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IN THE COURT OF APPEALS OF INDIANA

Carla Tinsley-Williamson, as Guardian of Ethan M. Tinsley,

Appellant-Plaintiff,

v.

A.R. Mays Construction, Inc., American Multi-Cinema, Inc., and Largo Theater Construction, Inc.,

Appellees-Defendants.

October 4, 2022

Court of Appeals Case No. 21A-CT-2230

Appeal from the Hendricks Superior Court

The Honorable Mark A. Smith, Judge

Trial Court Cause No. 32D04-2008-CT-130

Mathias, Judge.

[1] Carla Tinsley-Williamson, as guardian of Ethan M. Tinsley, appeals the Hendricks Superior Court's entry of summary judgment for A.R. Mays Construction, Inc. ("A.R. Mays") on Tinsley's complaint alleging negligence.

Tinsley raises a single issue for our review, namely, whether the trial court erred when it entered summary judgment for A.R. Mays. We affirm.

Facts and Procedural History

[2] At some point prior to mid-November 2016, America Multi-Cinema Entertainment ("AMC") entered into a contract with LTCI, Ltd. ("LTCI").[1] That contract required LTCI "to perform certain labor and furnish certain material for the erection and completion" of a new movie theater in Plainfield ("the project"). Appellant's App. Vol. 2, p. 125. On November 14, LTCI entered into a contract with A.R. Mays, which required A.R. Mays "to substantially complete the project" in accordance with referenced plans and specifications.[2] *Id.* at 75, 125.

[3] A.R. Mays's contract with LTCI required the following of A.R. Mays:

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[1] On appeal, Tinsley asserts that A.R. Mays inappropriately relies on a contract between AMC and LTCI that was entered into after Tinsley's accident to establish the relationship between AMC and LTCI. Reply Br. at 6; *see* Appellee's App. Vol. 2, p. 193. Tinsley further asserts that, under the LTCI-A.R. Mays contract, LTCI is referred to as the "Owner" of the project and A.R. Mays is referred to as the "Contractor." *See* Appellant's App. Vol. 2, p. 75. Tinsley's representations of the record are correct. However, in February 2017, LTCI and A.R. Mays appeared to enter into a "Contractor Work Order" pursuant to their November 2016 contract, and in that document they acknowledged LTCI's existing contractual relationship with AMC and LTCI's duties to AMC to construct the project. Appellant's App. Vol. 2, p. 125. Thus, the labels used by the parties in their contracts, and the date of the contract specifically cited by A.R. Mays on appeal, are beside the point; the designated evidence is clear that, at all relevant times, AMC contracted with LTCI for the completion of the project, and LTCI in turn contracted with A.R. Mays for the same.

[2] The parties dispute whether A.R. Mays was the general contractor for the work or a subcontractor to LTCI. It is not obvious from the various contracts that A.R. Mays was a general contractor and not a subcontractor or construction manager for LTCI on the project, but for the sake of argument on appeal we will assume that Tinsley's position that A.R. Mays was the general contractor is correct.

§ 10.2 SAFETY OF PERSONS AND PROPERTY

§ 10.2.1 [A.R. Mays] shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of [A.R. Mays] or [A.R. Mays's] Subcontractors or Sub-subcontractors; and

.3 other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

§ 10.2.2 [A.R. Mays] shall comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.

§ 10.2.3 [A.R. Mays] shall erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities.

* * *

> § 10.2.5 [A.R. Mays] shall promptly remedy damage and loss . . . to property referred to in Sections 10.2.1.2 and 10.2.1.3 caused in whole or in part by [A.R. Mays], a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which [A.R. Mays] is responsible under Sections 10.2.1.2 and 10.2.1.3, except damage or loss attributable to acts or omissions of [LTCI] or [the] Architect or anyone directly or indirectly employed by either of them, or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of [A.R. Mays]. . . .
>
> § 10.2.6 [A.R. Mays] shall designate a responsible member of [A.R. Mays's] organization at the site whose duty shall be the prevention of accidents. This person shall be [A.R. Mays's] superintendent unless otherwise designated by [A.R. Mays] in writing . . . .
>
> § 10.2.7 [A.R. Mays] shall not permit any part of the construction or site to be loaded so as to cause damage or create an unsafe condition.

Id. at 112 (bold font removed).

[4] In January 2018, AMC entered into a separate contract with Everything Cinema for the installation of new theater screens and sound systems at the Plainfield location. The AMC-Everything Cinema contract identifies Everything Cinema as an "independent contractor" to AMC. Appellee's App. Vol. 2, p. 102 (capitalization removed). Tinsley was an employee of Everything Cinema. On May 15, 2018, while working to install a sound system at the site, Tinsley stood on twenty-two-foot tall, unsecured scaffolding. Tinsley did not

have any protective gear in case he fell, and the scaffolding had a broken caster. Tinsley fell from the scaffolding and suffered serious injuries.

[5] Tinsley-Williamson, Tinsley's mother, brought suit against A.R. Mays on Tinsley's behalf (and thus we hereinafter simply refer to Tinsley). According to that complaint, A.R. Mays's contractual duties of care under the LTCI-A.R. Mays contract extended to Tinsley as an employee of Everything Cinema, and A.R. Mays acted negligently when it did not protect Tinsley under those duties.

[6] A.R. Mays filed a motion for partial summary judgment on the issue of its purported contractual duties of care to Tinsley. After a hearing, the trial court granted A.R. Mays's motion for summary judgment. The court then certified its order for interlocutory appeal, which we accepted.

Standard of Review

[7] Tinsley appeals the trial court's entry of summary judgment for A.R. Mays. Our standard of review in summary judgment appeals is well established. As our Supreme Court has made clear, "[w]e review summary judgment de novo, applying the same standard as the trial court." *G&G Oil Co. v. Cont'l W. Ins. Co.*, 165 N.E.3d 82, 86 (Ind. 2021). "Indiana's distinctive summary judgment standard imposes a heavy factual burden on the movant." *Siner v. Kindred Hosp. Ltd. P'ship*, 51 N.E.3d 1184, 1187 (Ind. 2016). We draw all reasonable inferences in favor of the nonmoving party and affirm summary judgment only "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 judgment as a matter

of law." *Id.* (quoting Ind. Trial Rule 56(C)). And we "give careful scrutiny to assure that the losing party is not improperly prevented from having its day in court." *Id.* (quoting *Tankersley v. Parkview Hosp., Inc.*, 791 N.E.2d 201, 203 (Ind. 2003)).

A.R. Mays Owed No Duty of Care to Tinsley under the LTCI-A.R. Mays Contract

[8] Tinsley's complaint alleged in relevant part that A.R. Mays acted negligently toward Tinsley. Prevailing on a negligence claim requires fulfillment of three elements: 1) duty owed to plaintiff by the 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). Whether a duty exists is a question of law for the court to decide. *Id.* at 386-87. Absent duty, there can be no negligence. *Peters v. Forster*, 804 N.E.2d 736, 738 (Ind. 2004).

[9] To establish a duty, Tinsley contends that the LTCI-A.R. Mays contract demonstrates that A.R. Mays intended to assume a duty of care to all persons at the project site. As our Supreme Court has explained:

> As to the duty owed by a general contractor, the long-standing rule in Indiana is that "a principal will not be held liable for the negligence of an independent contractor." *Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584, 586 (Ind. 1995) (citing *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 597, 106 N.E. 365, 367 (1914); also citing *City of Logansport v. Dick*, 70 Ind. 65, 78 (1880)).

> Therefore, a general contractor . . . will ordinarily owe no outright duty of care to a subcontractor's employees, much less so to employees of a sub-subcontractor. This means that when a subcontractor fails to provide a reasonably safe workspace, the general contractor will not incur liability for employee injury, even when such injury is proximately caused by the subcontractor negligence. The rationale behind this rule is that a general contractor has little to no control over the means and manner a subcontractor employs to complete the work. *Stumpf v. Hagerman Const. Corp.*, 863 N.E.2d 871, 876 (Ind. Ct. App. 2007).
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> However, five exceptions to our general rule exist. One such exception[3] allows for the existence of a duty of care where a contractual obligation imposes a "specific duty" on the general contractor. *Bagley*, 658 N.E.2d at 586. "If a contract affirmatively evinces an intent to assume a duty of care, actionable negligence may be predicated on the contractual duty." *Stumpf*, 863 N.E.2d at 876. In other words, a contract that is found to demonstrate the general contractor's intent to assume a duty of care exposes the general contractor to potential liability for a negligence claim where no such liability would have otherwise existed. A duty imposed by contract, once formed, is non-delegable and is thought to encourage the general contractor to minimize the risk of resulting injuries. *Bagley*, 658 N.E.2d at 588.

Ryan v. TCI Architects/Eng'rs/Cont'rs, Inc., 72 N.E.3d 908, 913-14 (Ind. 2017) (footnote omitted). Thus, in *Ryan*, our Supreme Court held that a general contractor may assume a duty of care for the safety of subcontractors' employees in the general contractor's contract with an owner. *Id.* at 914.

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[3] None of the other five exceptions are relevant to Tinsley's appeal.

[10] Tinsley's reliance on *Ryan*, and our ensuing case law, is misplaced. Nothing in the designated evidence demonstrates that Everything Cinema, Tinsley's employer, was a subcontractor or even a sub-subcontractor of A.R. Mays. To the contrary, the designated evidence makes clear that Everything Cinema was an independent contractor to AMC, and A.R. Mays had no contractual relationship to Everything Cinema directly or through an intermediate subcontractor. Therefore, A.R. Mays's contractual duties of care under the LTCI-A.R. Mays contract were not applicable to the employees of Everything Cinema.[4]

[11] Accordingly, we agree with the trial court that A.R. Mays's designated evidence affirmatively negates an element of Tinsley's negligence claim, namely, whether A.R. Mays owed Tinsley a duty of care. We affirm the trial court's entry of partial summary judgment for A.R. Mays.

[12] Affirmed.

Robb, J., and Weissmann, J., concur.

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[4] We are also not persuaded by Tinsley's arguments under foreign precedent and generalized policy concerns.