

IN THE COURT OF APPEALS OF IOWA

No. 5-254 / 94-100

TIM PARKS,

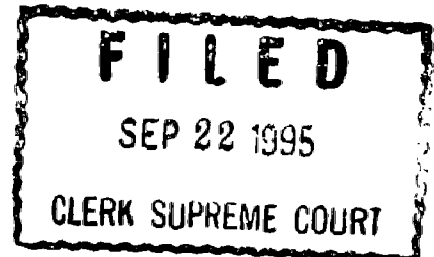
Plaintiff-Appellant,

vs.

DOLAN DEVELOPMENT CO., INC.,

An Iowa Corporation, and **TIMOTHY DOLAN,**

Defendants-Appellees



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers,
Judge.

Tim Parks appeals from a district court order granting summary judgment in
favor of the general contractor in his action seeking damages for injuries suffered
when he fell off the roof of a house. **AFFIRMED.**

William J. Bribriesco of William J. Bribriesco & Associates, Bettendorf, for
appellant.

Elliott R. McDonald, Jr. of McDonald, Stonebraker & Cepican, P.C.,
Davenport, for appellees.

Heard by Hayden, P.J., Cady, J., and Schlegel, S.J.*

* Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

SCHLEGEL, S.J.

On September 4, 1992, Tim Parks filed a petition at law against Dolan Development Co., Inc., Timothy Dolan, Larry Boedeker Construction, Inc., and Larry Boedeker seeking compensatory damages for injuries he suffered when he fell off a roof. Parks claimed Boedeker, the subcontractor, was liable for negligent installation of the toe-board which gave way and caused him to fall while Parks was shingling the roof. Parks also maintained Dolan and Dolan Development (Dolan) were vicariously liable for Boedeker's negligence.

Dolan filed a motion for summary judgment, alleging it did not have sufficient control over the premises to be held vicariously liable. Parks filed a resistance. Following a hearing, the district court granted Dolan's motion for summary judgment. The district court determined the various depositions demonstrated Dolan, at best, had the power "to hire and fire, to direct alterations or deviations from a plan, to inspect progress of a project and to order work started or stopped." The district court held this was insufficient to render Dolan vicariously liable.

Parks appeals.

Our review of a successful motion for summary judgment is for correction of errors at law. *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 302 (Iowa App. 1994). Summary judgment is appropriate only if there exists no genuine issue of material fact. *Farm Bureau Mut. Ins. Co. v. Milne*, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact.

Id. The evidence must be viewed in the light most favorable to the nonmoving party. *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. *Id.* A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Id.* If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Milne*, 424 N.W.2d at 423.

Questions of negligence are rarely decided in a summary judgment adjudication. Iowa R. App. P. 14(f)(10). However, the threshold issue of whether the defendant owed the plaintiff a duty of care is a question of law. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990).

Generally, an employer of an independent contractor is not liable for injuries caused to another by an act or omission of the independent contractor. *Downs v. A & H Constr. Ltd.*, 481 N.W.2d 520, 523-24 (Iowa 1992); Restatement (Second) of Torts § 409 (1965). Parks contends this case falls under an exception to the general rule in section 409 of the Restatement. This exception states:

One who entrusts work to an independent contractor but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965). Parks argues Dolan maintained sufficient control over Boedeker to become liable for Parks injuries. We find otherwise.

The degree of control retained by the employer is the critical element in determining whether the employer is liable for the injuries. *Hernandez*, 523 N.W.2d at 303. Comment c of section 414 provides guidance in making this determination.

[T]he employer 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 and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. *There must be such a retention or a right of supervision that the contractor is not entirely free to do the work in his own way.*

(Emphasis added.)

In his deposition, Dolan stated he retained the power to make recommendations, to hire or fire a subcontractor, and to suggest or direct alterations. There is no suggestion in the deposition, however, Dolan retained a degree of supervision **which** impinged upon Boedeker's freedom to do his work in his own way. The deposition by Boedeker does not suggest anything to the contrary. Parker also relies upon depositions from expert witnesses. These witnesses, however, merely testified regarding the working relationship between general contractors and

subcontractors. There is nothing in the depositions which indicates a genuine issue of material fact.

In *Downs v. A & H Constr. Ltd.*, a worker for the subcontractor doing the framing of a house was injured when he shot himself with a nailgun. *Downs*, 481 N.W.2d at 521-22. The worker had complained the scaffolding erected by his employer was unsafe and caused his injuries. *Id.* at 522. The worker sued the general contractor. The district court granted the contractor's motion for summary judgment. *Id.* Our supreme court found the subcontractor had erected the scaffolding with pump jacks owned by the subcontractor and poles and boards purchased by the general contractor. *Id.* The general contractor inspected progress of the subcontractor's work, received reports, and made suggestions. *Id.* The general contractor also had the power to stop work, resume work, and request alterations and deviations be made. *Id.* The supreme court specifically found there was insufficient control retained by the general contractor to rise to the level necessary under section 414 of the Restatement. *Id.* at 525.

In terms of the amount of control retained by the general contractor, we find this case is not significantly different from the situation in *Downs*. We conclude Dolan did not retain sufficient control to fall under the exception set out in section 414 of the Restatement and discussed in *Downs*. Accordingly, we find the district court's ruling on Dolan's motion for summary judgment to be proper.

AFFIRMED.