MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

ALDI (Indiana) L.P., Wiese USA, Inc., and Wiese Warehouse Management Solution, Inc.,

Appellants,

v.

Patricia Rich and Timothy Rich, Sr., as Parents and Natural Guardians of Timothy Rich, Jr.,

June 22, 2023

Court of Appeals Case No. 22A-CT-681

Appeal from the Johnson Superior Court

The Honorable Kevin M. Barton, Judge

Trial Court Cause No. 41D01-1907-CT-000106

Appellees

Memorandum Decision by Judge May
Judges Crone and Weissmann concur.

May, Judge.

[1] Wiese USA, Inc., and Wiese Warehouse Management Solution, Inc., (collectively "Wiese") and ALDI (Indiana) L.P. ("ALDI") appeal following the denial of their respective motions for summary judgment in the lawsuit brought by Patricia Rich and Timothy Rich Sr. (collectively "Riches") as Parents and Natural Guardians of Timothy Rich Jr. ("Rich Jr."). Wiese raises two issues, which we consolidate, revise, and restate as:

1. Whether Wiese is entitled to summary judgment on the Riches' claim that it negligently inspected the dock leveler that fatally injured Rich Jr.

ALDI raises one issue on appeal, which we expand, revise, and restate as:

2. Whether there is a genuine issue of material fact that ALDI:

2.1 negligently maintained its premises in a condition that posed an unreasonable risk to Rich Jr.; and/or

2.2 had or assumed a duty for the supervision and training of Rich Jr., even though Rich Jr. worked for an independent contractor.

We affirm in part, reverse in part, and remand.

Facts and Procedural History

[2] ALDI, a corporation that operates a chain of grocery stores, maintains a warehouse in Greenwood, Indiana. The warehouse serves as a wholesale distribution center where products are received and stored prior to being delivered to ALDI's stores. This warehouse includes 102 bays where semi-trucks may receive and deliver cargo. Bays 80 through 102 are used to receive and store perishable food items.

[3] In December 2006, ALDI purchased twenty-five Blue Giant vertical dock levelers, which are hydraulically powered plates that dock workers can raise or lower to "bridge" the gap between the dock floor and a semi-trailer and that enable dock workers to transport cargo and equipment between the warehouse and the semi-trailer without being impeded by the small gap between the warehouse floor and the end of the parked semi-trailer. (ALDI's App. Vol. IV at 10.) The dock levelers were installed near the bay doors in the perishable food section:

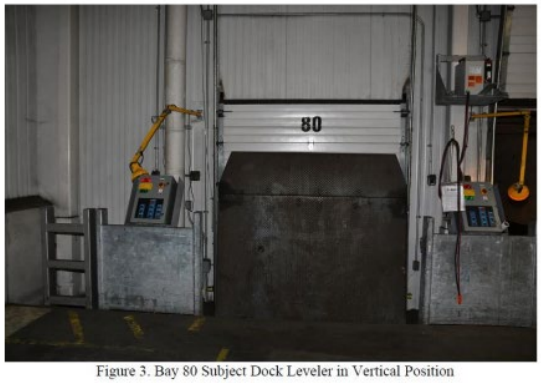

Figure 3. Bay 80 Subject Dock Leveler in Vertical Position


Figure 1. Dock Leveler Lip Extended onto Vehicle Load Bed

(ALDI's Appellant's Br. at 10 & ALDI's App. Vol. IV at 11-13.) The plate of each dock leveler was stored in a vertical position when not in use. After a truck driver backed a semi-trailer into the bay, the trailer was locked in place. Inside the warehouse, a dock worker then pulled a chain to release the dock leveler's mechanical lock, and the dock worker used the control panel located to the left of the bay door to operate the bay garage door and the dock leveler. The dock worker used push buttons on the control panel to raise the bay garage door, lower the bay garage door, and stop the garage door. The dock worker also used push buttons on the control panel to move the plate up or down and to extend or contract the lip of the plate. If an operator stopped the plate before it was completely lowered, the plate theoretically was to remain in the position where it was stopped. However, if a plate was left partially lowered for an extended period of time, the dock plate would eventually "bleed off or drift" downward, but "I'm talking hours, not—you can't see it—you can't actually see it happen." (ALDI's App. Vol. III at 144.)

[4] Warning stickers on the dock leveler warned the operator not to get behind the dock plate and instructed the operator to "[r]ead and follow the owners [sic]

manual and warning and operating decals before operating. Unsupported dock levelers can lower unexpectedly." (Wiese's App. Vol. III at 47.) The owner's manual for the Blue Giant dock leveler warned "**DOCK LEVELERS MAY BECOME HAZARDOUS IF MAINTENANCE IS NEGLECTED**." (ALDI's App. Vol. IV at 144) (emphasis and capitalization in original). It also stated:

> Arrange for a qualified Dock Leveler Service Technician to perform regularly scheduled planned maintenance on the Dock Leveler every three months for Single Shift Operation or monthly for Multi-Shift Operations. Call an authorized dealer or distributor for further details.

(*Id*. at 145.)

[5] In 2017, ALDI contracted with Wiese to perform annual maintenance of the equipment at the warehouse, including the dock levelers. Wiese performed this maintenance in July 2017, July 2018, and April 2019. The Wiese technicians did not specifically review the Blue Giant maintenance manual or receive training directly from Blue Giant before checking ALDI's dock levelers. The technicians also recorded their findings on preprinted forms which were not specific to Blue Giant dock levelers. The technicians used the control panel to raise and lower the plate during their maintenance tests, but the Wiese technicians did not check to see if the plate continued in a downward trend if the plate was stopped in a partially lowered position.

[6] On May 19, 2019, S&H Transportation ("S&H"), a motor carrier company, contracted with ALDI to transport ALDI's products between the Greenwood warehouse and over sixty of ALDI's stores. The contract provided:

> Carrier [S&H] shall be the sole employer of its Personnel and Employees. Accordingly, Carrier shall bear the sole responsibility for recruiting, hiring, testing, employing, determining the number of, evaluating, scheduling, assigning, directing, setting routes, promoting, demoting, disciplining, supervising, setting the terms and conditions of employment, and establishing and providing wages, benefits and other compensation to and for its Employees and Personnel. Carrier is solely responsible for developing, distributing and enforcing any rules, regulations and other policies applicable to its Personnel and Employees. … All Personnel used by Carrier must be fully qualified and trained by Carrier to perform services in accordance with all applicable laws, rules and regulations, including, but not limited to, those applicable to handling food products intended for human consumption. Carrier's training for the safe operation of the facility may include specific training applicable to all visitors and invitees on ALDI's property, including, but not limited to the "ALDI Ammonia Safety Training" program.

(ALDI's App. Vol. III at 98-99.) In addition to employing many truck drivers, S&H employed four dock workers at the Greenwood warehouse. The dock workers were responsible for loading and unloading the trucks and moving freight between the dock bays.

[7] S&H hired Rich Jr. to be a dock worker at the Greenwood warehouse. ALDI stored eggs in refrigerated trailers docked in bays at the warehouse, and the trailers required diesel fuel to run the refrigeration unit. During Rich Jr.'s shift

on July 2, 2019, he moved a refrigerated trailer docked at bay 80 away from the dock so that he could refuel it. After refueling the trailer, Rich Jr. returned it to bay 80 and locked the trailer into place. Rich Jr. then went inside the warehouse and used the control panel at bay 80 to open the bay's garage door. He pulled a chain on the dock plate which released the plate from its upright position and the plate began to drift downward toward the trailer. Rich Jr. then went behind the dock plate, presumably to open the closed back door of the trailer. After he went behind the dock plate, the dock plate continued to drift downward toward the closed trailer door. At some point, Rich Jr. lifted his upper body up above the downward drifting dock plate, but his lower body remained below the plate. The dock plate then pinned Rich Jr. against the closed trailer door, effectively crushing him. Rich Jr. died because of his injuries.

[8] After this incident, Wiese performed an additional inspection of the dock leveler at bay 80. At that time, the technician commented: "The dock drifts down faster than the dock next to it. The manufacturer has recommended replacing the lowering valve." (Riches' App. Vol. II at 23.) In addition, ALDI "changed the procedure where [the dock workers] had to now lower the dock plate all the way down with the lip folded to close or open the door. Before [they] could go behind it[.]" (ALDI's App. Vol. II at 155.)

[9] The Riches filed suit against Wiese and ALDI on July 12, 2019.[1] The Riches amended their complaint on October 30, 2019. The Riches alleged ALDI failed to maintain its premises in a reasonably safe condition and failed "to exercise reasonable care to protect plaintiff, by inspection and other affirmative acts, from the danger of reasonably foreseeable injury occurring from reasonably foreseeable use of said premises." (Wiese's App. Vol. III at 53.) The Riches also alleged Wiese "negligently failed to inspect and/or maintain and/or service and/or adjust the dock plate and accompanying equipment." (*Id*. at 54.)

[10] On December 10, 2021, the trial court held a hearing on the motions for summary judgment. On January 13, 2022, the trial court issued an order denying both motions. The trial court found:

> 26. Without information on the recommended procedure for planned maintenance by Blue Giant, an issue is present as to whether the checklist used by Wiese deviated from the recommended procedure by Blue Giant. Without information on the reason Blue Giant required planned maintenance to be performed only by trained and authorized personnel, an issue is present as to whether any component of the Blue Giant hydraulic dock leveler system is different from the hydraulic dock leveler system by any other manufacturer so as to require that planned maintenance only be performed by a technician trained as to the Blue Giant dock leveler.

[1] The Riches also sued the Blue Giant Equipment Corporation, but the Riches later stipulated to Blue Giant's dismissal.

27. Mr. [Dennis] Gilson [an ALDI maintenance technician] related the cause for "drifting" by the deck plate to "(e)ither a hydraulic leak or the holding value". [sic] Defendants do not designate that the checklist covered these two points.

* * * * *

29. The checklist of planned maintenance by Wiese did not create a condition where "drifting" would be observed.

30. The designated [evidence] does not permit the Court to determine that the planned maintenance by Wiese would have checked for a hydraulic leak or a faulty holding value. The Court also cannot say if these matters are within the ambit of normal planned maintenance.

* * * * *

34. Wiese is correct that there is no evidence designated that the dock plate was "drifting" at the time Wiese performed planned maintenance in April of 2019. However, the designated evidence establishes that [the Wiese service technician] did not check if the dock plate was drifting at the time of the inspection in April of 2019. Wiese is relying upon the absence of reports of drifting when the designated evidence does not establish a prior time when drifting would have been subject to being observed. Under the *Jarboe*[2] and *Hughley*[3] standards, the burden is upon the Defendants to negate the element, that is to establish with properly designated evidence that a breach did not occur. Wiese

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[2] *Jarboe v. Landmark Cmty. Newspapers of Ind., Inc.*, 644 N.E.2d 118 (Ind. 1994), *reh'g denied*.

[3] *Hughley v. State*, 15 N.E.3d 1000 (Ind. 2014).

relies upon an assertion that Plaintiffs cannot prove breach. That issue is subject to determination at trial.

35. The court does not find that Wiese has made a prima facie showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law by negating an element of Plaintiff's claim as required under the *Jarboe* and *Hughley* standards.

36. The Court turns to the Motion for Summary Judgment by Defendant Aldi (Indiana), L.P.[], hereinafter Aldi. Aldi asserts lack of actual or construction [sic] knowledge of a defective condition and lack of duty.

* * * * *

44. Here, Aldi had possession of the Blue Giant manual. The manual provided:

> "WARNING! DOCK LEVELERS MAY BECOME HAZARDOUS IF MAINTENANCE IS NEGLECTED.
>
> 1. Maintenance and inspection of all Dock Levelers shall be performed in conformance with the manufacturer's recommendations."

Under a multiple shift operation, the Blue Giant manual specified that maintenance was to be provided monthly.

45. Performance of planned maintenance goes to the exercise of reasonable care in the discovery of a condition. Aldi asserts that there is no evidence of a dangerous condition to discover. Aldi asserts: "Without evidence that it existed for some time prior to the accident to place ALDI in a position to discover the

condition, Plaintiffs cannot establish that ALDI shoudl [sic] have had constructive knowledge at the time of the incident." Aldi may be correct. However, on summary judgment, the burden is on Aldi to negate the element. Effectively, ALDI seeks to apply the *Celotex*[4] standard that is not the law of Indiana. [*Cole v. Gohmann*], 727 N.E.2d 1111 (Ind. Ct. App. 2000).

46. The designated evidence does not permit the court to conclude that a hazardous condition would not have been determined to be present if planned maintenance had been performed in accordance with the Blue Giant manual.

47. Aldi asserts that it owed no duty of training or supervision to Rich, an employee of an independent contractor.

* * * * *

57. A finder of fact could conclude that the failure to follow proper safety procedures in the use of the dock leveler could probably cause injury in the absence of safety precautions.

58. Furthermore, the designated evidence shows that notwithstanding the language in the contract with S&H, Aldi assumed responsibility for safety training of S&H employees on Aldi equipment.

* * * * *

61. From the designated evidence, a finder of fact could find affirmative conduct. If Aldi by its affirmative conduct undertakes

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[4] *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986).

to provide safety training, it is unclear on what basis Aldi may pick and choose the equipment on which a duty is assumed by affirmative conduct. An employee of S&H would seemingly not make the differentiation.

62. Mr. [Jacob] Cullison [an S&H manager at the Greenwood warehouse and Rich Jr.'s half-brother] further testified:

"The next day Aldi - they never put it into policy but they changed the procedure where we had to now lower the dock plate all the way down with the lip folded to close or open the door. Before, we could go behind it and they rolled that out before I ever returned to Greenwood division."

Cullison deposition, p. 38, lines 6-13.

63. Although a subsequent remedial measure, the statement provides evidence of assumption of duty for the safe operation of equipment. The policy change implemented a safety procedure consistent with the procedure set out in the Blue Giant manual.

64. The Court concludes there is designated evidence from which a finder of fact could find a gratuitous assumption of duty as set out in *Robinson v. Kinnick*[5].

65. The Motion For Summary Judgment by Aldi (Indiana) L.P. is denied.

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[5] 549 N.E.2d 1167 (Ind. Ct. App. 1989), *reh'g denied*, *trans. denied*.

(Wiese's App. Vol. II at 70-80.) Both ALDI and Wise moved for the trial court to certify the order denying their respective summary judgment motions for interlocutory appeal, and the trial court certified the order on March 4, 2022. We accepted jurisdiction on April 29, 2022.

Discussion and Decision

[11] Our standard of review following a trial court's ruling on summary judgment is well-settled:

> When we review a grant or denial of a motion for summary judgment, our standard of review is the same as it is for the trial court. The moving party must show there are no genuine issues of material fact and [it] is entitled to judgment as a matter of law. If the moving party carries its burden, then the nonmoving party must present evidence establishing the existence of a genuine issue of material fact. In deciding whether summary judgment is proper, we consider only the evidence the parties specifically designated to the trial court. We construe all factual inferences in favor of the non-moving party and resolve all doubts regarding the existence of a material issue against the moving party.

Asklar v. Gilb, 9 N.E.3d 165, 167 (Ind. 2014) (internal citations omitted). When, as here, the trial court issues findings of fact and conclusions of law detailing its rationale for denying a motion for summary judgment, the findings and conclusions "aid our review, but they do not bind us." *Elda Corp. v. Holliday, LLC*, 171 N.E.3d 124, 128 (Ind. Ct. App. 2021), *trans. denied*.

[12] In *Jarboe v. Landmark Community Newspapers*, our Indiana Supreme Court explained that under the Indiana Trial Rules, "the party seeking summary

judgment must demonstrate the absence of any genuine issue of fact as to a determinative issue, and only then is the non-movant required to come forward with contrary evidence." 644 N.E.2d 118, 123 (Ind. 1994), *reh'g denied*. This differs from summary judgment practice in federal courts. Under the Federal Rules of Civil Procedure, "the party seeking summary judgment is not required to negate an opponent's claim. The movant need only inform the court of the basis of the motion and identify relevant portions of the record 'which it believes demonstrate the absence of a genuine issue of material fact.'" *Id*. (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). Under the federal rules, the burden then shifts to the non-movant "to make a showing sufficient to establish the existence of each challenged element upon which the non-movant has the burden of proof." *Id*. In contrast, under the Indiana Trial Rules, "[w]hen the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff[']s claim." *Sheets v. Birky*, 54 N.E.3d 1064, 1069 (Ind. Ct. App. 2016). Our role "is not to act as a trier of fact" and "[w]itness credibility and the relative apparent weight of evidence are not relevant considerations at summary judgment." *Id*. However, when the moving party has made a prima facie case that it is entitled to summary judgment, "the non-moving party must designate some evidence to defeat the moving [party's] motion." *Griffin v. Menard, Inc.*, 175 N.E.3d 811, 814 (Ind. 2021). "[S]peculation is not enough to overcome summary judgment." *Id*.

1. Wiese's Motion for Summary Judgment

[13] The Riches allege Wiese "negligently failed to inspect and/or maintain and/or adjust the dock plate and accompanying equipment" and this failure proximately caused Rich Jr.'s fatal injuries. (Appellee's App. Vol. II at 4.) As we explained in *Podemski v. Praxair, Inc.*:

> To recover on a negligence theory, the plaintiff must establish: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant's breach. Absent a duty there can be no negligence or liability based upon the breach. Whether a duty exists is a question of law for the courts to decide. A defendant is entitled to summary judgment by demonstrating that the undisputed material facts negate at least one element of the plaintiff's claim. Generally, summary judgment is rarely appropriate in negligence cases because they are particularly fact-sensitive and are governed by a standard of the objective reasonable person, which is best applied by a jury after hearing all the evidence. However, where the facts are undisputed and lead to but a single inference or conclusion, the court as a matter of law may determine whether a breach of duty has occurred.

87 N.E.3d 540, 546-47 (Ind. Ct. App. 2017) (internal citations omitted), *trans. denied*.

[14] Wiese asserts it affirmatively negated an essential element of the plaintiffs' claim because the Riches cannot show the dock leveler was drifting at the time

Wiese inspected the dock leveler in April 2019.[6] Wiese notes its last inspection of the dock plate leveler occurred approximately three months prior to the

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[6] The Riches ask us to dismiss Wiese's appeal because of "serious violations of the rules of appellate procedure in the preparation of its appendix and its brief." (Appellee's (Wiese) Br. at 7.) The Riches note that Wiese's appendix does not include the evidence designated by the Riches to the trial court in opposition to Wiese's motion for summary judgment and some of the documents included in Wiese's appendix are out of chronological order. Rule 50 of the Indiana Rules of Appellate Procedure provides:

> (1) Purpose. The purpose of an Appendix in civil appeals and appeals from Administrative Agencies is to present the Court with copies of only those parts of the Record on Appeal that are necessary for the Court to decide the issues presented.
>
> (2) Contents of Appellant's Appendix. The appellant's Appendix shall contain a table of contents and copies of the following documents, if they exist:
>
> * * * * *
>
> (f) pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal.

In *Webb v. City of Carmel*, we stated that

> when appealing the grant or denial of a motion for summary judgment, it is not sufficient for the appellant to include in the appendix only those documents designated by it to the trial court. Rather, appellants should include in their appellant's appendix all documents relating to the disposition of the motion for summary judgment, including any documents that the appellee designated.

101 N.E.3d 850, 856 n.3 (Ind. Ct. App. 2018) (internal citation and quotation marks omitted). Thus, Wiese should have included in its appendix the materials the Riches designated to the trial court in opposition to Wiese's motion for summary judgment. Wiese also should have placed the designated evidence it submitted to the trial court before the documents that were filed later. We appreciate that the Riches filed an appellee's appendix with the material they designated to the trial court, but Wiese's failure to follow the Indiana Rules of Appellate Procedure has made our review of the record more difficult. *See*, *e.g.*, *Gallo v. Sunshine Car Care, LLC*, 185 N.E.3d 392, 399 (Ind. Ct. App. 2022) ("Gallo's omissions have hindered our review and caused needless extra work to piece together and consider the extensive filings in this case"), *reh'g denied*, *trans. denied*. Nonetheless, "we prefer to decide issues on their merits when possible." *See Webb*, N.E.3d at 856 n.3. Therefore, despite the deficiencies of Wiese's appendix, we will still address the merits of its appeal. *See id.* (deciding issue on the merits despite deficiencies in the appellant's appendix). Likewise, while the Riches assert the statement of the facts section of Wiese's brief is inadequate because it fails to recite the facts in the

accident, and it did not identify any issues with the dock leveler during that inspection. Moreover, both Jacob Cullison and Dennis Gilson testified that no employee of either S&H or ALDI witnessed the dock leveler drift before Rich Jr.'s accident.

[15] However, Wiese's argument is unpersuasive because ALDI hired Wiese to inspect the dock levelers, and therefore, Wiese had a duty to ensure the dock levelers operated properly. As the trial court found, "Wiese is relying upon the absence of reports of drifting when the designated evidence does not establish a prior time when drifting would have been subject to being observed." (Wiese's App. Vol. II at 72.) Patrick Kays, a lead service technician for Wiese, testified that during Wiese's inspections of the dock levelers, Wiese would not check to see if a plate drifted after being stopped midway because it was "not proper operation" to stop a plate midway. (Riches' App. Vol. II at 21.) Yet, both Kays and Gilson acknowledged the dock plate was not supposed to lower rapidly without someone pushing the down button on the control panel, and here, the dock plate lowered by itself onto Rich Jr. In addition, Cullison testified it was common for workers to go behind the dock plate to open a trailer door like Rich Jr. did in the instant case, and Cullison himself had done it "hundreds and hundreds of times." (ALDI's App. Vol. IV at 185.) Therefore,

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light most favorable to the Riches as the non-movants, we choose to address the merits of Wiese's appeal. *See*, *e.g.*, *Curtis v. Clem*, 689 N.E.2d 1261, 1262 n.1 (Ind. Ct. App. 1997) (choosing to address the merits of appellant's argument on appeal despite the deficiencies in the statement of facts portion of the appellant's brief).

a genuine issue of material fact exists regarding the adequacy of Wiese's inspection because even though the dock plate was not supposed to drift by itself, Wiese did not specifically check for drift until after Rich Jr.'s death nor, as the trial court found, did Wiese designate evidence that checking for a hydraulic leak or faulty valve was outside "the ambit of normal planned maintenance" for Blue Giant dock levelers. (Wiese's App. Vol. II at 71.) We affirm the trial court's denial of Wiese's motion for summary judgment. *See Kelly v. GEPA Hotel Owner Indianapolis LLC*, 993 N.E.2d 216, 222 (Ind. Ct. App. 2013) (holding genuine issue of material fact precluded summary judgment on hotel visitor's claim that elevator maintenance company negligently inspected and maintained elevator).

2. ALDI's Motion for Summary Judgment

2.1 Premises Liability

[16] ALDI asserts it is entitled to summary judgment with respect to the Riches' premises liability claim because it did not have knowledge of an allegedly hazardous condition on its premises. "Under Indiana premises liability law, a landowner owes the highest duty to an invitee: the duty to exercise reasonable care for his protection while he is on the landowner's premises." *Converse v. Elkhart Gen. Hosp., Inc.*, 120 N.E.2d 621, 625 (Ind. Ct. App. 2019). The category of "invitee" includes business visitors who are "'invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.'" *Burrell v. Meads*, 569 N.E.2d 637, 642 (Ind. 1991) (quoting Restatement (Second) of Torts § 332 (1965)), *reh'g denied*.

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Id. at 639-40 (quoting Restatement (Second) of Torts § 343 (1965)).

[17] ALDI contends it did not have either actual or constructive knowledge of a dangerous condition at the Greenwood warehouse. "A storekeeper is charged with actual knowledge of a dangerous condition created by his own act or acts of his employees within the scope of their employment." *F.W. Woolworth Co. v. Jones*, 130 N.E.2d 672, 673 (Ind. Ct. App. 1955). Similarly, the storekeeper is charged with constructive knowledge "if such condition has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the storekeeper, his agents or employees had used ordinary care." *Id*.

[18] James Bryant, ALDI's warehouse supervisor, and Gilson both testified that they had not seen or heard about the dock leveler at bay 80 drifting prior to the July 2, 2019, incident. Cullison also testified that he had never seen or heard

that the dock leveler at bay 80 was drifting before Rich Jr.'s death. Likewise, Bryan Anderson, the S&H employee in charge of safety at the Greenwood warehouse, testified that he did not remember the dock leveler at bay 80 having any issues before July 2, 2019. Given that there were no reported issues with the dock leveler at bay 80 prior to July 2, 2019, ALDI did not have actual knowledge of the drifting dock leveler. *See*, *e.g.*, *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012) (holding grocery store did not have actual knowledge of clear liquid on floor).

[19] The Riches assert ALDI "only wanted its dock levelers checked annually" even though the owner's manual specified that maintenance should be performed by qualified technicians at least quarterly and monthly if used in a multi-shift operation. (Riches' Br. (ALDI) at 11.) Therefore, the Riches contend a "fact finder could conclude that ALDI failed in all those respects and failed to properly provide safe premises for Mr. Rich and other S&H employees who had to use the dock plate levelers." (*Id.*) However, while the Riches fault ALDI for not performing maintenance on its dock levelers more frequently than it did, the Riches do not explain how more frequent maintenance would have allowed ALDI to discover the drifting condition prior to Rich Jr.'s accident. Wiese performed a maintenance inspection of the dock levelers less than three months before the accident. It is also not clear more frequent inspections would have discovered the dock leveler's drifting condition because Wiese did not specifically test for that during its inspections. Thus, ALDI also affirmatively disproved that it had constructive knowledge of the drifting condition at the bay

80 dock leveler prior to July 2, 2019. *See*, *e.g.*, *Schulz*, 963 N.E.2d at 1145 (holding store also did not have constructive knowledge of clear liquid on floor). Therefore, the trial court erred in not granting ALDI summary judgment on the Riches' premises liability claim.

2.2 Duty to Train or Supervise

[20] In addition, ALDI asserts it is entitled to summary judgment because it "did not owe a contractual duty or otherwise assume a non-delegable duty of care because Rich Jr. was the employee of ALDI's independent contractor, which was strictly responsible for employing, training, supervising, and protecting Rich Jr." (ALDI's Br. at 21.) "An employer does not have a duty to supervise the work of an independent contractor to assure a safe workplace and consequently is not liable for the negligence of the independent contractor." *Shawnee Constr. & Eng'g Inc. v. Stanley*, 962 N.E.2d 76, 81 (Ind. Ct. App. 2011), *trans. denied*. However, there are five exceptions to this general rule. *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999).

> The exceptions are: (1) where the contract requires the performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.

Id. These exceptions "represent specific, limited situations in which the associated duties are considered non-delegable because public policy concerns

militate against permitting an employer to absolve itself of all further responsibility by transferring its duties to an independent contractor." *Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584, 588 (Ind. 1995).

2.2.1 Contractual Duty

[21] We first look to the contract between S&H and ALDI to determine the anticipated scope of the companies' respective responsibilities over S&H's employees. "To interpret a contract, a court first considers the parties' intent as expressed in the language of the contract." *Schmidt v. Schmidt*, 812 N.E.2d 1074, 1080 (Ind. Ct. App. 2004). "If the language of the agreement is unambiguous, the intent of the parties must be determined from the four corners of the document." *Id*. In *Pelak v. Ind. Indus. Servs. Inc.*, we explained that "Indiana cases have uniformly held that where an instrumentality causing injury was in the control of an independent contractor, a duty will not be found where there is no evidence that the landowner maintained any control over the 'manner or means' by which the contractor engaged in its work." 831 N.E.2d 765, 781 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*. However, "[i]f a contract affirmatively evinces an intent to assume a duty of care, actionable negligence may be predicated upon the contractual duty." *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1268 (Ind. Ct. App. 2002), *trans. denied*.

[22] The agreement between ALDI and S&H specified S&H's "relationship to ALDI shall be that of an independent contractor, and not that of an employer, joint employer or co-employer with ALDI or of an Employee or joint Employee of ALDI." (ALDI's App. Vol. III at 98.) S&H agreed to provide the

equipment and personnel necessary to perform its duties in a "safe, timely, and efficient manner[.]" (*Id*. at 98.) It also agreed to be solely responsible for hiring, evaluating, directing, disciplining, and supervising its employees and to be "solely responsible for developing, distributing and enforcing any rules, regulations, and other policies applicable to its Personnel and Employees." (*Id*. at 99.) Moreover, the contract specified that S&H's "training for the safe operation of the facility may include specific training applicable to all visitors and invitees on ALDI's property, including, but not limited to the 'ALDI Ammonia Safety Training' program." (*Id*.) Thus, the contract between ALDI and S&H placed the responsibility for training and supervising S&H's employees on S&H. Therefore, the contract did not impose any duty on ALDI to train S&H's employees regarding the proper operation of the dock leveler. *See*, *e.g*., *Merrill*, 771 N.E.2d at 1269-70 (holding principal did not assume contractual duty to ensure independent contractor's compliance with OSHA regulations).

2.2.2 Assumption of Duty by Conduct

[23] Despite the language in the contract between ALDI and S&H, the trial court concluded that a finder of fact could find ALDI gratuitously assumed responsibility for training S&H employees to safely use ALDI's equipment. In *Yost v. Wabash Coll.*, our Indiana Supreme Court explained:

> A duty of care may arise where one party assumes such a duty, either gratuitously or voluntarily. The assumption of such a duty creates a special relationship between the parties and a corresponding duty to act in the manner of a reasonably prudent

> person. The assumption of such a duty requires affirmative, deliberate conduct such that it is apparent that the actor specifically [undertook] to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative legal duty to perform that undertaking carefully. Where the record contains insufficient evidence to establish such a duty, the court will decide the issue as a matter of law.

3 N.E.3d 509, 517 (Ind. 2014) (brackets in original) (quotation marks, ellipses, and citations omitted).

[24] ALDI provided paperwork to the dockworkers with instructions regarding the proper operation of its electric pallet jacks and required the dockworkers to demonstrate they could properly operate the jacks. However, ALDI did not provide any training or materials regarding the dock levelers. The trial court found that because ALDI provided safety training with respect to the electric pallet jacks, it assumed a duty to provide safety training on all of ALDI's equipment. The trial court explained ALDI may not "pick and choose the equipment on which a duty is assumed by affirmative conduct." (Wiese's App. Vol. II at 79.) However, we decline to hold that providing safety training on one piece of equipment manifests "affirmative, deliberate conduct," *Yost*, 3 N.E.3d at 517, to provide safety training on all equipment.[7] Likewise, while

[7] Moreover, we think such a holding would make for bad public policy because it would disincentivize employers from providing any sort of safety training to independent contractors for fear that doing so would increase the employer's litigation risk beyond the ambit of the training. *Cf. Pennington v. Mem'l Hosp. of South Bend, Inc.*, 206 N.E.3d 473, 485 (Ind. Ct. App. 2023) ("Underlying [Evidence] Rule 407 is a public policy

ALDI "changed the procedure" for lowering the dock plate after Rich Jr.'s accident, (ALDI's App. Vol. II at 55), this remedial measure does not indicate ALDI affirmatively assumed a duty to instruct the dock workers on the proper operation of the dock levelers before Rich Jr.'s accident. *See*, *e.g.*, *Strack v. Van Til, Inc. v. Carter*, 803 N.E.2d 666, 671 (Ind. Ct. App. 2004) (noting evidence of a remedial measure may "connote the defendant's exercise of care beyond that required by the law: the defendant turns to measures beyond those required by reasonable care"). As there is no genuine issue of material fact and the law is in ALDI's favor, we hold ALDI did not voluntarily assume a duty to provide training to S&H's dock workers on the proper operation of the dock levelers. *See*, *e.g.*, *Robinson v. Kinnick*, 548 N.E.2d 1167, 1170 (Ind. Ct. App. 1989) (holding homeowners did not gratuitously assume a duty for the safety of a roofer who slipped on ice and fell off the homeowners' house even though the homeowners provided some safety equipment and nailed toe boards on the roof), *reh'g denied*, *trans. denied*.

2.2.3 Due Precaution Exception

[25] The trial court also found the fourth exception to the general rule that an employer is not responsible for the negligence of an independent contractor applied because the "finder of fact could conclude that the failure to follow proper safety procedures in the use of the dock leveler could probably cause

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based on fear that permitting proof of subsequent remedial action will deter a defendant from taking action that will prevent future injuries.").

injury in the absence of safety precautions." (Wiese's App. Vol. II at 78.) This "due precaution" exception "imposes liability on a principal where the act to be performed will probably cause injury to others unless due precaution is taken." *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 955 (Ind. 2005) (internal quotation marks omitted), *aff'd on reh'g*, 834 N.E.2d 665 (Ind. 2005), *abrogated on other grounds by Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 854 N.E.2d 345 (Ind. 2006). It "requires that, at the time of engaging the contractor, the principal should have foreseen that the performance of the work or the conditions under which it was to be performed would, absent precautionary measures, probably cause injury." *Id*. The exception "does not render the principal liable for the contractor's failure to take normal precautions incident to the activity to be carried out." *Id*. For example, "a homeowner has no liability for an electrician's failure to take the normal precaution of breaking a circuit before touching the wiring." *Id*. The exception "requires several elements, including a peculiar risk; the contractee's foreseeability of that risk; and an injury consistent with the peculiar risk." *McDaniel v. Bus. Inv. Grp.*, 709 N.E.2d 17, 22 (Ind. Ct. App. 1999). It is not intended "to swallow the general rule of nonliability." *Id*. "The essence of this exception is the foreseeability of the peculiar risk involved in the work and of the need for special precautions." *Bagley*, 658 N.E.2d at 588.

[26] Both the owner's manual and decals on the dock leveler warned the operator not to get behind the plate if the plate was not locked in place. The plate itself was very heavy and the prospect of it causing injury if not operated properly

was a routine and predictable hazard. We agree with ALDI that it "was reasonably entitled to expect that its independent contractor would follow recommended procedures and implement training to ensure the safety of its workers[.]" (ALDI's Br. at 41.) Therefore, the "due precaution" exception does not impose liability upon ALDI, and the trial court erred in denying ALDI's motion for summary judgment. *See*, *e.g.*, *Ill. Bulk Carrier, Inc. v. Jackson*, 908 N.E.2d 248, 263 (Ind. Ct. App. 2009) (holding due precaution exception did not apply to hold principal liable for independent contractor's negligence because the risk of collision with another vehicle is not "more than a routine and predictable hazard associated with hauling sludge"), *trans. denied*.

Conclusion

[27] We affirm the trial court's denial of Wiese's motion for summary judgment because Wiese failed to affirmatively disprove an element of the Riches' claim against it. However, we reverse the trial court's denial of ALDI's motion for summary judgment because ALDI did not have either actual or constructive knowledge of the dock leveler's drifting condition and it did not otherwise assume a duty regarding the S&H employees' operation of the dock leveler. We remand for further proceedings consistent with this opinion.

[28] Affirmed in part, reversed in part, and remanded.

Crone, J., and Weissmann, J., concur.