

IN THE COURT OF APPEALS OF IOWA

No. 8-164 / 97-0972

**NATHAN NIEUWSMA, a Minor, by and
through JOHN C. NIEUWSMA and
CYNTHIA J. NIEUWSMA, His Conservators,
JOHN C. NIEUWSMA, Individually, and
CYNTHIA J. NIEUWSMA, Individually,**

Plaintiffs-Appellants.

vs.

**INTERSTATES ELECTRIC AND
ENGINEERING CO., INC.,**

Defendant-Appellee,

and

**JANS CORPORATION, FIRST REFORMED
CHURCH OF SIOUX CENTER, IOWA,
and Other Defendants Whose Names are Not
Known to Plaintiffs at This Time,**

Defendants.

JANS CORPORATION,

Third-Party Plaintiff,

vs.

**INTERSTATES ELECTRIC AND
ENGINEERING CO., INC.,**

Third-Party Defendant.

FILED
MAY 23 1998
CLERK OF COURT

Appeal from the Iowa District Court for Sioux County, Dewie J. Gaul, Judge.

Plaintiffs appeal from a district court order sustaining defendant Interstates Electric and Engineering Company's motion for summary judgment on plaintiffs' claims that Interstates was liable for injuries sustained by Nathan Nieuwsma from a fall down an elevator shaft. **AFFIRMED.**

Lloyd W. Bierma and Mark J. Schouten of Oostra, Bierma & Schouten, Sioux Center, for appellants.

Michael R. Hellige and James W. Radig of Shull, Cosgrove, Hellige & Lundberg, Sioux City, for appellee.

Heard by Sackett, P.J., and Streit and Mahan, JJ. Huitink, J., takes no part.

MAHAN, J.

The Nieuwsmas appeal the district court's grant of Interstates Electric and Engineering Company's (Interstates) motion for summary judgment. The Nieuwsmas allege the district court erred when it determined: (1) Interstates was not a possessor under the doctrines of unsafe premises and attractive nuisance; and (2) Interstates had no duty of care towards Nathan Nieuwsma arising out of its contract with the First Reformed Church ("the Church"). We affirm.

In February 1994, Nathan Nieuwsma, a fifteen-year-old, was attending a church function at the Church. While playing hide-and-seek on the second floor, Nathan entered the area of an elevator shaft. The area was unlit and Nathan moved a four foot by eight foot Blandex barrier placed directly in front of the opening to the shaft. Nathan fell down the shaft to the first floor and was paralyzed. The area where the elevator shaft was located was behind a temporary wall built by the Jans Corporation, a prime contractor for general construction. The wall contained a door marked "Church Sanctuary," and was normally locked, but it was unlocked at the time of the incident. Arlin Leusink, an employee of both Jans and the Church, controlled the key. Leusink did not work for Interstates. At the time of the incident no construction was being done on that portion of the building.

Interstates had signed a contract with the Church to be the prime electrical contractor for the Church's construction of a new church building. Interstates was not a subcontractor. The Church also signed a contract with Jans Corporation as prime

contractor for general construction. Both of the prime contractors remained independent of one another. Interstates' contract with the Church contained two documents, an American Institute of Architects Standard Form of Agreement Between Owner and Contractor and the Project Manual. The Project Manual had three parts: (1) Bidding Requirements; (2) General Conditions for the Contract of Construction ("the General Conditions"); and (3) Specifications.

The General Conditions contained definitions to be used throughout the contract. The "work" was defined as the construction and services required by the contract, and includes all labor, materials, equipment and services. The "work" could be the whole or a part of the "project." The "project" is the total construction. Section 1.2.3 states, "[P]erformance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results." Section 10.1.1 required the contractor to be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract. Section 10.2.1.1 required the contractor to provide reasonable protection to prevent damage, injury, or loss to employees on the work and other persons who may be affected thereby. Section 10.2.3 required the contractor to erect and maintain reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards. Section 10.2.6 required the contractor to designate a

responsible member of the organization at the site who had the responsibility of preventing accidents.

Section 1.8(C) in the Summary of Work limited Interstates' use of the premises for work and for storage to allow for: (1) work by owner and others; and (2) owner occupancy. Section 1.8(L) required Interstates to "secure areas of new construction against access by unauthorized personnel, except as necessary to meet exiting requirements."

Section 2.2(A)(3) of the Temporary Utilities required Interstates to "[p]rovide adequate artificial lighting for all areas of work when natural light is not adequate for work, and for areas accessible to the public."

The district court found there was no material issue as to who the possessor was under the common law. According to the district court, the possessor was not Interstates because the amount of control was not substantial enough to render it a possessor of land and therefore it owed no duty to Nathan. The district court also found no work was being done on the area and the area was not considered to be accessible to the public. Thus, according to the district court, Interstates owed no contractual duty to Nathan.

I. STANDARD OF REVIEW. We review a summary judgment ruling for error. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins.*, 568 N.W.2d 815, 817 (Iowa 1997). We examine the record

before the district court to decide whether a genuine issue of material fact exists and whether the court correctly determined the law. *Id.*

II. SUMMARY JUDGMENT. Although claims of negligence are seldom capable of summary adjudication, the threshold question 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).

We will uphold a grant of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law.

When we review the propriety of a grant of summary judgment, the moving party is required to show that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. In determining whether the movant has met this burden, we review the record in a light most favorable to the party opposing summary judgment, in this case the [defendant].

In this sense, we review the record as we would on a motion for directed verdict, with the nonmoving party entitled to every legitimate inference that reasonably can be deduced from the evidence and summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved.

Smith v. CRST Int'l, Inc., 553 N.W.2d 890, 893 (Iowa 1996). Even when the facts are not in dispute, summary judgment is not appropriate where reasonable minds could draw different inferences from the facts. *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 400 (Iowa App. 1997).

The common law duty to keep property reasonably safe for business invitees depends upon whether or not the party being sued is a possessor of land. *See Downs*

v. A & H Constr., Ltd., 481 N.W.2d 520, 524 (Iowa 1992) (we must next determine whether the party being sued was a possessor of land; for if it was not there can be no liability imposed). A possessor of land is defined as:

- (a) a person who is in occupation of the land with intent to *control* it, or
- (b) a person who has been in occupation of the land with intent to *control* it, if no other person has subsequently occupied it with intent to control it. or
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id. (citing Restatement (Second) of Torts § 328E) (emphasis added).

We find the district court correctly determined there was no genuine issue of material fact as to the possessor of the property. Interstates was not a possessor of the property and therefore had no common law duty to protect Nathan.

The Nieuwsmas also claim Interstates owed a contractual duty to make the premises safe. The rule is well settled in Iowa that where a contract imposes a duty upon a person, the neglect of that duty is a tort. *Farris v. General Growth Dev. Corp.*, 354 N.W.2d 251, 255 (Iowa 1984).

At the time of the incident, it is clear Interstates had no duty to provide permanent lighting. Thus, Interstates' liability could only arise if it had a contractual duty to provide temporary lighting under 2.2(A)(3) of the Temporary Utilities section. It is uncontroverted there was no work occurring at the time of the incident, so no lighting was needed for work. The only other contractual duty to provide temporary lighting arose when an area of construction was accessible to the public.

The church bulletins informed the parishioners they could tour the building. However, there is no evidence anyone expected those touring the building would be beyond the temporary wall built by Jans. The door to the area where Nathan fell was expected to be locked at all times; the public was not supposed to be there. Thus, the district court correctly determined Interstates had no contractual duty having any causal relationship to Nathan's injury.

For these reasons, we affirm the district court's grant of Interstates' motion for summary judgment.

AFFIRMED.