MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Specialties Company, LLC,
Appellant-Defendant,

v.

Douglas Hunt and Acuity Insurance, Inc.,
Appellees-Plaintiffs.

August 17, 2023

Court of Appeals Case No. 23A-CT-20

Appeal from the Marion Superior Court

The Honorable Cynthia J. Ayers, Judge

Trial Court Cause No. 49D04-1903-CT-10464

Memorandum Decision by Judge Tavitas
Judges Crone and Kenworthy concur.

Tavitas, Judge.

Case Summary

[1] Specialties Company, LLC, ("Specialties") appeals the trial court's denial of its motion for summary judgment regarding claims brought by Douglas Hunt. The trial court denied Specialties' motion for summary judgment, concluding that Specialties owed Hunt a duty under premises liability principles. We disagree. Accordingly, the trial court erred by denying Specialties' motion for summary judgment, and we reverse.

Issue

[2] Specialties raises three issues, but we find one issue dispositive, which we restate as whether Specialties owed a duty to Hunt.[1]

Facts

[3] Specialties operated a facility in Anderson, which distributed cement dust and kiln dust. Although there was no written haulage agreement or contract between KBT Enterprises ("KBT") and Specialties, KBT provided hauling services for Specialties. KBT employed Hunt as a driver of a tanker truck similar to the one shown below.

[1] Given our resolution of the duty issue, we need not address whether the trial court considered inadmissible evidence or whether the trial court erred by finding a genuine issue of material fact as to breach of duty.

Appellant's App. Vol. II p. 142.

[4] When Hunt was hired by KBT, he watched safety videos provided by KBT, which included proper procedures for using a harness and maintaining "three points of contact" to avoid falls. Appellant's App. Vol. IV p. 148. The "three points of contact" procedures require the driver to maintain "at least two feet and one hand or two hands and one foot on some part of the trailer" when ascending and descending the trailer. *Id.* at 149.

[5] Specialties had a Safety & Health Handbook that was distributed to its employees. Although Specialties expected non-employees to "abide by [its] safety rules," Specialties could not "tell them how to do their job." *Id.* at 112.

[6] At the Specialties' facility, KBT's drivers and others would stop shortly before the silo to open the hatch on the top of the trailer, pull forward to the silo for

loading, and pull forward again to close the hatch. Some drivers walked on top of the trailer to open the hatch, while some crawled across the trailer to the hatch. Some of the drivers also wore harnesses secured to the railing on the trailer. Other trailers were equipped with an "air gate[]," which would open the hatch by flipping a switch on the ground level. Appellant's App. Vol. V p. 8. Although some other facilities provided a fall protection system to be used by drivers while opening the hatches, Specialties' facility did not have such a system.

[7] Prior to the incident in question, Hunt was dispatched to transport material from Specialties on four occasions. On June 14, 2018, Hunt was again dispatched to Specialties' facility to load and transport materials to Mt. Comfort. Upon arriving at the facility, Hunt stopped his tanker truck in front of the silo, went to the back of the trailer, climbed the ladder to the top of the trailer, and walked to the hatch. After opening the hatch, Hunt returned to the small platform next to the ladder. When he reached the small platform, he pivoted his feet, bent over to reach for the railing, and lost his balance. Hunt fell approximately ten feet from the top of the trailer onto the rear wheels of the trailer and then onto the concrete. Hunt was injured as a result of the fall.[2] Hunt was not wearing the safety harness provided by KBT when he fell.

[2] Specialties had not had a similar incident in its seventeen years of operation. At some point after Hunt's fall, Specialties installed a fall protection system, which allowed drivers to walk up the stairs onto a platform and open the hatch. The system was installed as a result of Hunt's fall.

[8] In March 2019, Hunt filed a complaint against Specialties and alleged that: (1) Hunt was engaged in inherently dangerous work activities; (2) Specialties breached its duty to Hunt; and (3) Hunt sustained damages as a result. Acuity Insurance ("Acuity") and KBT filed a petition to intervene, and the trial court granted Acuity's petition but denied KBT's petition.

[9] In May 2021, Specialties filed a motion for summary judgment. Specialties argued that: (1) Specialties did not owe a duty to Hunt; (2) Specialties did not breach a duty owed to Hunt to maintain the premises in a reasonably safe manner; and (3) Hunt's claim was barred by the exclusivity provision of the Worker's Compensation Act. Hunt filed a response and a cross-motion for summary judgment on the issue of duty. Hunt argued that: (1) Hunt was a business invitee and was owed a duty of reasonable care; (2) a question of fact for the jury existed regarding whether Specialties breached its duty; and (3) Hunt was not an employee of Specialties and his claim against Specialties was not limited by the Worker's Compensation Act.

[10] The trial court denied Specialties' motion for summary judgment. The trial court found:

> This is a premises liability case. The question, then, is whether Specialties owed Hunt a duty of reasonable care and if they did owe him [ ] such a duty, was that duty breached in this accident situation.
>
> Here, Hunt was present on Specialties' property for the purpose of loading and hauling material. Specialties knew that truck drivers at its facility accessed the top hatch of the tanker trailers

> without a platform and stairway fall protection system and that drivers must access the top hatch of the tanker trailers to load material. They were aware that truck drivers were often, "at least 10 feet" off the ground when they did this. Specialties' knowledge of these facts demonstrated that it was foreseeable that truck drivers on its premises were likely to encounter a known and obvious danger associated with accessing the top of tanker trailers because it was necessary that a driver open the top of the tanker trailer to load product. In this circumstance due to the inherent danger of the hatch-opening operation, it was required of Specialties to take other reasonable steps to protect Hunt, against the known or obvious condition or activity, because Specialties had reason to expect that Hunt could, nonetheless, suffer physical harm. Hunt was a business invitee. Specialties['] foreseeability of an accident of this type was recognized and warned against in Specialties' "Safety Policy Statement". Hunt was, therefore, owed a duty of reasonable care by [Specialties] as a matter of law.

Appellant's App. Vol. V p. 96. Thus, the trial court found that Specialties owed a duty of care to Hunt. The trial court also found that a genuine issue of material fact existed as to whether Specialties breached its duty to Hunt.

[11] Specialties filed a motion for clarification and a motion to reconsider, motion to correct error, or in the alternative, a motion to certify the order for interlocutory appeal. The trial court issued an amended order finding "no just reason for delay" and entering final judgment "on the issue of duty only." Appellant's App. Vol. II p. 31. Specialties now appeals.

Discussion and Decision

[12] Specialties appeals the denial of its motion for summary judgment. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting *Murray v. Indianapolis Pub. Schs.*, 128 N.E.3d 450, 452 (Ind. 2019)); *see also* Ind. Trial Rule 56(C).

[13] The summary judgment movant invokes the burden of making a *prima facie* showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Burton*, 140 N.E.3d at 851. The burden then shifts to the non-moving party which must then show the existence of a genuine issue of material fact. *Id*. On appellate review, we resolve "[a]ny doubt as to any facts or inferences to be drawn therefrom . . . in favor of the non-moving party." *Id*.

[14] We review the trial court's ruling on a motion for summary judgment de novo, and we take "care to ensure that no party is denied his day in court." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "We limit our review to the materials designated at the trial level." *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*. Because the trial court entered findings of fact and conclusions thereon, we also reiterate that findings of fact

and conclusions thereon entered by the trial court aid our review, but they do not bind us. *Matter of Supervised Estate of Kent*, 99 N.E.3d 634, 637 (Ind. 2018).

[15] "[T]o prevail on a claim of negligence the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin v. Yeakle's Sports Bar and Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). "Absent a duty there can be no negligence or liability based upon the breach." *Id.* "Whether a duty exists is a question of law for the court to decide." *Id.* at 386-87. "[B]reach is usually a question of fact for the jury." *Megenity v. Dunn*, 68 N.E.3d 1080, 1083 (Ind. 2017).

[16] Our Supreme Court has held that, "[a]s a general rule, an owner of property has no duty to provide independent contractors with a safe workplace." *Hunt Const. Grp., Inc. v. Garrett*, 964 N.E.2d 222, 228-29 (Ind. 2012). Thus, "a principal is not liable for the negligence of an independent contractor." *Vaughn v. Daniels Co. (W. Virginia)*, 841 N.E.2d 1133, 1143 (Ind. 2006). The rationale for this rule is that the principal typically exercises "little, if any, control over the means or manner of the work" of an independent contractor. *Cf. Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007) (discussing general contractors and subcontractors), *trans. denied*. There are, however, exceptions to this rule, including:

> (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.

Vaughn, 841 N.E.2d at 1143.

[17] Hunt, however, argues that premises liability principles apply here instead of these general independent contractor principles. Under premises liability principles, "a property owner must maintain its property in a reasonably safe condition for business invitees, including employees of independent contractors." *Podemski v. Praxair, Inc.*, 87 N.E.3d 540, 547 (Ind. Ct. App. 2017), *trans. denied*. Indiana applies the formulation of landowner's liability to business invitees expressed in the Restatement (Second) of Torts. *Id.* The Restatement provides:

> 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.

Restatement (Second) of Torts § 343.

[18] In addition, Restatement (Second) of Torts § 343A(1), which addresses known and obvious dangers and is meant to be read in conjunction with § 343, provides: "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves, and thus the condition or activity must not only be known to exist, it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. Restatement (Second) of Torts § 343A, cmt. b. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable person, in the position of the visitor, exercising ordinary perception, intelligence, and judgment. *Id*.

[19] Thus, we must determine whether premises liability principles or the general independent contractor principles applies here. We addressed a similar situation in *Marks v. Northern Indiana Public Service Co.*, 954 N.E.2d 948 (Ind. Ct. App. 2011) ("*Marks I*"), and on rehearing in *Marks v. Northern Indiana Public Service Co*., 964 N.E.2d 238 (Ind. Ct. App. 2011) ("*Marks II*"). There, Northern Indiana Public Service Co. ("NIPSCO") operated a generating station that produced fly ash. NIPSCO entered into a contract with Headwaters to dispose of and recycle the fly ash, and Headwaters subcontracted with MCS Trucking to transport the fly ash from NIPSCO's silos to Headwaters' facility. David

Marks was a tanker truck driver for MCS Trucking. Marks would stop his tanker truck near the silo, climb to the top of the trailer to open a hatch, and then drive under the silo to have the trailer loaded with fly ash. Marks was on top of his trailer attempting to open the hatch when he slipped and fell to the ground.

[20] Marks filed a complaint against NIPSCO and Headwaters. Marks alleged that "NIPSCO owed a duty to [Marks] and was negligent for failing to provide him with a safe work site, failing to establish and implement a safety protocol, failing to inspect the work site for hazards, failing to correct hazards, failing to comply with safety codes, and in failing to provide safety belts, harnesses, lanyards, and similar safety equipment." *Marks I*, 954 N.E.2d at 951. NIPSCO moved for summary judgment, which the trial court granted, and Marks appealed.

[21] On appeal, the issue was whether NIPSCO owed a duty to Marks. In the initial opinion, we addressed whether the exceptions to the independent contractor rule applied. We concluded that NIPSCO did not assume a duty of care to Marks by way of contract. We also concluded that NIPSCO did not assume a duty of care by its conduct. Accordingly, we affirmed the trial court's grant of summary judgment to NIPSCO.

[22] We granted rehearing "for the limited purpose of addressing the issue of premises liability, but otherwise affirm[ed] our original opinion." *Marks II*, 964 N.E.2d at 239. We held:

> [I]t is undisputed that [Marks] fell while trying to open a hatch on top of the semi-trailer he was hauling. The semi-trailer was owned by his employer—a subcontractor of the general contractor hired by NIPSCO. There is nothing in the record indicating that NIPSCO retained any measure of control over the semi-trailer. As NIPSCO notes in its reply, "any defects in the trailer or problems associated with operating the hatch or gaining access to it from the trailer ladder are freestanding and unrelated to NIPSCO." Appellee's Response p. 1.
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> We held in *Pelak v. Indiana Industrial Services, Inc.*, 831 N.E.2d 765, 770 (Ind. Ct. App. 2005), *trans. denied*, that "[t]here is no persuasive public policy argument for imposing on a landowner a duty to guard a contractor's employees from an instrumentality exclusively controlled by the contractor." Because NIPSCO was not in control of David's truck at the time of the accident, there is no reason to impose liability on NIPSCO simply because David fell while on NIPSCO's premises.

Marks II, 964 N.E.2d at 239-40. Accordingly, we held that the trial court properly granted summary judgment to NIPSCO.

[23] Here, we have the same circumstances. Specialties' president stated: "Specialties did not own, operate, or control the tractor or tanker-trailer used by KBT and/or Douglas Hunt on June 14, 2018, on or about the subject premises, at the time of the alleged subject occurrence." Appellant's App. Vol. II p. 104. Also, Specialties' expert noted:

> [Hunt's] employer provided [Hunt] a trailer for dry-bulk material transport (tank trailer). [Hunt] and his employer knew the trailer would need to be accessed from the top of the trailer, based on the trailer configuration they chose for his use. [Specialties] had no role in the selection, configuration, and/or tank trailer access

> needs. [Specialties] did not direct [Hunt] on how to access the trailer's top.

Appellant's App. Vol. V p. 33.

[24] Specialties was not in control of Hunt's tanker truck and trailer when Hunt fell, and premises liability principles do not apply.[3] Rather, the general principle that "an owner of property has no duty to provide independent contractors with a safe workplace" applies. *Hunt Const. Grp., Inc.*, 964 N.E.2d at 228-29. Hunt makes no argument, however, that any of the exceptions to this general principle apply. Accordingly, we conclude that Specialties did not owe a duty to Hunt. The trial court erred when it denied Specialties' motion for summary judgment on the issue of duty.

Conclusion

[25] The trial court erred when it concluded that Specialties owed a duty to Hunt. Accordingly, the trial court erred by denying Specialties' motion for summary judgment. We reverse.

[26] Reversed.

Crone, J., and Kenworthy, J., concur.

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[3] Hunt relies upon *Ooms v. USX Corp.*, 661 N.E.2d 1250 (Ind. Ct. App. 1996). In *Ooms*, however, the plaintiff was injured when he slipped on oil on the defendant's property; he did not slip on his own employer's equipment. Accordingly, we find *Ooms* distinguishable.