

IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT
Filed January 30, 1981

THOMAS M. CLAUSEN,

)

Plaintiff-Appellee,

)

vs.

)

R. W. GILBERT CONSTRUCTION CO., INC.,

)

Defendant-Appellant.

)

0-246

2-64411

Appeal from Cerro Gordo District Court - Ralph J. McCartney, Judge.

Defendant, general contractor, appeals from judgment entered upon a jury verdict for plaintiff, subcontractor's employee, in plaintiff's negligence action alleging 1) that plaintiff failed to produce sufficient evidence to generate a jury question on the theory of "peculiar risk" or "inherent danger", 2) that trial court erred in failing to instruct the jury that collateral negligence in the method of doing the work exonerated the general contractor-employer from liability, 3) that trial court erred in failing to instruct the jury that a general contractor ordinarily is not liable for the acts of a subcontractor or a subcontractor's employees, 4) that the subcontractor's employee is not entitled to recover from the general contractor where the employee had as much actual knowledge of the danger as reasonable warnings by the contractor would have given, 5) that plaintiff was negligent as a matter of law, and 6) that trial court erred in submitting future medical expenses to the jury. REVERSED AND REMANDED FOR NEW TRIAL.

Don W. Burington and Gerald M. Stambaugh of Laird, Burington, Bovard, Heiny, McManigal & Walters, Mason City, Iowa, for defendant-appellant.

David E. Funkhouser of Brown, Kinsey & Funkhouser, Mason City, Iowa, for plaintiff-appellee.

William R. Bartmann of Dubuque, Iowa.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Defendant, general contractor Gilbert Construction Company, appeals from judgment entered upon a jury verdict for plaintiff, Thomas M. Clausen, an employee of subcontractor Mid-West Roofing Company, in plaintiff's negligence action. Defendant alleges 1) that plaintiff did not produce sufficient evidence to generate a jury question on the theory of "peculiar risk" or "inherent danger"; 2) that trial court erred in failing to instruct the jury that collateral negligence in the method of doing the work exonerated the general contractor-employer from liability; 3) that trial court erred in failing to instruct the jury that a general contractor ordinarily is not liable for the acts of a subcontractor or a subcontractor's employees; 4) that the subcontractor's employee is not entitled to recover from the general contractor where the employee had as much actual knowledge of the danger as reasonable warnings by the contractor would have given; 5) that plaintiff was negligent as a matter of law; and 6) that trial court erred in submitting future medical expenses to the jury. We reverse and remand for a new trial.

I. Procedural Background. Plaintiff commenced his action against defendant on November 8, 1976, alleging that defendant's negligence was the proximate cause of injuries and damages he sustained from falling off a roof at a work site. He sought damages totalling \$275,000. Defendant affirmatively alleged that plaintiff was negligent and that defendant had no obligation to construct toe-holds, cleats, or brackets. At the close of the trial on June 8, 1979, plaintiff amended his damage claim to \$200,000 plus costs. Defendant's motion for directed verdict was overruled. The jury returned a \$75,000 verdict for plaintiff on June 8, 1979. The defendant then filed its motion for judgment notwithstanding the verdict or for a new trial; both motions were overruled. Defendant's appeal followed.

II. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4. We will uphold the jury verdict if it is supported by substantial evidence. Iowa R. App. P. 14(f)(1).

III. The Facts. On November 27, 1974, plaintiff was an employee of Mid-West Roofing, an independent subcontractor employed by defendant-general contractor, R. W. Gilbert Construction Co., Inc., to assist in construction of a house addition in Mason City, Iowa, pursuant to an oral agreement for time and materials. The addition had a roof which was flat on top, where it abutted the existing roof, and had three sides sloping downward away from the flat surface at a forty-degree angle. Defendant planned first to shingle the three sloping sides and then have the subcontractor lay a

"hot tar" roof on the flat area. The flat area was between sixteen to twenty feet above the ground and the "fall" of the sloping roof (referred to as a "mansard roof") was approximately five inches in every twelve inches.

Prior to November 27, 1974, defendant had constructed scaffolding extending around the mansard roof from the ground up to the roof. Workers used the scaffolding to place plywood roofing materials upon the structure of the roof itself and to shingle along the bottom edge of the roof to a depth of one foot or more. Either on November 26th or the morning of the 27th, the scaffolding was removed. Neither toe-boards nor a catch platform was installed on the sloping sides of the roof until after the accident. The evidence is in conflict as to whether defendant's employee then placed the toe-boards at the insistence of the subcontractor or on his own initiative.

One or two days prior to the accident, the general contractor requested the subcontractor to place a temporary felt paper roof on the flat deck and partially on the sloping roof to protect the area from moisture over the upcoming Thanksgiving holiday weekend. The plywood sheets on the sloping areas formed a crack approximately twelve inches down the sloping roof; another crack was formed about five or six feet further down the slope. The testimony is in conflict as to whether the subcontractor's employees were to cover both of these cracks or only the one twelve inches from the top of the sloping roof. On the day of the accident, the subcontractor's vice-president instructed plaintiff's supervisor, Ronald Olson, generally on what had to be done and the manner of doing it. Plaintiff and Olson then began this work.

The sloping roof had patches of frost due to moisture condensation but the flat roof had been covered overnight and was dry. Weather conditions were cold and windy. As the work progressed, plaintiff, working on the northwest corner, attempted to hold the felt roofing paper by lying down and thus using his body to keep the paper from being torn by the wind while he fastened the paper over the top crack in the plywood. While fastening the felt paper in this manner, plaintiff may have shifted his position to hear what defendant's employee, Gunther Hugo, was saying to him. In any event, it is undisputed that Mr. Hugo was standing near plaintiff and that plaintiff slid down the sloping roof and onto the ground, sustaining serious injuries to his feet.

While plaintiff's testimony shows he was aware of the frosty conditions further down on the sloping roof, there was testimony that plaintiff did not know the dry, flat area had been covered by a canvas the previous night. Plaintiff testified that he had checked the area he was sitting on before he fell and could not feel any wetness there. The subcontractor's vice-president, John Drew, testified that due to the time of year

exposed plywood could get slippery and draw moisture; he cautioned his employees to stay off the sloping roof. The supervisor, Olson, testified to seeing frosty areas on the sloping roof and to cautioning plaintiff "to stay away from the edge and to be careful."

Testimony of defendant's employee Hugo established that the subcontractor was requested to cover the crack between eight to twelve inches down from the flat roof's edge and also to go further down the sloping roof to cover another crack in the plywood (which was five to six feet from the top). The testimony of Mr. Hugo also shows his awareness of the frost condition on the sloping area:

At that time of the morning the roof was pretty slippery, so I told them to just do the flat area and down approximately 8 to 10 inches or whatever it took. But then as the day went on, if it warmed up they could go further down.

IV. Peculiar Risk or Inherently Dangerous Theory. The defendant contends that the proof produced by plaintiff was insufficient to generate a jury question on the theory of peculiar risk or inherent danger. We disagree.

A. The Issue. The specific issue we must address is whether, under the facts, the jury instructions based on the "peculiar risk" and "inherent danger" doctrines should have been given at all. Defendant contends that all construction work involves some hazard and that if we find these facts support application of either doctrine, then every house or building construction job could be so classified. We believe that defendant fails to understand the doctrine's focus.

"The fact that an activity involves an ordinary and customary danger of the particular work to be performed is immaterial to the question of whether it may involve a peculiar risk within the meaning of the peculiar risk doctrine." Griesel v. Dart Industries, Inc., 23 Cal. 3d 578, 587, 591 P.2d 503, 508, 153 Cal. Rptr. 213, 218 (1979).

"What is required is that the work be 'likely to involve a peculiar risk of physical harm unless special precautions are taken,' [citation omitted] (emphasis added) and that it be 'a risk which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work, or the particular method which the employer knows that the contractor will adopt.' " Lunde v. Winnebago Industries, Inc., 299 N.W.2d 473, 476 (Iowa 1980) (citing Restatement (Second) of Torts, § 416, Comments d and e at 397 (1965)).

B. Peculiar Risk Doctrine. The "peculiar risk" doctrine of section 416, Restatement (Second) of Torts (1965), and the "inherent danger" doctrine of section 427, Restatement (Second), represent different forms of the same general rule, "... that the

employer [of an independent contractor] remains liable for injuries resulting from dangers which he should contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them." Restatement (Second), supra, § 416, Comment a at 395. The peculiar risk doctrine applies where the employer fails to provide in the contract that the independent contractor shall take the necessary precautions to make the work safe. Restatement (Second), supra, § 413, Comment c at 396. Section 416 is more commonly used where the employer should anticipate the need for a specific precaution, "... such as a railing around an excavation in the sidewalk," whereas section 427 is more often applied where a number of precautions are required or a number of hazards are involved, such as work involving blasting or painting upon a scaffold above a highway. Id. Comment b under section 413 is applicable to section 416 as to both peculiar risk and special precautions. Id. That comment provides:

It is obvious that an employer of an independent contractor may always anticipate that if the contractor is in any way negligent toward third persons, some harm to such persons may result. Thus one who hires a trucker to transport his goods must, as a reasonable man, always realize that if the truck is driven at an excessive speed, or with defective brakes, some collision or other harm to persons on the highway is likely to occur. This Section has no reference to such a general anticipation of the possibility that the contractor may in some way be negligent. It is not concerned with the taking of routine precautions, of a kind which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work. Such precautions are the responsibility of the contractor; and if the employer has exercised reasonable care to employ a contractor who is competent and careful (see § 411), he is not required to provide, in the contract or otherwise, that the contractor shall take them.

This Section is concerned with special risks, peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions. The situation is one in which a risk is created which is not a normal, routine matter of customary human activity, such as driving an automobile, but is rather a special danger to those in the vicinity, arising out of the particular situation created, and calling for special precautions. "Peculiar" does not mean that the risk must be one which is abnormal to the type of work done, or that it must be an abnormally great risk. It has reference only to a special, recognizable danger arising out of the work itself.

In order for a work activity to come under the peculiar risk doctrine, the work must be "... likely to involve a peculiar risk of physical harm unless special precautions are taken, even though the risk is not abnormally great." Restatement (Second), supra,

§ 416, Comment d at 397. Further, a peculiar risk may be one "... which the employer should recognize as likely to arise in the course of the ordinary and usual method of doing the work or the particular method which the employer knows that the contractor will adopt." Id., Comment e at 397. The employer's knowledge and experience in the particular field (here construction) is a significant factor. See Restatement (Second), supra, § 413, Comment f at 386-87. Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 510, 595 P.2d 619, 623, 156 Cal. Rptr. 41, 44 (1979).

The supreme court recently said in Lunde that "[t]he requirement that such a risk will likely attend the performance of the work seems to insert the element of foreseeability." 299 N.W.2d at 476. The court there noted that an employer may be held liable for the acts of the independent contractor if doing the work "in its normal manner" exposes others to undue risk of harm, "... but that if performance of the work in its usual manner would not expose others to 'unreasonable peril,' the employer would not be liable even though negligence occurred during the course of the work. Id. This negligence would be 'collateral' to the risk created by the nature of the work itself." Id. The court cited Carson v. Blodgett Construction Co., 189 Mo. App. 120, 174 S.W. 447 (1915), where the following distinction was made:

In the one case the doing of the work creates danger and requires active care to counteract the danger. In the other there is no danger unless created by negligence. The one starts with danger and requires preventive care to make safety, while the other starts with safety and requires negligence to make danger.

Id. at 476-77 (quoting Carson, 189 Mo. App. at 126, 174 S.W. at 448).

While ordinary building projects, as a general rule, do not come under the peculiar risk rule, "... in specific cases, the circumstances may make the work so dangerous that the law will not permit the owner to escape liability even though the work is performed by an independent contractor" Id. (quoting 41 Am. Jur.2d Independent Contractors § 43, at 810 (1969)). The risk realized must be inherent in the nature of the work in order to come within the peculiar risk doctrine. Elder v. Pacific Telephone & Telegraph Co., 66 Cal. App. 3d 650, 660, 136 Cal. Rptr. 203, 207 (1977); Rodriguez v. Elizabethtown Gas Co., 104 N.J. Super. 436, 445, 205 A.2d 408, 413 (1969).

With this understanding of the peculiar risk doctrine, we next analyze the issue.

C. Analysis of the Issue. Even though the subcontractor failed to take safety precautions and defendant-employer failed to provide in the contract for the subcontractor to take precautions to protect plaintiff, following the approval in

Giarratano v. Weitz Co., 259 Iowa 1292, 147 N.W.2d 824 (1967), of the Restatement (Second) of Torts, sections 413 and 416 principles of liability, we find the contractor (defendant here) remained liable whether or not he provided for safety precautions in the contract or otherwise. 259 Iowa at 1308, 147 N.W.2d at 834.

In Giarratano, the defendant-principal contractor was constructing an addition for the owner, a power company. Erwin Giarratano, age 18, was a new, inexperienced employee of the roofing subcontractor. The roofing subcontractor was to apply a gypsum roof deck at the eighty foot level, in an area approximately thirty-five feet north to south and seventy feet east to west. The steel girders or I-beams were already in place, eight feet apart, and the bulb-tees (steel rails) were in place and welded every thirty-two inches, atop and perpendicular to the I-beams. "[A] temporary platform for storing materials and as a solid area to walk on after a person had climbed a stairway at the northeast corner of the structure had been installed. This platform consisted of wood planks clear across the north and extending approximately five feet south of the north edge of the roof." Id. at 1297, 147 N.W.2d at 827. The subcontractor had not furnished the planking. By 9 a.m. when Giarratano went to the roof,

... the process of laying form boards between the bulb-tees, rolling wire over the form boards and pouring gypsum [which takes twelve to fifteen minutes to harden] had been completed in an area about ten feet wide, just south of the wood planked area. This finished gypsum surface paralleled the wood planks from the east to west of the roof and formed a solid walking surface from east to west for 15 feet south of the north edge of the roof.

Id., 147 N.W.2d at 828.

At the time of the accident, one employee was laying form boards south of the poured area. Three employees, including Giarratano, were carrying boards from the northeast edge of the roof to the employee laying the form boards. Giarratano allegedly "... either slipped on a bulb-tee or tripped on wire and fell through a form board which was yet unprotected by wire or gypsum. The [eighty foot] fall occurred about 15 feet south of the poured slab at approximately the middle of the roof." Id. at 1298, 147 N.W.2d at 828.

Plaintiff conceded that generally one who employs an independent contractor is not liable for the latter's torts, but argued that exceptions to the rule applied, including retained control, positive responsibility, unreasonable risk and special danger in work, and duty to invitee. Id. The court concluded that "... there is substantial evidence of the existence of each of them and that a jury would be justified in finding defendant

owed a duty toward decedent and would be liable for negligent exercise of it." Id. at 1309, 147 N.W.2d at 834. The court further found that a jury could find defendant was negligent in exercising this duty. Id. The area through which Giarratano fell was unprotected by wire, gypsum, or scaffolding. Id. at 1310, 147 N.W.2d at 835. The defendant had earlier "... either furnished planking for the north end of the deck for use in storing materials and to serve as a platform to walk on, or at least permitted it to remain on the deck after the bricklayers had finished with it." Id. The court, in reversing and remanding trial court's order sustaining defendant's motion for judgment notwithstanding the verdict and granting judgment against plaintiff, stated:

... a jury could find defendant was negligent in not providing additional planking as scaffolding for the workers to walk on as they carried form boards to the area beyond the poured surface where ... [another employee] was working and in failing to require the wire mesh strips which would support a man's weight to be placed over the boards already in place as soon as a 3-1/2 or 4 foot space had been made available. Further, a jury could find there was a space at least 4 to 6 feet beyond the poured surface that could have been covered with gypsum as a safety precaution, especially in light of defendant's requiring the men on the top floor of the structure to wear hard hats.

Id.

Here, the defendant is the general contractor, experienced in the field of construction. We find that it is not unreasonable to expect the general contractor as a business entity to recognize that work to be done at a height of sixteen to twenty feet, under frosty and windy weather conditions, on a roof with a five in twelve inch slope, required taking special precautions to prevent harm to workers working on or near the sloping roof. See Aceves, 24 Cal. 3d at 510, 595 P.2d at 623, 156 Cal. Rptr. at 44.

We, therefore, find that defendant should have foreseen the risk of falling due to the frosty conditions on the roof. Defendant covered the flat roof with a canvas, overlapping it onto the sloping roof the night before plaintiff arrived to work on the roof; defendant was in the best position to determine the frosty conditions when the canvas was removed the following morning, a few hours before plaintiff arrived. Further, plaintiff was asked by defendant to work on the sloping roof, whether to cover cracks in the plywood twelve inches down on the sloping roof or five to six feet down on the sloping roof, or both. At the time of the fall, plaintiff was working in a northwest corner and having difficulties with the wind tearing the felt paper as he attempted to overlap it eighteen inches onto the sloping roof. No safety precautions had been taken to prevent him from falling. In addition, when defendant's employees worked on the

sloping roof just the day before, scaffolding was in place to protect these employees. From our review of the evidence, we find that the danger of falling here while doing the roofing work was, as in Giarratano, a risk inherent in the nature of the work to be done.

We further conclude that the recent Lunde decision does not defeat liability. In Lunde, the court found that under the circumstances there trial court ruled correctly as a matter of law that the defendant-owner was not liable under the rationale of the peculiar risk doctrine. 299 N.W.2d at 478. On the day that Lunde fell, he and another employee were attaching roof panels to steel purlins. While the other employee drilled holes into the purlins, Lunde followed, screwing down the panels with an impact wrench. Near the edge of the building, while attaching the first row of roof panels, the other employee moved to an adjacent purlin to drill holes while plaintiff-employee, apparently unaware of the other employee's location, continued down the slope of the roof onto the unsupported part of the last panel and fell approximately twenty-five feet to a black top surface. Id. at 474-75.

The defendant in Lunde was an owner, not a general contractor. The court could reasonably have considered an owner's degree of knowledge and experience in construction to be considerably less than a general contractor's. See Restatement (Second), supra, § 413, Comment f at 386-87. While no safety precautions had been taken for the work on the roof with a one in twelve inch slope, no circumstances outside the employee's method of working appeared to have contributed to the fall.

In this case, the defendant-general contractor's knowledge and experience in the construction field make it much more reasonable to find that the defendant should have foreseen the likelihood of the risk of falling given the circumstances--the height, the frost on the sloping roof, the wind conditions, and the absence of safety precautions. In addition, there is testimony from both plaintiff's and defendant's witnesses that plaintiff's method of working would be an ordinary way to fasten felt paper when overlapping it eighteen inches on a sloping roof. Also the roof in the instant case had a pitch of a five inch fall per twelve horizontal inches, much steeper than the one-in-twelve in Lunde. Based on these differences in facts, we find Lunde distinguishable.

We conclude that Giarratano best guides our analysis, and that under the circumstances as shown by the evidence, trial court did not err in submitting the instruction on peculiar risk to the jury. Further, we have examined each of defendant's authorities and find them all distinguishable for various reasons which we need not elaborate.

We finally consider the impact of the Occupational Safety and Health Administration (OSHA) regulations.

D. Impact of OSHA. OSHA standards in effect at the time required both the defendant and the subcontractor to assume responsibility for complying with the standards. Due to the height of the roof, the standards required scaffolding for this work. Following Giarratano, even if the subcontractor is liable, the general contractor remained liable where a peculiar risk is involved. 259 Iowa at 1308, 147 N.W.2d at 834; see Restatement (Second), supra, § 416 and § 427, Comments c and d at 416-17. Under peculiar risk, the employer is liable unless special precautions are taken. Thus, violations of OSHA regulations are evidence of negligence and as such could be used by the jury in determining whether the employer breached the duty to take special precautions owed to plaintiff. OSHA regulations, however, neither enlarge nor affect in any manner the duties owed here by defendant-employer to plaintiff-employee. See Lunde, 299 N.W.2d at 478; 29 U.S.C. § 653(b)(4) (1970).

V. Collateral Negligence. Defendant next claims that the collateral negligence of the subcontractor, plaintiff's employer, exonerates defendant from any liability. We disagree. The general rule for collateral negligence is found in Restatement (Second), supra, § 426. The type of negligence covered by this section has been described as that negligence which is unusual or abnormal to the normal risks of doing the work as distinguished from negligence which creates only normal risks. Restatement (Second), supra, § 426, Comment a at 414.

The employer is required to contemplate, and to be responsible for, the negligence of the contractor with respect to all risks which are inherent in the normal and usual manner of doing the work under the particular circumstances. (See § 427.) He/she/it is not required to contemplate or anticipate abnormal or unusual kinds of negligence on the part of the contractor, or negligence in the performance of operative details of the work which ordinarily may be expected to be carried out with proper care, unless the circumstances under which the work is done give ... [the employer] warning of some special reason to take precautions or some special risk of harm to others inherent in the work.

Restatement (Second), supra, § 426, Comment b at 414 (emphasis added).

Here the flat roof was entirely covered by a canvas the previous night; the covering extended over the sloping sides for a short distance. Plaintiff knew the flat roof was dry; he felt the area on the sloping side near the edge of the roof where he was working and determined that it was not wet. The wind was blowing. Although the evidence is conflicting as to the ordinary manner of doing the particular work,

testimony from both sides indicates an ordinary method of tacking down felt paper which is being overlapped eighteen inches is to get down on the side and nail it on the bottom. Plaintiff, working on the northwest corner, apparently had part of his body over the edge while lying on the felt paper to keep the paper from being torn by the wind. Defendant's employee admitted to talking to plaintiff at the time of the accident. The plaintiff testified that he was on his left side, turned partially to his right side as he was being spoken to, and then turned back on his left side. At that time, he started sliding off the roof.

From our review of all the evidence, we find that there was nothing abnormal about the plaintiff's manner of working and that the defendant's employee actually may have distracted plaintiff, causing him to shift his body weight in order to hear what was being said to him. The employer thereby is not exonerated under the collateral negligence rule. Restatement (Second), supra, § 426. Even if plaintiff's manner of working was unusual, we believe the circumstances of the height and the frost were sufficient to have given defendant warning of a reason to take special precautions. See Restatement (Second), supra, § 426, Comment b at 414. We conclude that defendant employer was not exonerated under section 426¹ and that trial court was correct in not instructing on collateral negligence.

VI. Instructions 2(1) and 8. Defendant next contends that trial court erred in giving instructions 2(1) and 8 involving defendant's alleged negligence because any obligation owed by defendant to plaintiff as a business invitee could be discharged by making the premises reasonably safe or by warning the plaintiff of any potential danger. Defendant argues that plaintiff was aware of the danger and that under Hanson v. Town and Country Shopping Center, Inc., 259 Iowa 542, 144 N.W.2d 870 (1966), this awareness was better than a warning and further that the duty to warn exists only as to latent dangers. Defendant relies specifically on Mundy v. Warren, 268 N.W.2d 213 (Iowa 1978), for the alternative duty to warn or to make safe. 268 N.W.2d at 217.

We agree with defendant that, under Mundy, instructions giving the alternative duty to warn or make safe were required elements of the duty to invitee theory. Id. Trial court instructed only on the duty to make safe. This is clearly erroneous under Mundy. Id. We conclude that the error requires reversal and remand for a new trial.

We further note that relevant instructions on retrial, if given, must distinguish the

¹ The rule on section 426 is the converse of section 427, negligence as to danger inherent in the work. Restatement (Second), supra, § 427, Comment d at 417.

two theories of liability and the duties particular to each. In addition, we note the Mundy court's admonishment that under the duty to invitee theory, "[i]f the possessor should anticipate harm despite knowledge or obviousness, due care may thus require that he give additional warning in order for the warning to be adequate or that he make the condition reasonably safe." Id. (citing to Restatement (Second), supra, § 343A, Comment f at 220 (emphasis added)).

On this issue, therefore, we find reversible error.

VII. The General Rule Instruction. Defendant also asserts that trial court erred in failing to instruct the jury that a general contractor ordinarily is not liable for the acts of a subcontractor or his employees. We disagree.

In DeMoss v. Darwin T. Lynner Construction Co., 159 N.W.2d 463 (Iowa 1968), the court considered as alleged error two grounds for defendant's negligence:

- (1) In creating or allowing to be created a dangerous condition on the premises which the defendant knew, or should have known, to be a dangerous condition to persons rightfully on the property.
- (2) In failing to keep the property reasonably safe.

159 N.W.2d at 468.

The rule that one is not ordinarily liable for the negligence of an independent contractor was not set forth in the instructions; however, the only error found in the instruction was the specification that defendant was negligent "in creating or allowing to be created a dangerous condition on the premises." Id. The court noted that "[w]e are confronted with the rule that one is not ordinarily liable for the negligence of an independent contractor." Id. The court said "[e]ven if we assume the independent contractor was negligent in stacking the material, such negligence would not be attributable to defendant under the circumstances existing here." Id. The court, however, did hold that there was enough evidence on the question of failure to keep the premises reasonably safe to justify submission to the jury. Id.² Likewise in Giarratano, no instruction on the general rule was given; rather, the jury was instructed on the applicable exceptions. See Record, vol. 4446, Abstracts & Arguments at 202-220 (Sept. 1966).

Based on these authorities, we conclude that no error occurred by trial court's failure to instruct on the general rule. We also note, however, that we would not have

²Case decided prior to Mundy.

found it objectionable if trial court had instructed on the general rule, together with the exceptions applicable here.

VIII. Actual Knowledge and Warnings. Defendant next contends that the employee of the subcontractor is not entitled to recover from the general contractor where the employee had as much actual knowledge of the danger as a reasonable warning from the contractor would have given. Defendant further asserts that it had no obligation under the circumstances to warn anyone. We disagree. Plaintiff urges that error on this issue was not preserved. We find that error was preserved and thus may be raised on appeal.

The duty owed to one who is an employee of a subcontractor doing work contracted to it by a general contractor is like that owed by a possessor of land to an invitee. Giarratano, 259 Iowa at 1308, 147 N.W.2d at 834. Plaintiff here therefore was defendant's business invitee. Mundy, 268 N.W.2d at 215. Defendant thus owed plaintiff the duties set forth in sections 343 and 343A of the Restatement (Second), *supra*. Plaintiff's knowledge and defendant's obligations under these sections are jury questions which are discussed in section VI. We find no error on this issue.

IX. Plaintiff's Negligence as a Matter of Law. Defendant further claims that plaintiff was negligent as a matter of law and that the issue should not have been submitted to the jury. Plaintiff contends that the question was one for the finder of fact. We agree with plaintiff on this issue.

Generally, questions of negligence, contributory negligence, and proximate cause are for the jury. Iowa R. App. P. 14(f)(10). Giarratano, 259 Iowa at 1309, 147 N.W.2d at 835. "It is only the exceptional case in which the issue of freedom from contributory negligence should not be submitted to the jury--only where such negligence is so palpable, flagrant and manifest that reasonable minds may fairly reach no other conclusion; if there is any evidence tending to establish [plaintiff's] freedom from contributory negligence, the question is for the jury and doubts should be resolved in favor of such submission." Id. at 1311, 147 N.W.2d at 835.

As we have already indicated, there was testimony from both sides here that an ordinary way of fastening down the felt paper, which was overlapped eighteen inches onto the sloping roof, was to get down on the sloping side and nail it on the bottom edge. Another way was to lay on one's stomach and reach over the edge. There was testimony that the wind was blowing, causing the paper to tear. Plaintiff testified that he attempted to hold the paper down with his body in order to prevent further tearing

while fastening it to the roof. In addition, defendant's employee asked plaintiff to cover the crack which was approximately eight to ten inches down and, later on in the day, to go further down the roof and cover another crack (which was five to six feet further down the roof). The evidence is in conflict as to whether the roof appeared to be dry or frosty on the date in issue. Further, after the accident, the roofing work was not resumed until toe-holds were placed on the sloping roof.

As also was said in Giarratano, "...trial court correctly submitted the contributory negligence issue to the jury. This is not the exceptional case in which reasonable minds could fairly reach no other conclusion than that [plaintiff] was contributorily negligent." Id. We conclude no error has been shown on the issue of contributory negligence.

X. Future Medical Expenses Jury Instruction. Defendant generally contends that there was no evidence of the cost of future surgery and hospitalization, and no details provided of the type of surgery required or of the probability that it would ever be required and that, therefore, this issue should not have been submitted to the jury. Defendant further argues that because the jury award does not specify the amount awarded for future medical and hospital expenses, the court cannot order a remittitur or reverse that part of the award and that the judgment should be reversed on that point alone. We agree in part with defendant.

While we believe plaintiff introduced sufficient evidence to show the probability of future medical expenses, we find the record devoid of any evidence as to the value or cost of such expenses. Under this record, therefore, trial court erred in submitting this issue to the jury.

REVERSED AND REMANDED FOR NEW TRIAL.

All judges concur, except Donielson, J., who specially concurs.

DONIELSON, J. (concurring specially)

While I concur in the decision to reverse and remand, I disagree that there was sufficient evidence to generate a jury question on the theory of peculiar or inherent risk.

The peculiar or inherent risk doctrine applies to the situation where an independent contractor is employed to do work "which, as it progresses, is likely to involve the creation of a dangerous condition unless special precautions are taken to prevent the dangerous condition from existing, or to make it harmless after it is created." Restatement (Second) of Torts § 413, Comment c, at 386. Since it is the nature of the work itself that gives rise to the expectation that, in the course of performing the particular work involved, the peculiar risk may arise, W. Prosser, Handbook of the Law of Torts § 71, at 472 (4th ed. 1971), there is an element of foreseeability involved in the application of the doctrine. Lunde v. Winnebago Industries, Inc., 299 N.W.2d 473, 476 (Iowa 1980).¹ The risk involved must be one that is foreseeable not at the time of the injury but at the time the nature of the work is first apparent, i.e., at the time the contract is entered into. See Restatement (Second) of Torts § 416, Comment a, at 395. We are therefore concerned with whether working on a standard mansard roof by itself presents a dangerous condition such that it is foreseeable from the outset that special precautions must be taken to avoid it. I conclude that working on a roof is not work of this type. Roofing work appears to me to be contained in the category of ordinary building projects, which are usually not covered by the peculiar risk exception, unless the circumstances render the work so dangerous that the employer should not be able to avoid liability, as is the case, for example, when a building is demolished in a heavily-populated section of a city. Lunde, 299 N.W.2d at 477 (quoting 41 Am. Jur. 2d Independent Contractors § 43, at 810 (1969)). Because I do not find such circumstances present in the instant case, I conclude that the plaintiff's evidence is insufficient to generate a jury question regarding peculiar risk, and would specify on remand that the jury is not to be instructed on this doctrine.

¹While it is true that Lunde involves an owner and contractor rather than a contractor and subcontractor, I do not see that this distinction makes any real difference as to the principle of law set forth in Lunde, with the exception of the element of foreseeability. However, under the set of facts presented by the instant case (work performed on a standard mansard roof), I find especially applicable the Lunde principle of law regarding peculiar risk and the general rule that the peculiar risk doctrine is not normally applied in the context of ordinary building projects. I therefore do not agree with the majority's attempt to distinguish Lunde and I do not see Glarrantano as being factually relevant to our inquiry.