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NO. A09-1686

State of Minnesota
In Court of Appeals

Geraldine Presbrey as Trustee for the heirs and next of kin
of Paul C. Presbrey, deceased,

Appellants,

vs.

Jonathan James and Carla James,

Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

I. Did the District Court err by applying the wrong Premises Liability Standard of “open and obvious” and not applying the Retained Control doctrine?

The District Court did not apply or address the facts pertinent to the Retained Control doctrine which is error.

Restatement of Torts, 2D § 414 (1965).

Conover v. Northern States Power Co., 313 N.W.2d 397, 403 (Minn.

1981)

Rausch v. Julius B. Nelson & Sons, Inc., 276 Minn. 12, 22, 149

N.W.2d 1, 6 (1967).

STATEMENT OF THE FACTS

The present case stems from the death of Paul C. Presbrey on August 25, 2006. Paul C. Presbrey was hired by the Respondents to replace two decks attached to their residence. On August 25, 2006 Paul C. Presbrey was working on the rear deck when he fell from scaffolding sustaining an acute subdural hematoma resulting in his death.

Summary judgment motion was brought by Respondents stating that Appellants' claims were barred because there was no negligence against the homeowners because they did not have control of the jobsite. Appellant argued that Respondents maintained and admitted control of the jobsite and were negligent.

This Summary Judgment matter was heard in the Washington County District Court before the Honorable Elizabeth Martin (hereinafter District Court) on June 26, 2009. Summary Judgment was granted by District Court. District Court found that the homeowner Respondent owed a duty of care to the Paul C. Presbrey but the dangers were open and obvious. The District Court did not address the "retained control" doctrine which Appellant argues is the correct standard.

LEGAL ARGUMENT

I. Standard

When certified questions arise from a denial of summary judgment, the summary judgment standard applies; therefore; we review the record to resolve “whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law.” Employers Mut. Cas. Co. v. A.C.C.T., Inc., 580 N.W.2d 490, 493 (Minn.1998). On appeal, we “must view the evidence in the light most favorable to the party against whom judgment was granted.” Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn.1993) (citation omitted).

The main issues here are whether appellants had a legal duty to respondents and whether the district court erred in its interpretation of various statutes. Whether a legal duty exists is generally a question of law for the court to determine. Larson v. Larson, 373 N.W.2d 287, 289 (Minn.1985).

II. Argument

The District Court failed to address the actions of the Respondent of removing boards and nails from the jobsite, thus exercising control. The District Court applied the premise liability standard of open and obvious nature of any danger present. It is pertinent to look at the testimony presented in order to understand the issue is not one of simple “open and obvious” but goes to the

issues of control of the premises. Some of these facts have been recited in the previous motions but will be re-presented in this brief to address how the District Court did not apply pertinent facts to the law and failed to apply to the proper standard.

Paul C. Presbrey's son Paul A. Presbrey (hereinafter son) was helping his father build the decks for the Respondents. On August 25, 2006 son was working with his father on the rear deck. Son was setting up the scaffolding and taking off some of the railings on the rear deck. His father Paul C. Presbrey was on the ground cutting. See deposition; Paul A. Presbrey, 12-2-08, Appellants' Appendix (A11) Son left the jobsite early around 11:00 a.m. to attend a doctor's appointment. He planned to return to the jobsite after his appointment. (A8 to A10). Due to misty conditions the Presbrey's discussed shutting down early that day son believed that if his father didn't have anyone else there to work with him he would have gone to lunch. (A31). Father slipped and fell and eventually passed away due to the injuries sustained in the fall. Respondent admitted in his deposition that he changed the jobsite before the incident. Respondent admits he was picking up boards on the deck construction and pulling out nails. See deposition Jonathan K. James, 12-2-08 Appellant's Appendix (A66, A73). He also admits that he used a drill and a crowbar to remove screws and nails from lumber. (A68) He admits he was not told to do this (A74). Clearly the

Respondent admitted he had exercised some control over the jobsite Paul C. Presbrey may not have been aware of the work done. The District Court applied the wrong standard. The proper standard revolves around the “retained control” doctrine once the “control” issue kicks in the District Court did not go far enough in its analysis.

The Restatement of Torts provides that the duty of a property owner or his general contractor to the employees of a subcontractor is limited:

The employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.

Restatement of Torts 2D § 409 (1965). See Conover v. Northern States Power Co., 313 N.W.2d 397, 403 (Minn. 1981); Rausch v. Julius B. Nelson & Sons, Inc., 276 Minn. 12 149 N.W.2d 1 (1967).

The exception that applies is the “retained control” doctrine. Under this doctrine, an exception to the general rule exists when the general contractor retains control of the work site:

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 of Torts; 2D § 414 (1965).

Minnesota also recognizes this so-called retained control exception. See Conover, supra, 313 N.W.2d at 401; Thill v. Modern Erecting Co., 272 Minn. 217, 136 N.W.2d 677 (1965).

The “retained control” exception imposes liability when a general contractor voluntarily contractually undertakes the duty of taking “all reasonable precautions for the safety of, and to provide all reasonable protection to prevent damage, injury, or loss to all employees on the job.” Lemmer v. IDS Properties, 304 N.W.2d 864, 867 (Minn. 1980). Such contractual undertakings are valid evidence of the duty of a general contractor to others. See Foster v. Herbison Constr. Co., 263 Minn. 63, 115 N.W.2d 915 (1962).

There need not be an actual contract. The duty of a general contractor is to exercise reasonable care and to promote safety is one that arises typically not from contract but rather from the circumstances under which the construction has actually proceeded. See, e.g., Rausch v. Julius B. Nelson & Sons, Inc., 276 Minn. 12, 22, 149 N.W.2d 1, 6 (1967). The Minnesota Supreme Court has said that a general contractor’s contractual agreement may be used to create a duty to an injured employee of a sub-contractor. Lemmer v. IDS Properties, 304 N.W.2d 864, 868 (Minn. 1980)(“where the general construction manager is the possessor of the property and has voluntarily, contractually undertaken the duty of taking safety precautions for the safe construction of the building , a greater degree of

care is required. Whether the standard of care was met was a jury question . . .

“). Id.

The court in Lemmer also stated a general contractor’s contract with a building owner may create a duty to an injured employee of a sub-contractor. The duty arises when the general contractor voluntarily contractually undertakes the duty of taking “all reasonable precautions for the safety of, and to provide all reasonable protection to prevent damage, injury, or loss to all employees on the job.” Id. at 867. The court distinguished the duty of a property owner and a general contractor:

Although a mere possessor of land will not have a duty to anticipate the danger in this case, where the construction manager is the possessor of the property and has a voluntarily contractually undertaken the duty of taking precautions for the safe construction of the building, a greater degree of care is required. Id.

The case law and restatement have further gone on to delineate the control issue. "Retained control" may be found when a contractor in possession of a work site acts in such a manner at the construction site that its conduct controls or directs the project with sufficient dominance that it has exercised sufficient dominance to be accorded the same responsibilities that an owner of property would otherwise have over non-construction property.

The Restatement has the perspective that "something more" than ordinary activities of a general contractor are required for the doctrine of "retained control" to make such a contractor liable for the simple performance of its unique directoral tasks. The standard in Minnesota as applied by the courts is that the exception applies even when "the right retained by the [general contractor] to control the actions of [the sub-contractor's] employees was . . . more in the nature of general policing of the premises rather than a direct authoritative control over the manner in which they performed their work." Thill v. Modern Erecting Co., 272 Minn. 217, 227, 136 N.W.2d 677, 683 (1965)

Again the court noted under Minnesota law, a general contractor owes the duty to foresee certain dangers and take steps to guard against them, or to warn, in the event that guarding cannot assure adequate protection. Lommen v. Adolphson & Peterson, 283 Minn. 451, 168 N.W.2d 673 (1969).

The court has also defined criteria used to judge the degree of control needed before the retained control exception will be applied against a general contractor include:

Whether arising from a contract or in light of circumstances surrounding the construction project, the supervision as a general policing authority of the manner in which work is performed by a co-tortfeasor subordinate over how it performed its work has been held to be a sufficient retention of control to justify

an exception to the general rule. Thill v. Modern Erecting Co., 272 Minn. 217, 227, 136 N.W.2d 677, 683 (1965).

Under the Restatement, something more than mere coordination of the various contractors must be shown, since that is part of the typical function of a general contractor, whether or not control is retained. Restatement of Torts, 2D § 515, Comment (a) (1965). Similarly, something more than the right to inspect or make suggestions to subcontractors must be shown, since that as well is a standard function of a general contractor, whether or not control is retained. Id.

Finally, applicable to the case at bar the case there is a duty to warn. The District Court did not address this issue. Again, they did not go far enough. Once work is done and control exercised the Respondent should have informed Paul A. Presbrey of the work done. Fault may be assessed for failure to warn against dangerous conditions or those which otherwise render a premises generally safe. This duty, which exists on the owner/possessor of land, also applies to a general contractor, who, by the nature of some of his conduct, exerts sufficient control to be considered a "possessor of land" for certain purposes. See Whirlpool v. Morris, 222 F. Supp.645 (D. Minn. 1963), *aff'd*, 332 F.2d 901(8th Cir. 1964); Gaston v. Fazendin Construction Inc., 262 N.W.2d 434 (Minn. 1978).

The basis for the duty of the contractor to exercise reasonable care and promote safety arises not by virtue of a contract, but rather based upon all the circumstances relating to the manner in which the construction was proceeding. Rausch v. Julius B. Nelson & Sons, Inc., 276 Minn. 12, 149 N.W.2d 16 (1967).

A duty also exists to foresee certain dangers and take steps to guard against them or warn in the event guarding cannot safely assure protection. Lommen v. Adolphson & Peterson, 283 Minn. 451, 168 N.W. 2d 673 (1969).

Furthermore, there is a duty to police and maintain jobsite safety. Liability may also be imposed even when there is only a finding that "the right retained by the [general contractor] to control the actions of [sub-contractor] employees was . . . more in the nature of general policing of the premises rather than a direct authoritative control over the manner in which they performed their work.." Sutherland v. Barton, 570 N.W.2d 1 (Minn 1997)

The mere fact that the owner of the premises where the construction project is being undertaken remains in possession of the property, does not mean that the owner has also "retained control." The court has held that the property owner must retain control over the operative detail of the work such that the contractor employing the injured worker was not entirely free to do its work in its own way. Sutherland v. Barton, 570 N.W.2d 1 (Minn. 1997)

Whether the standard of care was met was a jury question. Id. Lemmer v. IDS Properties, 304 N.W.2d 864,868 (Minn. 1980).

There remain significant fact disputes as to control of the premises. Although respondent Jonathan James attempts to state he was not the general contractor or in control of the construction. He admits to exercising some control. The District Court did not address the issues. Respondent admits he was picking up boards on the deck construction and pulling out nails. (AA58 to A59, A66, A73). He also admits that he used a drill and a crowbar to remove screws and nails from lumber. (A68) He admits he was not told to do this (A74). The District Court does not even address this in their decision. As analogous to Lemmer, Mr. James has voluntarily undertaken the duty of taking precautions for the safe construction of the deck. Clearly, this is a jury question. This is more than mere coordination. The removal of nails and boards goes to safety issues. Without telling Mr. Presbrey of his work he has substantially changed the jobsite. Respondent did not warn Mr. Presbrey and therefore did not maintain a safe jobsite. This is confirmed in the fact that while reviewing the site, Mr. Presbrey's son observed several decking boards were lifted up with loose nails. (A15) One of the deck boards was in fact missing and Mr. James admitted to Paul Jr. that he had loosened deck boards (A14-16)

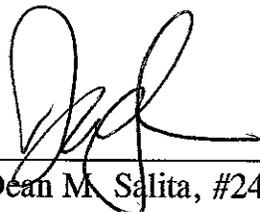
Clearly, the respondent owed a duty to Mr. Presbrey and it was foreseeable that removing nails and security on a wet day was dangerous. The respondent has exercised control by doing this. The District Court's decision was that the landowner had no duty to warn because the dangers of the jobsite was open and obvious. See Order Granting Summary Judgment 7-13-09, Appellants' Appendix (A112). It relied on Peterson v. W.T. Rawleigh, 274 Minn 497, 144 N.W. 2d 555 at 558(Minn 1966). The District Court missed the key fact that the Respondent himself, by his own admission, changed the jobsite. If there was an open and obvious dangerous condition, the Respondent created it himself and gave no warning to Paul C. Presbrey. The District Court decided facts that were still in question. The District Court found that because Mr. Presbrey was in jeans and sandals he knew he could fall. (A110). Again, this is a fact question which is more appropriate for a jury to decide. The District Court did not take into account that the Respondent's admission as to removal of boards and nails was a substantial change in the jobsite. If Respondent truly did not want control, he should not have altered the jobsite. In keeping with that finding the Mr. Presbrey would not have expected any change and the condition of the jobsite would not be open and obvious negating the District Court's finding.

CONCLUSION

The District Court erred in finding that the Mr. Presbrey should be aware of an open and obvious condition in the workplace where his death occurred. The Respondent exercised control of the jobsite by removing boards and nails. The actions of the Respondent create fact disputes that the District Court erred in not addressing.

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