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IN THE
COURT OF APPEALS OF INDIANA

LORRAINE BUNN, as Personal Representative of the Estate of ROBERT P. BUNN, Deceased, and ROBERT L. BUNN,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 50A03-0810-CV-504
INDIANA DEPARTMENT OF TRANSPORTATION,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARSHALL CIRCUIT COURT
The Honorable Curtis Palmer, Judge
Cause No. 50C01-0712-CT-29

June 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Lorraine Bunn, as Personal Representative of the Estate of Robert P. Bunn, deceased, and Robert L. Bunn (collectively, "the Estate") appeal the grant of summary judgment in favor of the Indiana Department of Transportation ("INDOT") upon the Estate's negligence claims. We reverse and remand for further proceedings.

Issue

The sole issue presented is whether the trial court erroneously granted summary judgment to INDOT upon concluding that INDOT owed no duty of care to the injured parties.

Facts and Procedural History

INDOT contracted with Pioneer Associates, Inc. ("Pioneer") for the completion of a highway construction project in Marshall County ("the Project"). Pioneer then subcontracted a portion of the paving work to Brooks Construction Company, Inc. ("Brooks").

On June 8, 2005, Brooks employees Robert P. Bunn ("Robert") and Robert L. Bunn ("Bobby"), father and son, were engaged in paving work at the Project. Adam Bunn was operating an asphalt paver that was pushing a dump truck loaded with asphalt. The bed of the dump truck was moved into a raised position in order to empty asphalt. The truck bed came close enough to overhead power lines to allow both the dump truck and the asphalt paver to become energized. Robert was fatally electrocuted, with Bobby witnessing the incident from a close proximity.

On April 19, 2007, the Estate brought suit against Pioneer, Northern Indiana Trucking,

LLC, INDOT, Bremen Municipal Service Company d/b/a Bremen Electrical Department, and Northern Indiana Public Service Company. INDOT moved for summary judgment, contending it had no duty to Robert or Bobby, as they were independent contractors. The Estate also requested partial summary judgment on the issue of INDOT's duty. On September 25, 2008, the trial court granted INDOT summary judgment and determined, pursuant to Indiana Trial Rule 54(B), that the partial summary judgment should be treated as a final appealable order. The Estate appeals.[1]

Discussion and Decision

I. Standard of Review

A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Smith v. City of Hammond, 848 N.E.2d 333, 337 (Ind. Ct. App. 2006), trans. denied. Once the movant satisfies this burden through evidence designated to the trial court pursuant to Indiana Trial Rule 56, the non-movant may not rest upon its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Id.

On review, we apply the same standard as the trial court: we must decide whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Carie v. PSI Energy, Inc., 715 N.E.2d 853, 855 (Ind. 1999). In so doing, we consider only those portions of the pleadings, depositions, and other matters specifically designated to the trial court by the parties for

[1] With the exception of INDOT, the defendants are not active parties to this appeal.

purposes of the motion. Ind. Trial Rule 56(C), (H). We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence. McDonald v. Lattire, 844 N.E.2d 206, 212 (Ind. Ct. App. 2006). The filing of cross-motions for summary judgment does not alter our standard of review. Hartford Acc. & Indem. Co. v. Dana Corp., 690 N.E.2d 285, 291 (Ind. Ct. App. 1997), trans. denied.

II. Analysis

To recover upon a negligence claim against INDOT, the Estate must establish: (1) a duty owed by INDOT; (2) INDOT's breach of that duty; and (3) damages proximately caused by the breach of duty. Hammock v. Red Gold, Inc., 784 N.E.2d 495, 498 (Ind. Ct. App. 2003), trans. denied. Summary judgment is rarely appropriate in negligence cases. Colen v. Pride Vending Serv., 654 N.E.2d 1159, 1162 (Ind. Ct. App. 1995), trans. denied. Nevertheless, a defendant is entitled to judgment as a matter of law when the undisputed material facts negate at least one element of the plaintiff's claim. Id.

In this case, the trial court granted INDOT's motion for summary judgment on the basis that INDOT had no duty with regard to Robert's and Bobby's injuries, because they were independent contractors. Whether there is a legal duty owed by one party to another in a negligence action is generally a question of law for the court to decide. Chandradat v. State, Indiana Dept. of Transp., 830 N.E.2d 904, 908 (Ind. Ct. App. 2005), trans. denied.

As a general rule, a contractee is not liable for the negligence of an independent contractor. Bagley v. Insight Commc's Co., 658 N.E.2d 584, 586 (Ind. 1995). A duty will be imposed, however, if one of five exceptions to the general rule of contractee non-liability

exists. Id. Those 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.

"[T]he five 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." Id. at 588. The exceptions encourage the employer of the contractor to participate in controlling work covered by any of the five exceptions in order to minimize the risk of injuries. Id. An injured worker's status as an employee of an independent contractor does not deprive him or her of the right to seek the application of an exception to the rule of non-liability for the torts of an independent contractor. Id.

Here, the Estate argues that exception (2) applies to the work in which Robert and Bobby were engaged at the time the injuries were sustained, because INDOT is charged by statute with road construction and maintenance and charged by contract with overseeing safety compliance. To support the argument that INDOT had a non-delegable duty by law, the Estate cites Indiana Code Section 8-23-2-4.1(4)(A), which provides that INDOT is responsible for "the construction, reconstruction, improvement, maintenance, and repair of state highways[.]"

To support its contention that INDOT contractually assumed a duty for the safety of

the workers at the jobsite, the Estate cites the Safety/Accident Prevention provisions of the Project contract. Pursuant to the contract terms, INDOT retained the authority to determine what safeguards were reasonably necessary to protect the life and health of workers on the Project, to impose compliance with OSHA standards, and to shut down the Project if it determined there was non-compliance with OSHA.

It has long been held that the State has a general duty to exercise reasonable care in the design, construction, and maintenance of its highways for the safety of public users. Mishler v. State, 730 N.E.2d 229, 231 (Ind. Ct. App. 2000) (citing Elliott v. State, 168 Ind. App. 210, 213, 342 N.E.2d 674, 676 (1976)). In Shand Mining, Inc. v. Clay County Bd. of Comm'rs, 671 N.E.2d 477, 481 (Ind. Ct. App. 1996), trans. denied, we determined that while a governmental entity could delegate its responsibility for maintaining streets to a private party, it could not avoid liability for negligent maintenance of the streets on the basis of its delegation. The holding was based on the well-settled law in Indiana that a principal cannot avoid liability for the negligence of its agent if the principal is by law or contract charged with performing the specific duty. Bagley, 658 N.E.2d at 586. See also City of Vincennes v. Ruehl, 672 N.E.2d 495, 497 (Ind. Ct. App. 1996), trans. denied.

More recently, in Indiana Dept. of Transp. v. Howard, 879 N.E.2d 1119 (Ind. Ct. App. 2008), this Court again recognized a non-delegable duty on the part of INDOT. In Howard, a negligence suit was brought against INDOT and other parties by the parents of a driver who had veered off the road at an allegedly poorly marked construction zone, crashed, and died. See id. at 1120. INDOT claimed that it was entitled to judgment as a matter of law because it

was not responsible for the negligence of E & B Paving, an independent contractor; the trial court disagreed. See id. at 1121.

INDOT appealed, contending that the trial court erroneously permitted application of the second exception to the rule of non-liability for the torts of an independent contractor, i.e., that INDOT is charged by law with performing the specific duty. See id. at 1123. The Howard Court recognized that INDOT's enabling legislation gives INDOT general responsibility for the "construction, reconstruction, improvement, maintenance, and repair of state highways," Ind. Code § 8-23-2-4.1(4), but also recognized that "INDOT can delegate the performance of its duty to maintain and repair state highways" (citing Indiana Code §§ 8-23-9, describing the procedure for awarding state highway contracts).

Ultimately, however, "although a governmental entity can delegate its responsibility for maintaining streets to a private party, it cannot avoid liability for negligent maintenance of the streets on the basis of its delegation." Howard, 879 N.E.2d at 1123 (citing Shand Mining, 671 N.E.2d at 481). The Howard Court recognized a duty "arising from the general nature of the relationship between INDOT and its contractors" such that the contractor is to perform work within specifications provided by INDOT and INDOT is to ensure the work is performed accordingly. Id. at 1125, n.6. Affirming the trial court's decision to vacate an earlier summary judgment order on motion to correct error, the Howard Court held that summary judgment for INDOT was "not warranted" and "the trial court did not necessarily impose a duty greater than supervision upon INDOT." Id. at 1125.

INDOT argues that the decedent in Howard was a member of the traveling public

rather than an employee of an independent contractor employed by the governmental entity, and thus Howard is distinguishable on this basis. We are not persuaded that Howard should be so narrowly construed, particularly in light of our Supreme Court's language in Bagley: "An injured worker's status as an employee of an independent contractor does not deprive him or her of the right to seek the application of an exception to the rule of non-liability for the torts of an independent contractor." Bagley, 658 N.E.2d at 588.

Moreover, here, as in Howard, the relationship between the parties was such that the contractor was to perform work within specifications provided by INDOT and INDOT was to ensure that the work was performed accordingly. INDOT contractually mandated that OSHA safety provisions would apply to all aspects of the project:

> It is a condition of this contract, and shall be made a condition of each subcontract, which the contractor enters into pursuant to this contract, that the contractor and any subcontractor shall not permit any employee, in performance of the contract, to work in surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or safety, as determined under construction safety and health standards (29 CFR 1926) promulgated by the Secretary of Labor, in accordance with Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

(App. 34.) INDOT also reserved the right to make ultimate safety determinations:

> In the performance of this contract the contractor shall comply with all applicable Federal, State, and local laws governing safety, health, and sanitation (23 CFR 635). The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the SHA [State Highway Agency] contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.

(App. 34.) (emphasis added.) Finally, the contract contained specific language with reference to the power line at issue:

> The facilities of Northern Indiana Public Service Company is [sic] involved in this project but no relocation is required. They have a power pole line on the east side of the bridge. There are electric wire crossings on the north and south sides of the bridge and also diagonally above the bridge. Please practice extreme caution while working on this project.

(App. 75.) Consistent with its statutory and contractual duties, INDOT maintained a frequent presence at the Project site. In fact, two INDOT engineers were at the site when the electrocution occurred. For all the foregoing reasons, INDOT is not entitled to summary judgment premised upon a lack of a duty to Robert and Bobby.

We reverse the grant of summary judgment and remand for proceedings consistent with this opinion.

Reversed and remanded.

ROBB, J., concur.

DARDEN, J., dissents with separate opinion.

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vs.	)	No. 50A03-0810-CV-504
INDIANA DEPARTMENT OF TRANSPORTATION,	)	
Appellee-Defendant.	)	

DARDEN, Judge, dissenting, with separate opinion.

I respectfully dissent. Citing to *Howard*, the majority concludes that INDOT cannot avoid liability to independent contractors' employees on the basis of its delegation of its responsibility to maintain and repair state highways. In so doing, the majority acknowledges that the decedent in *Howard* was a member of the traveling public, not an employee of an independent contractor performing road construction; however, it declined to distinguish this case from *Howard* on that basis.

I believe that *Howard* applies only to work performed by an independent contractor, the negligent execution of which may endanger the traveling public. *See Shand Mining*, 671

N.E.2d at 481 ("Indiana judicial decisions have recognized that governmental entities have a specific obligation with respect to public travel.") (emphasis added); *see also PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 953 (Ind. 2005) (holding that "in the absence of negligent selection of the contractor, an employee of the

contractor has no claim against the principal based solely on the five exceptions to the general rule of nonliability for acts of the contractor"), *aff'd on reh'g*.

Furthermore, I cannot agree that INDOT can be held liable pursuant to its contract with Pioneer.

> When interpreting a written contract, it is the court's duty to ascertain the intent of the parties at the time the contract was executed as disclosed by the language used to express their rights and duties. We look to the contract as a whole by examining all of its provisions to determine whether a party is charged with a duty of care under a contract. Moreover, the assumption of duty by contract exception to the general rule of non-liability is not triggered merely because a contractor may have a right to inspect and test the work, approve the work, and/or supervise employees of the independent contractor or even by requiring the contractor to follow company rules.

Walker v. Martin, 887 N.E.2d 125, 135-36 (Ind. Ct. App. 2008) (internal citations omitted), *trans. denied*.

Here, there is no language in the contract by which INDOT assumed a specific duty to oversee the safety of the employees of either Pioneer or Pioneer's subcontractor. Rather, the contract only required that Pioneer follow certain safety provisions and observe common-sense precautions regarding power lines. Moreover, I cannot agree that INDOT's presence at the site triggered any contractual obligations.

Accordingly, I would affirm the trial court.