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IN THE COURT OF APPEALS OF INDIANA

Jerry Dixon,
Appellant-Plaintiff,

v.

Shiel Sexton Company, Inc.,
Appellee-Defendant.

September 28, 2022

Court of Appeals Case No. 22A-CT-847

Appeal from the Marion Superior Court

The Honorable Kurt M. Eisgruber, Judge

Trial Court Cause No. 49D06-2102-CT-5132

Brown, Judge.

[1] Jerry Dixon appeals the trial court's entry of summary judgment in favor of Shiel Sexton Company, Inc. We affirm.

Facts and Procedural History

[2] Dormakaba USA, Inc., ("Owner") hired Shiel Sexton Company, Inc., ("Sexton") to serve as the general contractor in connection with the construction of the Dormakaba Office & Warehouse Addition Precon-Design ("Project"). The Owner and Sexton signed a Standard Form of Agreement Between Owner and Design-Builder (the "Agreement"). Dixon worked as a mason for Biancofiori Masonry, Inc. ("BMI"), a subcontractor of Sexton pursuant to a Subcontractor Agreement.

[3] According to the Agreement:

> **§ 10.2.8** The Owner and [Sexton] acknowledge and agree that the obligations of [Sexton] related to the protection of persons and property are obligations that run to the Owner only. [Sexton] shall remain the controlling contractor for the Work performed by its own forces but assumes no duty of care to employees of Subcontractors, sub-subcontractors and suppliers or employees or agents of any of them as they are independent contractors. [Sexton] shall require each of its Subcontractors to initiate, maintain and supervise all safety precautions and programs in connection with the performance of their respective work. Subcontractors are solely responsible to the Owner and [Sexton] for, and have control over, its construction means, methods and techniques, including safety programs and procedures related thereto. [Sexton] is not the insurer of safety for everyone on the Project, but rather each Subcontractor, as experts in their respective fields or line of work, are in the best position to implement programs and procedures that will ensure

> the safety of those performing its work. The obligations of [Sexton] herein [are] for the purpose of protecting the Owner and to promote safety without exposing [Sexton] to suits by workers employed by its Subcontractor, sub-subcontractor and supplies or anyone directly or indirectly employed by any of them or anyone for whose acts they may be liable.

Appellant's Appendix Volume II at 63.

[4] Prior to commencing work on the Project, Sexton required all new workers to watch a video that described general best safety practices, after which workers received a sticker to place on their helmets indicating they had watched the video. Throughout the Project, Sexton conducted "[w]eekly [m]eeting[s] with Subcontractors to review all job related items," and Carl Warner, BMI's project manager, was the only BMI employee who attended the meetings. On July 2, 2019, Dixon's work required him to scale scaffolding that had been erected by BMI, and as he attempted to transition from the ladder to the scaffolding's platform, he fell.

[5] On February 15, 2021, Dixon filed a complaint for damages in the Marion Superior Court, alleging injuries due to Sexton's negligence. On August 17, 2021, Sexton filed a motion for summary judgment, and on January 13, 2022, Dixon filed a cross-motion for partial summary judgment. The designated evidence contains depositions of Jay Hostetter, Sexton's project manager for the Project, and Ray Lake, the safety director for Sexton. On April 8, 2022, the trial court granted Sexton's motion for summary judgment.

Discussion

[6] Dixon argues that the designated evidence demonstrates that Sexton "exceeded the scope of its contracts and assumed a duty of care for [his] safety through its conduct" and, "even if the designated evidence did not demonstrate as a matter of law that Shiel Sexton owed him a duty, at a minimum it demonstrated sufficient questions of fact to prevent entry of summary judgment in favor of Shiel Sexton." Appellant's Brief at 7. He claims that, although "the construction documents made subcontractors, such as BMI, solely responsible for safety on the project," "in actual practice the responsibility for safety on the project was shared between Shiel Sexton and subcontractors." *Id.* at 6-7. Dixon contends that Sexton assumed a duty by utilizing safety managers and Safety Director Lake with the authority to remedy and discipline safety violations, using a superintendent, requiring subcontractors to watch a safety video before working on the Project, "[r]equiring subcontractors to become familiar with and adhere to Shiel Sexton's safety rules," and by "[c]onducting weekly safety inspections and routinely holding safety meetings with subcontractors." *Id.* at 27. Sexton argues that its actions did not exceed the Subcontractor Agreement and that its actions fell within the scope of the Agreement.

[7] We review summary judgment using the same standard as the trial court: summary judgment is appropriate only when the designated evidence shows no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Hughley v. State*, 15 N.E.3d 1000, 1003

(Ind. 2014). And where the challenge to summary judgment raises questions of law, we review them de novo. *Ballard v. Lewis*, 8 N.E.3d 190, 193 (Ind. 2014). Questions such as contract interpretation are well-suited for summary judgment. *Ryan v. TCI Architects*, 72 N.E.3d 908, 913 (Ind. 2017). The party appealing the trial court's summary judgment determination bears the burden of persuading us the ruling was erroneous, but we scrutinize the trial court's decision to assure that the party against whom summary judgment was entered was not improperly prevented from having its day in court. *Id.* The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Once these two requirements are met by the moving party, the burden then shifts to the non-moving party to show the existence of a genuine issue by setting forth specifically designated facts. *Id.*

[8] To prevail on a claim of negligence, a plaintiff must demonstrate three elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) compensable injuries proximately caused by the breach. *Id.* Whether a duty exists is a question of law for the court to decide. *Rogers v. Martin*, 63 N.E.3d 316, 321 (Ind. 2016). "Absent duty, there can be no negligence." *Ryan*, 72 N.E.3d at 913.

[9] In *Hunt Constr. Grp., Inc. v. Garrett*, the Indiana Supreme Court used *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212 (Ind. Ct. App. 1983), as a "durable template" where Shannon Garrett, "the employee of a contractor or subcontractor," was

"injured in a workplace accident on a jobsite where a construction manager arrangement [was] in place" and the employee "[sought] to recover from the construction manager."[1] 964 N.E.2d 222, 225 (Ind. 2012). In discussing *Plan-Tec*, the Indiana Supreme Court stated:

> Plan-Tec, Inc., signed a contract with North Clark Community Hospital to provide construction management services for a hospital construction project. After construction began, the construction manager also assumed additional responsibility for changing expansion joints on the exterior skin of the building in order to suit the architect's modifications. A journeyman carpenter employed by one of a number of subcontractors on the expansion joint work was injured in a jobsite accident when the scaffold on which he was working collapsed.
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> *Plan-Tec* held that a construction manager owes a legal "duty of care"—a necessary element to recover for negligence—for jobsite employee safety in two circumstances: (1) when such a duty is imposed upon the construction manager by a contract to which it is a party[;] or (2) when the construction manager "assumes such a duty, either gratuitously or voluntarily[.]"

Id. (citations and footnote omitted).

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[1] To the extent Dixon cites *Smith v. Walsh Constr. Co. II, LLC*, 95 N.E.3d 78 (Ind. Ct. App. 2018), *trans. denied*, we note in that case, the Court addressed a general contractor's assumption of a general duty of care with respect to third-party nonemployees, determined the contract between the Indiana Department of Transportation and general contractor evinced "an intent to charge Walsh with a general, non-delegable duty of care," and the general contractor "was required to perform 30% of the work" and had "elected to assume a duty of care with respect to this work." *Smith*, 95 N.E.3d at 85-86. We find *Smith* distinguishable.

[10] The Indiana Supreme Court held:

> There are a series of cases decided by both the Court of Appeals and the federal courts applying Indiana law reciting that an employee of a construction-site contractor can be owed a legal duty of care for his or her safety by a project owner or construction manager that, though not obligated by contract to provide jobsite safety, takes actions such as appointing a safety director, initiating weekly safety meetings, and directing the contractors to observe certain safety precautions. *Bateman v. Cent. Foundry Div., Gen. Motors Corp.*, 992 F.2d 722, 725-726 (7th Cir. 1993); *Vaughn v. Daniels Co. (W. Va.) Inc.*, 777 N.E.2d 1110, 1135-1138 (Ind. Ct. App. 2002), *aff'd in relevant part*, *rev'd in part*, 841 N.E.2d 1133, 1144-1145 (Ind. 2006); *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1270-1271 (Ind. Ct. App. 2002), *trans. denied*; *Robinson* [*v. Kinnick*, 548 N.E.2d 1167, 1169 (Ind. Ct. App. 1989)]; *Teitge v. Remy Constr. Co.*, 526 N.E.2d 1008, 1014-1015 (Ind. Ct. App. 1988); *Phillips v. United Eng'rs & Constructors, Inc.*, 500 N.E.2d 1265, 1268-1269 (Ind. Ct. App. 1986); *Perry v. N. Ind. Pub. Serv. Co.*, 433 N.E.2d 44, 49-50 (Ind. Ct. App. 1982), *trans. denied*. Garrett deploys some of these cases in support of her position that Hunt's actions in this case demonstrate that it assumed a legal duty of care for her safety.
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> Of these cases, only *Phillips* examines the extent of the duty of care for jobsite-employee safety of a construction manager; most of these cases mention construction managers because they rely on *Plan-Tec.* We think they do so with inadequate precision.
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> It is certainly true that in *Plan-Tec*, the court held there was a question for the jury as to whether the construction manager assumed a legal duty of care for jobsite-employee safety (and that a jury's verdict to that effect was not contrary law) based on the following evidence: that the construction manager apparently appointed a safety director; that the construction manager initiated weekly safety meetings and directed that certain safety precautions, such as building guard rails around floor openings

> and wearing hard hats in working areas, be taken by the contractors; and that each morning the construction manager's safety director inspected the scaffolding that collapsed. 443 N.E.2d at 1220. But to say that *Plan-Tec* holds that it always creates a jury question as to duty when a construction manager takes such actions ignores a key aspect of *Plan-Tec.* In *Plan-Tec,* the construction documents clearly indicated that the individual contractors were responsible for safety and that *Plan-Tec* was not responsible for safety. But after the project was underway, the construction manager explicitly agreed to take on specific supervisory responsibilities beyond those set forth in the original construction documents.

Id. at 229-230. The Court held that "for a construction manager not otherwise obligated by contract to provide jobsite safety to assume a legal duty of care for jobsite-employee safety, the construction manager must undertake specific supervisory responsibilities beyond those set forth in the original construction documents." *Id.* at 230. It concluded that "Hunt's specific actions regarding safety did not go beyond what was required of it in the original construction documents," "[e]ach action Hunt took that Garrett contends constituted Hunt's assumption of a legal duty of care for her safety, Hunt was in fact required to perform by its contract with the Stadium Authority," and that "[u]nlike the situation in *Plan-Tec*, these actions did not go beyond what was required of Hunt in the original construction documents." *Id.*

[11] Here, we observe that Dixon and Sexton agree that "[t]he construction documents placed exclusive control over safety on subcontractors," and Sexton did not assume a duty of care for safety through the Subcontractor Agreement. Appellant's Brief at 23. To the extent Dixon claims that Sexton assumed a duty

of care for safety through its actions regarding the Project, the designated evidence reveals the Agreement states that Sexton shall generally "promote safety." Appellant's Appendix Volume II at 63. Under the Agreement, Sexton was responsible for "supervising all safety precautions and programs in connection with the performance of the Contract," "requir[ing] each of its Subcontractors to initiate, maintain and supervise all safety precautions and programs in connection with the performance of their respective work," "be responsible to the Owner for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract," and "be responsible to the Owner for precautions for the safety of, and reasonable protection to prevent damage, injury or loss to . . . employees on the Work and other persons who may be affected thereby . . . ." *Id.* at 62-63. The Agreement required Sexton to "designate a responsible member of [Sexton's] organization, at the site, whose duty [would] be the prevention of accidents. This person shall be [Sexton's] superintendent unless otherwise designated by [Sexton] in writing to the Owner." *Id.* at 62. In the Subcontractor Agreement, BMI agreed that:

> it shall comply with the safety policy and the jobsite rules and regulations of [Sexton], which may be modified from time to time. Subcontractor shall take all necessary steps toward compliance and shall have sole responsibility for the safety of its employees and agents. Subcontractor shall be liable for each hazardous condition which Subcontractor either creates or controls . . . .

Id. at 101.

[12] Hostetter, Sexton's project manager, agreed with the statement that safety managers "are expected to be looking for safety violations and potential safety hazards that are being created by subcontractors." Appellant's Appendix Volume IV at 85. About the required video, he stated that it "primarily focused on describing safety best practices," did not describe how scaffolding should be erected, and was meant to address "general areas of safety" in which "accidents commonly occur or could occur," that showing such a video was general practice on all projects, and that the video applied to "all people who work[ed] on the project" including Sexton's personnel. *Id.* at 78, 88. According to Hostetter, the weekly subcontractor meetings consisted of a "Safety section and then [would] move on to Quality and then Schedule," Sexton employees would direct the meetings, Sexton would conduct the meetings for its employees, and subcontractors would conduct separate weekly meetings for their employees and submit accompanying materials from the meetings to Sexton. *Id.* at 82. Safety Director Lake agreed that the primary focus of the weekly meeting was safety, Sexton "utilize[s] a third-party generation of the . . . talks," and the talks were sourced each month for "multiple topics." Appellant's Appendix Volume II at 156. Carl Warner, BMI's project manager, was the sole BMI employee to attend the meetings. According to Lake, his purpose on visits to any large-scale project is "to observe work activities and give any sort of recommendations to [Sexton's] project team" with a focus on safety, to "sometimes" give advice on actual construction techniques, and to make sure generally that people are performing work safely and complying with OSHA standards and internal Sexton policies. *Id.* at 151. As part of his duties, he oversaw safety managers

and would try to visit all of Sexton's large-scale construction projects, but he could not say that he had been to every Sexton project during his tenure.

[13] Based on our review of the record, we conclude the designated evidence establishes that Sexton's actions regarding safety at the Project fell within the scope of its contractual obligations to the Owner, and it did not assume a duty of care with respect to the safety of BMI employees through its actions to supervise or ensure compliance with general safety requirements imposed by contract. *See Hunt Constr. Grp., Inc.*, 964 N.E.2d at 230; *Gleaves v. Messer Constr. Co.*, 77 N.E.3d 1244, 1254 (Ind. Ct. App. 2017) ("[T]o hold [the construction manager] liable for [the subcontractor employee's] injury would create a perverse incentive for construction managers to refrain from taking a role in ensuring safe working conditions at construction sites. [The construction manager's] actions and conduct constituted its fulfillment of its contractual obligations to [the owner]; [the construction manager] did not undertake supervisory responsibilities beyond those obligations, and it did not assume a duty to [the subcontractor's employee] through its actions or conduct.").

[14] For the foregoing reasons, we affirm the trial court's grant of summary judgment.

[15] Affirmed.

Bailey, J., and Mathias, J., concur.