge did, "`whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, supra, 142 N.J. at 536.). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009). Applying these standards, we conclude that summary judgment should have been granted.

Generally, a landowner "who invites workmen of an independent contractor to come upon his premises is under a duty to exercise ordinary care to render reasonably safe the areas in which he might reasonably expect them to be working." Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 66 (App. Div. 1986). However, a landowner's "duty to provide a reasonably safe place to work is relative to the nature of the invited endeavor and does not entail the elimination of operational hazards which are obvious and visible to the invitee upon ordinary observation and which are part of or incidental to the very work the contractor was hired to perform." Id. at 67; see also Rigatti v. Reddy, 318 N.J. Super. 537, 541-42 (App. Div. 1999); Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 463 (App. Div.), certif. denied, 158 N.J. 685 (1999). "The landowner is under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work." Sanna, supra, 209 N.J. Super. at 67. A plaintiff can overcome this exception by showing that: (1) the landowner retained control over "the manner and means of doing the work which is the subject of the contract"; (2) the landowner hired an incompetent contractor; or (3) the work constituted a nuisance per se. Accardi, supra, 317 N.J. Super. at 463. These principles apply to a landowner who acts as a general contractor. Slack v. Whalen, 327 N.J. Super. 186, 194 (App. Div.), certif. denied, 163 N.J. 398 (2000).

Here, defendant hired a general contractor to repair his garage roof. Donchev, who had experience sheathing roofs, was working in his capacity as DND's employee at the time of the accident and knew about the roof's condition prior to starting the work. Defendant was not present during the actual work, and was not required to be there. He did not oversee, supervise, or exercise control over the means or method of the roofing work or provide any assistance or equipment. Thus, defendant, as a landowner, neither owed nor breached a duty of care to Donchev. His status as president of DND or experience in the construction industry was legally irrelevant because the employer-employee relationship did not actually impact the way the DND employees carried out the roof work. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 574 (1996). Thus, the judge erred in denying the first summary judgment.

II.

Defendant contends, in the alternative, that the judge erred in denying his second summary judgment motion. He argues that even if he was acting as Donchev's employer and breached a duty of care in this capacity, he is immune from suit pursuant to the WCL. We agree.

The WCL has been characterized as

> a historic trade-off whereby employees relinquished their right to pursue common-law remedies in exchange for automatic entitlement to certain, but reduced, benefits whenever they suffered injuries by accident arising out of and in the course of employment. Thus the quid pro quo anticipated by the Act was that employees would receive assurance of relatively swift and certain compensation payments, but would relinquish their rights to pursue a potentially larger recovery in a common-law action.
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> [Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985).]

The exception to the exclusive-remedy provision is when the employee's injuries arise from an employer's "intentional wrong." N.J.S.A. 34:15-8; Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 606 (2002). The "intentional wrong" exception must be read narrowly. Millison, supra, 101 N.J. at 177. In the context of summary judgment, to establish intentional wrong the court must view the totality of the circumstances and make two inquiries:

> The first is whether, when viewed in a light most favorable to the employee, the evidence could lead a jury to conclude that the employer acted with knowledge that it was substantially certain that a worker would suffer injury. If that question is answered affirmatively, the trial court must then determine whether, if the employee's allegations are proved, they constitute a simple fact of industrial life or are outside the purview of the conditions the Legislature could have intended to immunize under the [exclusive-remedy provision]. Resolving whether the context prong of Millison is met is solely a judicial function. Thus, if the substantial certainty standard presents a jury question and if the court concludes that the employee's allegations, if proved, would meet the context prong, the employer's motion for summary judgment should be denied; if not, it should be granted.
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> [Laidlow, supra, 170 N.J. at 623).]

There is no evidence in this case that defendant acted with knowledge that it was substantially certain that a worker would suffer injury. Accordingly, the judge erred in denying the second summary judgment motion.[3]

Reversed.

[1] By order dated April 26, 2012, this court granted appellant's motion to suppress respondents' brief and indicated it would reconsider the decision if respondents filed a conforming brief no later than May 29, 2012. By order dated July 24, 2012, this court denied respondents' motion to file and accept a letter brief because the brief submitted did not actually or substantially comply with the requirements of Rule 2:6-1.

[2] For the remainder of this opinion we may sometimes refer to Donchev and his wife collectively as plaintiffs.

[3] Having concluded that this matter must be reversed because of the improper denial of summary judgment, we need not address defendant's contentions relating to the judgment and post-trial motions.