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IN THE
COURT OF APPEALS OF INDIANA

JAMES H. FINCHER, SR.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 42A01-0701-CV-25
	)	
SOLAR SOURCES, INC., and SOLAR SOURCES UNDERGROUND, LLC,	)	
	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE KNOX CIRCUIT COURT
The Honorable Sherry L. Biddinger-Gregg, Judge
Cause No. 42C01-0103-CP-126

July 6, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

James Fincher ("Fincher") appeals the Knox Circuit Court's grant of summary judgment in favor of Solar Sources and Solar Sources Underground (collectively "Solar Sources"). On appeal, he raises several issues, which we reorder and restate as:

I. Whether the trial court erroneously granted summary judgment on Fincher's common law negligence claim;

II. Whether the trial court erroneously granted summary judgment on Fincher's negligence per se claim;

III. Whether the trial court erroneously granted summary judgment on Fincher's abnormally dangerous activity claim; and,

IV. Whether the trial court erroneously granted summary judgment on Fincher's product liability claim.

We affirm.

Facts and Procedural History

This is a personal injury case involving a trucking accident. The Appellee, Solar Sources. operates a coalmine in Monroe City. Once the raw coal is removed, Solar Sources processes it through a washing process, which involves various screens and belts. This process creates clean usable coal, as well as coarse refuse and fine refuse. The fine refuse, which consists of particulate material the size of a grain of sand or smaller, is also referred to as "filter cake" or "coal sludge," as it has a wet consistency.

In April of 1995, Solar Sources entered into a contract with Elmer Buchta Trucking Inc. ("Buchta"), giving Buchta the exclusive right to transport the coal to Solar Sources' processing facilities, customers, and various other destinations in Indiana. Solar Sources has a permit from the Indiana Department of Natural Resources to dispose of its coarse refuse and coal sludge in two places. One such place is a 147-acre disposal pit

adjacent to the mine and wash plant, where the coarse refuse is stacked up to build a dam so that it can then contain the coal sludge. The other site is Pride Creek's mine, about twenty miles away from the wash plant. During the summer months, Solar Sources would dispose of the coal sludge at the Pride Creek mine because the dam at the adjacent disposal pit was not high enough to contain the coal sludge.

On July 17, 2000, Fincher, an employee of Buchta, was driving a Mack semi-truck loaded with coal sludge south on Highway 61 to the Pride Creek mine site. While he was driving around a curve in the road, the coal sludge in the trailer shifted, causing the semi-truck to roll over and into the lane of oncoming traffic. David Prosser ("Prosser"), also an employee of Buchta, was driving north on Highway 61 when he collided with Fincher's vehicle. As a result of this collision, Fincher suffered injuries and Prosser died.

On March 22, 2001, Fincher, along with several other parties, filed a complaint against Solar Sources. Fincher amended this complaint several times. On September 5, 2006, Solar Sources filed a motion for summary judgment. The trial court conducted a hearing on this motion on October 26, 2006. On December 14, 2006, the trial court granted the motion. Fincher now appeals. Additional facts will be added as necessary.

Summary Judgment

The sole issue upon review is whether the trial court erred in granting Solar Source's motion for summary judgment. Upon review of a grant or denial of summary judgment, we use the same standard of review as that used by the trial court. "Summary judgment is appropriate only where the evidence shows there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law." Bushong v. Williamson, 790 N.E.2d 467, 473 (Ind. 2003) (citing Ind. Trial Rule 56(C)).

All facts and reasonable inferences are construed in favor of the non-moving party, and our review is limited to those materials designated to the trial court. Id. Neither the trial court nor the reviewing court may look beyond the evidence specifically designated to the trial court. McDonald v. Lattire, 844 N.E.2d 206, 210 (Ind. Ct. App. 2006).

We will affirm the grant of summary judgment on any legal theory that is consistent with the designated evidence in the record. Crist v. K-Mart Corp., 653 N.E.2d 140, 142, (Ind. Ct. App. 1995). While the non-movant bears the burden of demonstrating that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that the non-movant was not wrongly denied his or her day in court. Kennedy v. Guess, Inc., 806 N.E.2d 776, 779 (Ind. 2004).

I. Negligence

Fincher alleges that the trial court erroneously granted summary judgment in favor of Solar Sources on the issue of negligence.[1] Fincher contends that Solar Sources owed a direct duty of reasonable care to Fincher to avoid having him haul excessively wet coal sludge on Highway 61.

The tort of negligence is comprised of three elements: (1) a duty on the part of a defendant in relation to the plaintiff; (2) a failure on the part of the defendant to conform

[1] Fincher also claims that his Second Amended Complaint alleges negligent hiring. Upon review of this complaint, found in Appellant's Appendix pages 32-36, we find no such claim. Apparently, neither did the trial court as it stated in its order that "[t]he plaintiff makes no claim that Solar Sources negligently selected Buchta Trucking to perform the coal sludge hauling." Id. at 21. Therefore, this claim is waived, and we do not address it.

its conduct to the requisite standard of care required by the relationship; and (3) an injury to the plaintiff that was proximately caused by the defendant's breach. Merrill v. Knauf Fiber Glass GmbH, 771 N.E.2d 1258, 1264 (Ind. Ct. App. 2002), trans. denied, (citation omitted). In order to prevail on a negligence action, the plaintiff must prove all of the essential elements of the cause of action. Hence, even though summary judgment is rarely appropriate in a negligence action, a defendant may obtain summary judgment by demonstrating that the undisputed facts negate at least one element of the plaintiff's claim. Id.

We note initially that Fincher is the employee of an independent contractor. Under Indiana common law, a principal is not vicariously liable for the negligence of its independent contractor. Armstrong v. Cerestar USA, Inc., 775 N.E.2d 360, 369 (Ind. Ct. App. 2002), trans. denied. Here, Fincher attempts to circumvent this general rule by claiming common law negligence, as opposed to vicarious liability. Fincher claims that Solar Sources was negligent in giving him a load of coal sludge that was too wet and therefore dangerous to haul. Our review of Indiana case law indicates that in most instances where employees of an independent contractor sue the principal for injuries sustained under a negligence theory, their suits are based upon claims of premises liability. See, e.g. Ozinga Transp. Sys., Inc., v. Mich. Ash Sales, Inc., 676 N.E.2d 379 (Ind. Ct. App. 1997), trans. denied; Pelak v. Ind. Indus. Serv., Inc., 831 N.E.2d 765 (Ind. Ct. App. 2005), trans. denied; Beta Steel v. Rust, 830 N.E.2d 62 (Ind. Ct. App. 2005). Here, Fincher alleges another type of negligence: negligence in permitting the coal

sludge to be excessively wet.[2] In other words, Fincher contends that Solar Sources owed him a duty of ensuring that the load he was carrying was safe.

"In premises liability cases, whether a duty is owed depends primarily upon whether the defendant was in control of the premises when the accident occurred. The rationale is to subject to liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm." Pelak, 831 N.E.2d at 775. Although this is not a premises liability case, in determining the existence of a duty, the same analysis of control is relevant to determine which party was in the best position to prevent the harm. Here, the trial court found that Buchta, the independent contractor, had been in the business of hauling coal sludge for sixty years. Appellant's App. p. 18. In fact, Buchta advertised itself as the largest bulk hauler of coal, rock and ash in three states, including Indiana. Id. at 19. Buchta made the determination of what type of vehicle to use to transport the coal, the appropriate equipment to use, and how generally to complete the work. Buchta also warned each of its drivers about the risk of load shifting and told them to adjust their speed accordingly to avoid braking before turning, which could cause the sludge to break loose and shift the weight of the truck.

Fincher, who had hauled coal six days a week for more than eight months, admitted that he was aware there was a problem with the manner in which the coal sludge was being transported before the accident occurred. He stated he was concerned with safety and the possibility of an accident. Id. at 18. Fincher had discussed with his

[2] Fincher points out that the trial court's analysis seems to focus on the theory of vicarious liability rather than common law negligence. However, we note that on appeal, summary judgment will be affirmed if it is sustainable on any theory or basis found in the evidentiary matter designated to the trial court. Figg v. Bryan Rental Inc., 646 N.E.2d 69, 71 (Ind. Ct. App. 1995), trans. denied.

supervisor the possibility of using baffles in the truck to prevent load shifting but was told that Buchta did not want to spend the money for the baffles. Id. at 19.

Generally, a contractor has the superior experience, equipment, knowledge, staff, and incentive to protect its employees. Teitge v. Remy Const. Co., Inc., 526 N.E.2d 1008, 1012 (Ind. Ct. App. 1988). With more than sixty years of experience in hauling coal, Buchta was certainly equipped with superior knowledge of this industry and how to safely transport wet coal sludge. In this case, Solar Sources demonstrated that Buchta specifically had knowledge about the danger of load shifting and had advised its employees of the risk but had declined to install additional safety measures. Fincher has failed to demonstrate that Solar Sources was better equipped to understand and prevent any foreseeable harm of transporting wet coal sludge.

Furthermore, Fincher has not demonstrated that Solar Sources retained any control over the manner in which the transportation was carried out or oversight of the safety of Buchta's employees.[3] "[C]haos would reign supreme on any job where several [entities] with divergent concepts of safety might take seriously their supposed duty to supervise the safety practices of themselves and each other." Id. Therefore, Fincher has failed to demonstrate that Solar Sources maintained sufficient control to give rise to a duty of care

[3] Fincher contends that this element of control was demonstrated by Solar Source's choice to have the coal sludge transported to Pride's Creek rather than the disposal pit across the street. We find this argument to be without merit. John Stachura, Jr, the vice president of Solar Sources stated that to dispose of coal sludge, you must have a permit and meet the Department of Natural Resources' requirements. In disposing of coal sludge in a dam, the walls of the dam are built up with coarse refuse. The DNR requires the dam to be built with a four-to-one degree slope to prevent water erosion. Appellant's App. pp. 144, 158. In the summer, Solar Sources had the coal sludge sent to Pride's Creek because the walls of the dam at the disposal pit adjacent to the plant were not built up with enough coarse refuse to contain the coal sludge. Solar Source's decision to comply with DNR regulations does not demonstrate its control over the manner in which Buchta transported the coal sludge.

toward Buchta's employees. Absent a duty, there can be no recovery for the plaintiff in a negligence cause of action. Pelak, 831 N.E.2d at 781 (citation omitted.)

II. Negligence Per Se

Fincher contends that Solar Sources violated its statutory duty with regard to the operation of its coal mine. Under Indiana law, an unexcused or unjustified violation of a duty dictated by statute is negligence per se. Town of Montezuma v. Downs, 685 N.E.2d 108, 112 (Ind. Ct. App. 1997), trans. denied. Before determining that the violation of a statute constitutes negligence, however, the court must scrutinize the statute and consider the purpose of the enactment, the persons whom it was intended to protect and the injuries that it was intended to prevent. Id. (citation and quotation omitted).

The first prong of this issue involves a pure question of law: whether Solar Sources has a statutory duty to safely dispose of coal mining material. Interpretation of a statute is a question of law reserved for the courts. Blake v. State, 860 N.E.2d 625, 627 (Ind. Ct. App. 2007) (citation omitted). Appellate courts review questions of law under a de novo standard and owe no deference to a trial court's legal conclusions. Id. In determining whether the trial court properly interpreted the intent of the statute, we will first determine whether the legislature has spoken clearly and unambiguously on the point in question. Rheem Mfg. Co. v. Phelps Heating & Air Conditioning, Inc., 746 N.E.2d 941, 947 (Ind. 2001) (citation omitted). "We will not read into a statute that which is not the manifest intent of the legislature." Robinson v. Gazvoda, 783 N.E.2d 1245, 1250 (Ind. Ct. App. 2003), trans. denied (citation omitted). For this reason, it is as important to

recognize not only what a statute says, but also what a statute does not say. See Clifft v. Ind. Dep't of State Revenue, 660 N.E.2d 310, 316 (Ind. 1995).

Fincher contends that Indiana law required Solar Sources to protect the public from the risk of hauling wet coal sludge on a public highway. Fincher relies on two subsections of Indiana Code section 14-34-11-1 (1998), which state, in relevant part:

> In addition to other requirements that the commission establishes by rule after considering the distinct difference between surface coal mining and underground coal mining and that do not conflict with or supersede any provision of the federal Mine Safety and Health Act of 1977, as amended (30 U.S.C. 801 through 960), or any of its regulations, an operator of an underground coal mining operation who holds a surface coal mining and reclamation permit shall do the following:
>
> * * *
>
> (7) Protect offsite areas from damages that may result from the mining operations.
>
> (8) Eliminate fire hazards and other conditions that constitute a hazard to the health and safety of the public.

In interpreting this statute, the trial court concluded that it "only addresses the duties of the mine operator at the mine site" and not the transportation of mine material. We agree. As this statute does not pertain to the transport of mine material, Solar Sources could not have violated the statute. We need proceed no further. In the absence of a statutory duty, there can be no recovery under the theory of negligence per se, and Solar Sources was entitled to summary judgment.

III. Abnormally Dangerous Activity

Fincher contends that hauling coal sludge is an abnormally dangerous activity. "[T]he issue of whether an activity is abnormally dangerous is a question of law for the court to decide." Inland Steel v. Pequignot, 608 N.E.2d 1378, 1384 (Ind. Ct. App. 1993),

trans. denied. "Inherently dangerous[4] means that the danger exists in the doing of the activity regardless of the method used. It is a risk intrinsic to the accomplishment of the task and not simply a danger arising from a casual or collateral negligence of others." Cummings v. Hoosier Marine Prop., Inc., 173 Ind. App. 372, 386, 363 N.E.2d 1266, 1275 (1977) (citation omitted). "Work is intrinsically dangerous if the risk of injury involved cannot be eliminated or significantly reduced by taking proper precautions." Shell Oil Co. v. Meyer, 705 N.E.2d 962, 978 (Ind. 1998) (citation omitted).

"An activity that is inherently dangerous or ultra-hazardous or abnormally dangerous imposes strict or absolute liability in tort upon the employer of an independent contractor because one cannot transfer the duty arising from the conduct." Inland Steel, 608 N.E.2d at 1384. "When deciding whether to impose strict liability, we must not look at the abstract propensities of the particular substance involved, but must analyze the defendant's activity as a whole. Id. at 1385 (citation omitted). "If the rule was otherwise, virtually any commercial or industrial activity involving substances which are dangerous in the abstract automatically would be deemed as abnormally dangerous. The result would be intolerable." Id. (quoting Erbrich Prods. Co., Inc. v. Wills, 509 N.E.2d 850, 856 (Ind. Ct. App. 1987), trans. denied).

Section 520 of the Second Restatement of Torts provides:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:

[4] In his reply brief, Fincher contends that Solar Sources "either misconstrue[s] or [does] not understand plaintiff's claim that the hauling of wet coal sludge on a public highway was an abnormally dangerous activity for which defendants are directly liable" because Solar Sources refers to it as "inherently dangerous work." Under Indiana case law, we have treated these terms in the same manner as both impose strict liability upon a principal. See Inland Steel, 608 N.E.2d at 1384 ("this difference in nomenclature is of no importance" (quoting Erbrich Products Co., Inc. v. Wills, 509 N.E.2d 850, 853 (Ind. Ct. App. 1987))).

(a) Existence of a high degree of risk of some harm to the person, land or chattels of another;
(b) Likelihood that the harm that results from it will be great;
(c) Inability to eliminate the risk by the exercise of reasonable care;
(d) Extent to which the activity is not a matter of common usage;
(e) Inappropriateness of the activity to the place where it is carried on;
(f) Extent to which its value to the community is outweighed by its dangerous attributes.

Inland Steel, 608 N.E.2d at 1385 (quoting Restatement Second § 520).

Using this criteria, in Inland Steel, we held that hauling steel or any other heavy load was not "inherently dangerous," "intrinsically dangerous" or "abnormally dangerous" as those terms are used in strict liability. 608 N.E.2d at 1385. In Armstrong, we held that guiding a tube into a tanker hatch to fill it with sludge material was not intrinsically dangerous work. 775 N.E.2d at 370. Under this reasoning, we hold that hauling a wet load of coal sludge is not intrinsically dangerous work. Work is intrinsically dangerous only if the risk of injury involved cannot be eliminated or significantly reduced by taking proper precautions. Shell Oil Co., 705 N.E.2d at 978. Unlike blasting operations or crop dusting where the chances of damage or injury are oftentimes inevitable despite the amount of care taken, the hauling of wet coal does not encompass the same unavoidable mishaps. See Ehbrich Prods. Co., Inc., 509 N.E.2d at 857. Therefore, Solar Sources was entitled to summary judgment on this issue.

IV. Product Liability

In a similar vein, Fincher contends that Solar Sources is strictly liable under the Indiana product liability statute. Here, the trial court determined that this statute was inapplicable as coal sludge is not a product. The trial court found:

> The coal sludge in question is a waste by-product of a coal mining operation. It is trash. The coal sludge was not marketable or ever in a marketed state. It was not sold or being transported to a consumer. It was being transported to a disposal site. It was also never intended for consumption or for any use by any consumer.

Appellant's App. p. 22.

Under the Indiana Code,

> (a) "Product," for purposes of IC 34-20, means any item or good that is personalty at the time it is conveyed by the seller to another party.
> (b) The term does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.

Ind. Code § 34-6-2-114 (1999). Without a doubt, the contract between Buchta and Solar Sources exclusively involved the transport of coal sludge. Therefore, this transaction by its nature involved the sale of a service rather than a product.

Furthermore, as the trial court noted, the coal sludge had not been and was not going to be marketed. "[A]lthough a literal 'sale' of the product is not required, the product must be placed into the stream of commerce before . . . strict liability can attach." Hedges v. Pub. Serv. Co. of Ind., Inc.**,** 396 N.E.2d 933, 935 (Ind. Ct. App. 1979) (holding that appellants came into contact with electrical energy in an unmarketable and unmarketed state and therefore strict liability did not apply). As the coal sludge was intended for disposal rather than for sale, it does not fit the definition of a product, and Solar Sources was entitled to summary judgment on this issue, as well.

Conclusion

For all of these reasons, we conclude that the trial court did not abuse its discretion when it granted Solar Source's motion for summary judgment.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.