IN THE COURT OF APPEALS OF IOWA

No. 1999-204 (9-428) / 98-1931
Filed December 27, 1999

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CLERK SUPREME COURT

HEATH BOMAR,
Plaintiff-Appellant,

vs.

FARMERS COOPERATIVE ASSOCIATION n/k/a FIRST COOPERATIVE ASSOCIATION a/k/a MARATHON CO-OP d/b/a FARMERS CO-OP ASSOCIATION,
Defendant-Appellee.

Appeal from the Iowa District Court for Buena Vista County, Frank B. Nelson, Judge.

Plaintiff appeals from the district court's summary judgment ruling in favor of defendant in plaintiff's personal injury action. **AFFIRMED.**

Michael H. Figenshaw of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, and Martin E. Spellman of the Spellman Law Firm, Perry, for appellant.

Neven J. Mulholland and James L. Kramer of Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C., Fort Dodge, for appellee.

Considered by Streit, P.J., and Vogel and Vaitheswaran, JJ.

STREIT, P.J.

With control comes responsibility. Heath Bomar claims a legally-recognized relationship existed when Marathon Coop hired his employer to install grain handling equipment and it also assumed a duty to provide a safe working environment. The trial court disagreed with Bomar's assertions and granted Marathon Coop summary judgment. Because Marathon Coop did not exercise sufficient control over the construction, we find no relationship existed as a matter of law. The trial court is affirmed.

I. Background Facts & Proceedings.

Farmers Cooperative Association of Marathon, Iowa, sought to construct a large grain storage facility capable of holding 1.3 million bushels of grain. Marathon Coop placed one of its employees, Randy Dunn, in charge of hiring independent contractors to perform each phase of the construction. Marathon Coop did not employ a general contractor to oversee and direct the construction. Marathon Coop hired one contractor to do the initial excavating, a second to actually construct the building, a third to wire the building, and one to install the grain handling equipment. During construction, Dunn was called upon to occasionally monitor each contractor's headway, answer questions, and describe the intended operation of the facility.

Each phase was quickly completed, and soon the only remaining task was the installation of the grain handling equipment. The company hired to complete that phase of the project was Midwest Elevator, Inc. In performing its phase of the

construction, one of its employees, Heath Bomar, slipped while caulking around some ventilation fans on the roof of the structure. Bomar slid completely off the roof and sustained serious injuries as a result of the fall.

Bomar filed suit against Marathon Coop claiming it failed to comply with various common law and statutory duties that would have prevented his injuries. Marathon Coop moved for summary judgment claiming no such duties arose as it was not a general contractor nor did it retain control over the construction site. The district court, in granting the motion for summary judgment, ruled as a matter of law Marathon Coop did not owe Bomar a duty of care.

Bomar now appeals, claiming the district court erred in granting summary judgment because Marathon Coop was a defacto general contractor and, in the alternative, retained sufficient control over the construction site as to impose the various duties.

II. Standard of Review.

Our review of a grant or denial of summary judgment is at law. Iowa R. App. P. 4; *Gabrilson v. Flynn*, 554 N.W.2d 267, 270 (Iowa 1996). Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997). We review the record in the light most favorable to the party opposing summary judgment; in this sense, we consider a motion for summary judgment as we would a motion for directed verdict.

Dickerson v. Mertz, 547 N.W.2d 208, 212 (Iowa 1996). Under this standard, summary judgment is inappropriate if reasonable minds would differ on how the issue should be resolved. *Id.*

Normally, summary adjudication of claims of negligence is inappropriate. *Rieger v. Jacque*, 584 N.W.2d 247, 250 (Iowa 1998). This broad statement, however, is not without exception, for "the threshold determination of whether the defendant owes the plaintiff a duty of care is always a legal question for the court." *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 875 (Iowa 1996). The trial court relied on this exception in overcoming the general presumption that such action is unwarranted absent exceptional circumstances. *See* Iowa R. App. P. 14(f)(10). It was error to determine the issue as one only implicating a duty of care. The determination whether an existing relationship gives rise to a duty is purely a question of law, yet the *existence* of that relationship is a question of fact properly reserved for the jury. *See Clyde E. Williams & Assocs., Inc. v. Boatman*, 375 N.E.2d 1138, 1140 (Ind. Ct. App. 1978). The determination of whether there was sufficient control to create a duty between a landowner and an independent contractor's employee should normally be reserved for the jury. If the jury finds such a relationship exists, the court shall determine the appropriate duty.[1] The trial court's ruling may stand only if it reached

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[1] Given this mixed bag of law and fact, trial courts will likely have to fashion a jury instruction that resolves the dichotomy.

> For example, it would be proper to instruct the jury alternatively that if it should find a certain set of facts, then a duty exists; however, should the jury reach a different factual conclusion, then no duty would exist. This procedure may be closely analogized to the case in which the status of the

the appropriate conclusion despite its erroneous belief that such a determination was a matter of law.

III. The Merits.

Bomar claims the trial court erred in granting summary judgment on two alternate theories. First Bomar alleges Marathon Coop retained sufficient control over the worksite as to impose a duty under the common law. *See* Restatement (Second) of Torts § 414 (1965). In the alternative, Bomar claims Marathon Coop acted as a defacto general contractor and therefore had the duty to provide a safe worksite under the various provisions of the Occupational Safety and Health Act (OSHA). *See* 29 C.F.R. § 1926 (1997). Although Bomar attacks the trial court's ruling on two fronts, the issue underlying both claims centers on the degree of control exercised by Marathon Coop. In response to Bomar's assertions, the trial court found

> as a matter of law that the control exercised by Marathon over the worksite was insufficient . . . for Marathon to be considered a "general contractor." Defendant Marathon has produced deposition testimony that establishes the absence of a fact dispute on this issue. Marathon retained no control over the day-to-day workings on the site or over the manner in which the work would be done.
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> . . . [E]ven considering the amount of control exercised by Dunn and any other agent of Marathon at the site, the court finds it insufficient as a matter of law.

A. The Retained Control Doctrine. The ecumenical overlay draping this case is a landowner who employs "an independent contractor is not vicariously liable

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> parties will determine the duty owed between parties, i.e., licensee, invitee, trespasser . . . .

Clyde E. Williams & Assocs., Inc., 375 N.E.2d at 1141.

for injuries arising out of the contractor's negligence." *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 475 (Iowa 1980). The commonly-accepted reasoning for this rule "is the lack of control by the employer over the details of the contractor's work." *Id.* The doctrine of retained control, however, operates as an exception to this general premise. *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 303 (Iowa App. 1994). The doctrine of retain control permits an action for negligence if the landowner who entrusted the work to the independent contractor retained control of any part of the work. *Downs v. A & H Constr., Ltd*, 481 N.W.2d 520, 524-25 (Iowa 1992) (quoting Restatement (Second) of Torts § 414 (1965)). To establish control the landowner

> must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or deviations.

Restatement (Second) of Torts § 414 cmt. c (1965); *see Downs*, 481 N.W.2d at 522, 525 (ruling a contractor's inspection of the work, receipt of reports, suggestions, recommendations, alterations, and ability to start or stop work insufficient evidence of control over a subcontractor); *Hernandez*, 523 N.W.2d at 303 (ruling a contractor's inspection every three hours, directions to wear hard hats and safety glasses, and ability to stop or resume work insufficient control over a subcontractor). The type of control envisioned by the retained control doctrine includes instructions as to the performance of specific tasks or the method of operation. *See Hernandez*, 523 N.W.2d at 303.

Marathon Coop did not exercise the degree of control necessary to invoke the retained control exception. Marathon's control consisted of hiring the individual contractors to perform their assigned tasks, occasional inspection as to the progress of each component of the construction, making one minor alteration as to the location of a doorway, and fielding questions as to how it wanted specific aspects of the conveyor system to operate. Marathon Coop did not dictate day-to-day tasks, did not order when work was to stop or resume, and never gave specific instructions on how a particular task was to be completed. The trial court was correct in its finding the control exercised by Marathon was "not the type of substantial control envisioned by the case law." As a matter of law, the evidence simply does not support the existence of a relationship between Marathon Coop and Bomar that would create a duty. Despite our general reluctance to grant summary judgment on issues other than the determination of a duty owed in an existing relationship, we find this case exceptional. Viewing the facts in a light most favorable to Bomar, a rational trier of fact could not find the existence of a relationship implicating a common law duty. The trial court's grant of summary judgment is affirmed.

B. Duties Imposed on General Contractors. Bomar also seeks to impose duties of care on Marathon Coop because it allegedly acted as a defacto general contractor and is thus responsible for complying with the various requirements of OSHA.

Despite Bomar's clever attempt to recast the central issue of duty under the rubric of responsibilities imposed by OSHA, Marathon Coop was not a defacto general contractor and therefore had no duty to protect Bomar. Although a violation of OSHA standards may constitute negligence per se, *Wiersgalla v. Garrett*, 486 N.W.2d 290, 292 (Iowa 1992), they cannot be construed to enlarge or diminish the common law. *Lunde*, 299 N.W.2d at 478. Thus, a common law relationship must still exist before duties arise. To impose the label "general contractor" on a landowner, the landowner must demonstrate the same degree of control contemplated by the retained control doctrine. *Compare Tanksley v. Alabama Gas Corp.*, 568 So. 2d 731, 736 (Ala. 1990) (ruling a contractor or landowner must control the manner in which the work was done to become a general contractor), ***Pinson v. Minidoka Highway Dist.***, 106 P.2d 1020, 1022 (Idaho 1940) (ruling the general rule for determining whether one is a general contractor "is the right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done"), *Bastian v. Carlton County Highway Dep't*, 555 N.W.2d 312, 317 (Minn. Ct. App. 1996) ("Active involvement by an employer in directing other employers' workers at a construction site is essential to the extension of OSHA liability. . . ."), *and Rodas v. Weissberg*, 690 N.Y.S.2d 116, 117-18 (N.Y. App. Div. 1999) (ruling a landowner must control or direct the work being performed to be a general contractor), *with* Restatement (Second) of Torts § 414 cmt. c. (1965) (stating a landowner "must have retained at least some degree of control over the

manner in which the work is done" to establish control under retained control doctrine). Because we find the quantum of control necessary to establish duties as a general contractor mimic the quantum under the retained control doctrine, we need not further postulate whether Marathon was a general contractor as our earlier discussion dispatches the issue. The trial court's grant of summary judgment is affirmed.

AFFIRMED.