

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.

RESPONDENTS' 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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LEGAL ISSUES

I. Whether Respondents, as landowners, breached a duty of reasonable care to Presbrey as a business invitee to Respondents' property.

Trial court held: No.

Apposite cases: *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *Bisher v. Homart Development Co.*, 328 N.W.2d 731 (Minn.1983); and *Olmanson v. LeSueur County*, 693 N.W.2d 876 (Minn. 2005).

II. Whether Respondents retained control of the worksite and are therefore liable for Presbrey's injuries.

Trial court held: No.

Apposite cases: *Sutherland v. Barton*, 570 N.W.2d 1 (Minn.1997); and *Zimmer v. Carlton County Co-op. Power Ass'n*, 483 N.W.2d 511 (Minn.App.1992).

STATEMENT OF THE CASE

Respondents Jonathan James and Carla James ("Respondents") hired Paul C. Presbrey ("Presbrey") to rebuild two decks on their property. While at the worksite, Presbrey apparently fell and suffered injuries that resulted in his death. Presbrey's surviving spouse brought this action, alleging that Respondents had the duty to use reasonable care for Presbrey's safety on their premises, and to inspect and repair the premises or to warn of an unreasonable risk of harm. She also alleged that Respondents, as general contractors of the project, were negligent in instructing and/or supervising Presbrey. Finally, she alleged that Respondents retained control of the worksite and therefore undertook the duty of taking all reasonable precautions for Presbrey's safety and to provide all reasonable protection to prevent damage, injury and loss to Presbrey and, as such, had the duty to warn, police and maintain the worksite. [RA-2].

Respondents moved for summary judgment in Washington County District Court, Tenth Judicial District, which was granted by Order of The Honorable Elizabeth H. Martin. [A-109]. The court found that Respondents owed Presbrey “a duty of reasonable care that is not higher than any standard of care” and that Respondents did not operate as Presbrey’s general contractor. [A-110]. Judgment was entered on July 15, 2009 [A-114], after which Appellant initiated this appeal. [RA-17].

STATEMENT OF FACTS

Respondents Jonathan and Carla James have resided at _____
_____, since approximately 2002. [A-49, A-56-7]. At the time they purchased the residence, there were two decks attached, one in front and one in back of the house. In 2006, Respondents decided to replace the decks, which were small, old, and rotting. [A-57].

Sometime in the summer of 2006, Jonathan James (“James”) spotted Paul C. Presbrey (“Presbrey”) working at a housing development. James told Presbrey he was looking for someone to build a deck and Presbrey responded, “I’m your guy, I build decks.” [A-52]. A few weeks later, Presbrey came to the James home to discuss the project. At that time, Respondents hired Presbrey to rebuild their decks and agreed to pay him by the hour plus materials. [A-54-5]. Respondents had not known Presbrey prior to meeting him that summer. [A-52]. There was no written agreement between the parties. [A-54].

At the time he met Respondents, Presbrey was 70 years old [RA-13] and worked part time as an independent contractor. Presbrey presented himself to Respondents as a

deck expert. [A-72 and RA-14]. Presbrey was responsible for every aspect of Respondents' deck project, including, but not limited to, securing building permits, providing all tools and equipment, choosing his work clothes, choosing when he would and would not work, determining how the work would be completed, providing and installing any necessary scaffolding, providing and setting ladders, dismantling the existing decks, measuring for necessary materials and supplies, and purchasing and transporting such materials and supplies. [A-54, A-58, A-72, and RA-14-5]. James did not assist with any of these things. [A-59, A-60, A-68, A-70, A-82 and RA-15].

Presbrey started work at the James home on Monday, August 21, 2006 [A-53] and spent most of that week working on the deck project. Prior to that, Respondents had done nothing to the decks. [A-58]. During the time Presbrey was working at Respondents' property, James would occasionally check on Presbrey's progress. [A-60-1]. However, James did not supervise Presbrey in any way [A-60, A-85-6 and RA-15] and did not help Presbrey work on the project, with one exception. James noticed that, as Presbrey pulled boards from the existing deck, he would toss them up on the deck floor or on the ground with nails exposed. [A-50-60 and A-70-1]. James would periodically clean up the site by removing these boards and the nails so that no one would step on them. [RA-15]. Presbrey did not ask James to do this. [A-74]. By periodically checking on Presbrey's progress and performing cleanup at the worksite James did not consider himself to be a general contractor of the project, just an interested homeowner. [A-60, A-83 and RA-15].

On the morning of Friday, August 25, 2006, Presbrey came to work in sandals and new jeans, which was different from what he normally wore. [A-77 and A-87]. He had already completed his work on Respondents' front deck, and had begun work on the back deck. [A-83]. Because it was drizzling, and because of the way Presbrey was dressed, James did not expect Presbrey to be working on the deck that day. [A-77, A-85 and A-87]. Presbrey's son, Paul A. Presbrey ("Paul Jr.") testified that he worked with his father that morning [A-7-8], but that he left for a doctor's appointment some time after 11:00 A.M. [A-10]. Paul Jr. further testified that he and his father had finished the front deck, set up the scaffolding around the back deck, and took off the railing from the back deck. [A-9 and A-11]. He testified that he did not loosen the floorboards of the deck that day, and that he did not see his father loosen them. [A-16].

Although Paul Jr. testified that James also worked on the project that morning [A-15-7], his testimony is based on his recollection of a conversation he had with James, and conflicts with James's testimony. Paul Jr. did not actually see James work on the project on August 25, 2006, but he believes James loosened the floorboards of the back deck on that morning, by pulling up the nails. [A-15-6].

James testified that he did not work on the project on August 25, 2006. [RA-15]. That morning, he was in dress clothes, preparing to travel to Mankato for his work. [A-77, A-85 and A-87]. However, James testified that, earlier, Presbrey had loosened some of the back deck boards and thrown them up on the wooden beams with nails exposed, and that James had removed nails from those boards. [A-71-2]. At no time did James loosen the boards. [RA-15].

James talked briefly with Presbrey on the morning of August 25, 2006, then left to take his young daughter to a neighbor's house. [A-77-8]. When James left Presbrey, Presbrey was standing on the concrete underneath the scaffolding around the back deck holding a tape measure. [A-89-90]. James did not see Paul Jr. that day and does not know if he worked on the back deck, although James had seen Paul Jr. working on the front deck earlier in the week. [A-90]. When James returned from the neighbor's house, he looked out the back porch window toward the deck, but did not see Presbrey. He then heard someone groaning and discovered it was Presbrey, lying on his back on the concrete. [A-78]. Presbrey was bleeding and gasping, so James called 911 and tried to comfort Presbrey until emergency personnel arrived. Presbrey was taken by ambulance to the hospital where he died that night. [A-78-9].

There were no witnesses to Presbrey's accident. James did not see Presbrey fall and does not know how it happened. [A-80]. Paul Jr. also did not see Presbrey fall because he had gone to his doctor appointment. Paul Jr. testified that the accident occurred close to noon. [A-29]. He was on his way back to the jobsite when he received a call from his mother informing him of the accident. [A-12].

STANDARD FOR REVIEW

On an appeal from summary judgment, the appellate court examines two questions, whether there are any genuine issues of material fact and whether the lower court erred in its application of the law. *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn. 1997). On appeal from summary judgment where no material facts are in dispute and the only question is one of law, the appellate courts review *de novo*. *Dairyland Ins.*

Co. v. Starkey, 535 N.W.2d 363, 364 (Minn. 1995). As we shall see, there are no genuine issues of material fact in this case and, further, the trial court correctly applied the law.

Defendants in a negligence action are entitled to summary judgment when the record reflects a complete lack of proof of any of the four elements necessary for recovery: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001), citing *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn.1995). The trial court correctly determined, in this case, that the record reflects a complete lack of proof that Respondents breached a duty to Presbrey.

ARGUMENT

Appellant argues that the trial court applied the wrong standard and overlooked some important facts in deciding the summary judgment motion that is on appeal in this case. Specifically, Appellant argues that the trial court should not have applied the “open and obvious” standard, set forth at Restatement (Second) of Torts § 343A, but rather should have applied the standard set forth at Restatement (Second) of Torts § 414, because Respondents “retained control” of the worksite.

It is clear from the trial court’s Order that it applied both of the above standards, finding in Respondents’ favor on both theories. Although Respondents agree they owed Presbrey a duty of reasonable care, they dispute they owed him the higher standards of care that Appellant would impose—to take all reasonable precautions for Presbrey’s safety, to provide all reasonable protection to prevent injury to Presbrey, and to inspect, repair, warn, police and maintain the worksite. Appellant urges this court to impose these

higher standards of care on Respondents because she believes Respondents operated as the general contractor of their deck project and were therefore supervising Presbrey in his work. The evidence is overwhelming, however, that Presbrey was an independent contractor and that Respondents were simply interested homeowners who retained no control over the project or the worksite.

I. Respondents, as landowners, did not breach their duty of reasonable care to Presbrey as a business invitee to Respondents' property.

On this issue, the trial court held as follows: "Although it is undisputed that James owed a duty of care to Presbrey, this duty of care standard is not any higher than of a person under similar circumstances. Further, any dangerous condition on the land would have been either created by Presbrey or obvious to him." [A-112]. The trial court did not err in applying the proper law to the facts, as examined below.

Any legal analysis of an action brought against a landowner alleging negligence must begin with an inquiry into whether the landowner owed the entrant a duty, which is generally an issue for the court to determine as a matter of law. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). It is well established that a landowner has a duty to use reasonable care for the safety of all entrants upon the premises. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 880 (Minn. 2005). However, this duty is not absolute and will not be imposed if a danger is known or obvious. Minnesota courts have adopted the rule set out in Restatement (Second) of Torts § 343A (1965), as follows:

"A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Baber v. Dill*, 531 N.W.2d 493, 495-6 (Minn.1965).

This rule imposes the duty of reasonable care on both the landowner and the entrant. An entrant is held to the same standard of care as a landowner, that of a reasonable man under the circumstances then existing. *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639, 647 (1972). A landowner's "duty will be modified according to the expected use to which the land will be put. The entrant's duty of exercise of reasonable care for his own safety will likewise vary according to circumstances under which he enters the land." *Id.* Among the factors to be considered in determining liability for injury to an entrant upon land "might be the circumstances under which the entrant enters the land . . . ; foreseeability or possibility of harm; duty to inspect, repair, or warn; reasonableness of inspection or repair; and opportunity and ease of repair or correction." *Id.* at 648.

Thus, breach of duty in a premises liability case is not proved by the mere occurrence of an accident, but rather is determined by what should have been reasonably anticipated. "The duty is to guard, not against all possible consequences, but only against those which are reasonably to be anticipated in the normal course of events." *Bisher v. Homart Development Co.*, 328 N.W.2d 731, 733 (Minn.1983). Although Respondents owed a duty of reasonable care for Presbrey's safety, they are not liable to Presbrey, or his family, for any condition or activity on their property that was known or obvious to Presbrey. Presbrey, too, was obligated to exercise reasonable care for his own safety according to the circumstances under which he entered the property.

Presbrey entered Respondents' property as a deck expert. He was present on the property on the day of the accident for the sole purpose of removing an existing deck and constructing a new deck. Presbrey was a veteran deck builder and had all the necessary experience to complete the project. Everything that was done to alter the property was done by Presbrey or at his direction. He set up the scaffolding and the ladders, and he was in the process of dismantling the existing deck. As a result, under the *Peterson* factors set forth above, any dangerous condition on the property would have been known or obvious to Presbrey.

Respondents believe Presbrey was injured as a result of his own negligence. Presbrey chose to be at the work site on a day when it was drizzling. If he climbed a ladder, or the scaffolding, he did so knowing he could slip and fall on the concrete beneath him. Respondents had no duty to warn him of such an obvious danger. *See Rausch v. Julius B. Nelson & Sons, Inc.*, 276 Minn. 12, 21, 149 N.W.2d 1, 7 (1967) (there is no duty to warn against dangers which are obvious). If there was some other danger existing on the property, Respondents did not know about it. [RA-16]. Respondents have no liability if they do not have either actual or constructive notice of a defective condition on the premises. *See Otto v. City of St. Paul*, 460 N.W.2d 359, 362 (Minn. Ct. App. 1990).

The fact that Presbrey was injured at the jobsite does not automatically mean Respondents were negligent. Negligence is determined by what should have been reasonably anticipated and not merely by what happened. *Bisher*, 328 N.W.2d at 733. Respondents had no reason to anticipate any harm coming to Presbrey. Their whole

purpose in hiring Presbrey was to have him come in and make their property safer. Respondents did not have that expertise. Respondents had never built or dismantled a deck and knew nothing about it. They relied on Presbrey and his experience to recognize any dangerous condition. [A-73 and RA-14 and 16]. It is Presbrey who should have anticipated the dangers that existed on the property, or that he created. It is Presbrey who should have taken precautions for his own safety.

Appellant complains that Respondents had a duty to warn, which was not addressed by the trial court. [Brief p. 9]. Per Restatement (Second) of Torts § 343A (1965), set forth above, the duty to warn would have applied to Respondents in only two situations: (1) prior to turning over the jobsite to Presbrey, unless the danger was known or obvious to Presbrey, and (2) in the event Respondents anticipated harm to Presbrey despite the known or obvious nature of the danger. Neither of these situations applies in the present case for reasons already discussed. Respondents hired Presbrey to correct the obviously dangerous nature of their property and they did not anticipate any harm coming to Presbrey as a result, because he had held himself out to be a deck construction expert. Respondents had every reason to believe that Presbrey knew how to complete the project safely.

Appellant cites *Whirlpool Corp. v. Morse*, 222 F.Supp. 645 (D.C.Minn. 1963), *aff.* 332 F.2d 901 (8th Cir. 1964) and *Gaston v. Fazendin Const., Inc.*, 262 N.W.2d 434 (Minn. 1978) in support of her contention that Respondents had a duty to warn. In addition to being a federal case, and, therefore, not precedent for this court, the *Whirlpool* case can be distinguished from the present case by its facts and the issues presented. The *Gaston*

case can also be distinguished from the present case. In *Gaston*, a telephone company employee brought an action against defendant construction company to recover for injuries he sustained in a fall while installing telephone wires in a home being constructed by the defendant. The court found that the defendant had a duty to warn plaintiff of a hole that defendant had exposed in the floor, through which the plaintiff fell, because the defendant should have anticipated harm to plaintiff. This fact situation is much different from that in the present case, because the construction company was in control of the entire worksite and had caused the dangerous condition existing on the property. These distinctions will be more fully explored below.

II. Respondents did not retain control of the worksite and are not liable for Presbrey's injuries.

On this issue, the trial court held as follows: “[Respondents] did not operate as Presbrey’s general contractor; instead, they acted as simply interested homeowners. Presbrey was an independent contractor who had absolute control of the site, including the times he worked, the attire he wore, the setting and dismantling scaffolding, and whether he employed any safety precautions while working, and therefore was responsible for his own safety.” [A-113]. Again, the trial court did not err in applying the proper law to the facts.

Appellant, however, questions whether the trial court properly considered all the facts. Appellant argues that certain facts, which she says were ignored by the trial court, prove Respondents retained control of the worksite, which, under Restatement (Second) of Torts § 414, imposes liability on Respondents for Presbrey’s injuries. However,

Appellant misrepresents those facts, as well as the nature of the relationship between the parties.

A. Appellant misrepresents certain facts.

Appellant's theory in this case, based on the testimony of Paul Jr., is that James is liable for Presbrey's injuries because he removed nails and boards from the old deck without warning Presbrey and, in so doing, exercised control over the project. Appellant believes Presbrey fell from the scaffolding located next to the old deck, that he attempted to grab hold of the deck boards to steady himself, but that, because James had loosened the boards, Presbrey was unable to regain his balance, and fell. [A-14-16]. However, Appellant's theory is speculative and not substantiated in the record.

Appellant misrepresents that James admitted he exercised control over the jobsite [Brief pp. 5, 11 and 12]. James has never made such a claim and has testified only as follows:

- “7. Presbrey loosened boards from the back deck prior to August 25, 2006, the date of the accident. I never loosened any of the boards from the deck by prying up nails or screws; I only removed exposed nails from boards that had already been loosened, and picked up loosened boards to remove them from the site.
8. The only work I did on the project was to periodically clean up the site by collecting loose nails and boards that had been removed from the old deck. The boards and nails had been thrown all over and I was concerned that someone would step on them or that they would cause my lawnmower to get a flat tire. No one asked me to do this. I did no work to dismantle the deck and did not remove any boards from the deck.
9. I did not work at the site on Friday, August 25, 2006, the day of Presbrey's accident.” [RA-15].

Although Paul Jr.'s testimony conflicts with James's testimony, Paul Jr.'s testimony is based on his recollection of a conversation he had with James after the accident and is not based on his own observations. Paul Jr. did not see James remove the boards or nails on the day of the accident.

Appellant also misrepresents that James voluntarily undertook the duty of taking precautions for the safe construction of the deck. [Brief p. 11]. Nothing James did was related to the dismantling of the old deck or the construction of the new deck. He was only concerned with picking up exposed nails so that no one stepped on them and so that his lawnmower did not get a flat tire. James has no experience or special knowledge of what constitutes a safe construction site and certainly did not "voluntarily undertake" such a duty. It is a leap for Appellant to assume, because James removed nails and boards from the site, that he was asserting control over the whole project or that cleaning up the site somehow made him a general contractor.

Appellant further misrepresents that James substantially changed the job site without warning Presbrey. [Brief pp. 11-12]. James's testimony is that he did not work on the project at all on the day of the accident and that he had never removed any nails or boards from the deck itself. Even if James had worked at the site that day, and even if he had loosened and removed boards from the deck, there is no evidence to suggest that his actions caused Presbrey's death. Because there were no witnesses to Presbrey's fall, it is not clear exactly how it occurred. No one knows if he attempted to grab hold of the deck boards to steady himself, as Appellant claims. Further, Appellant's allegation that James

did not warn Presbrey implies that James needed to warn Presbrey because Presbrey did not know there were loose deck boards, but that fact is not established by the record. It is possible that Presbrey himself loosened and lifted the deck boards just prior to his death.

These misrepresentations do not amount to “significant fact disputes,” as Appellant claims. [Brief p. 11]. The facts that Appellant refers to—that James worked at the site on the day of the accident, that James loosened deck boards without warning Presbrey, that Presbrey attempted to grab the loose deck boards, but fell instead to his death, and that Presbrey did not know the deck boards were loose—are not disputed, they are simply non-existent, and should not result in a reversal by this court. The trial court did not overstep its bounds, as Appellant alleges, and act as a fact finder in this summary judgment action [Brief p. 12], because the facts in question are not “material facts” that would defeat a summary judgment motion. Whether or not James worked on the day of the accident, and whether or not James loosened deck boards, are not material facts in this case, because there is no evidence to conclude those actions caused Presbrey’s death. Therefore, these are not fact questions that a jury need decide.

B. Appellant misrepresents the nature of the relationship between the parties.

By focusing on the fact that James removed nails and boards from the worksite, Appellant is attempting to show that James retained control of the worksite and, as the general contractor of the project, owed a duty to Presbrey to make the premises safe, citing *Thill v. Modern Erecting Co.*, 272 Minn. 217, 226, 136 N.W.2d 677, 684 (1965). *Thill*, and most other cases Appellant cites, are not helpful in analyzing the present case,

however, because the injured party in those cases was an employee of a subcontractor who sued a general contractor. The nature of the relationship between the parties in the present case is very different, because Presbrey was not an employee of a subcontractor and the Respondents were not the general contractor. Before it is possible to analyze any legal duties owed by these parties, it is necessary to understand the nature of their relationship.

The record is clear that Presbrey was an independent contractor in this situation—not an employee and not a subcontractor. By definition, an independent contractor is “one who undertakes to do a specific piece of work for another without submitting himself to the other's control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.” *Angell v. White Eagle Oil & Refining Co.*, 169 Minn. 183, 187, 210 N.W. 1004, 1006 (1926).

Respondents hired Presbrey, an independent contractor, to replace two decks on their property and relinquished control of that part of their property to Presbrey for that purpose. Respondents did not operate as general contractors in this situation. They did not own any of the tools or equipment at the worksite, they did not decide where or how to set the scaffolding or ladders that Presbrey used, and they did not require Presbrey to work any particular days or hours. They did not instruct, or attempt to instruct, Presbrey on when, where or how to construct the decks. Indeed, if they had had that expertise, they would not have needed to hire Presbrey. Presbrey was free to determine when he worked, how he worked and whether he took any safety precautions. There is no

evidence to suggest that Respondents required Presbrey to work, or continue work, on the day of the accident; rather, the evidence suggests that James was surprised to see him working that day in the drizzling rain while wearing sandals. As an independent contractor, Presbrey had a duty to exercise reasonable care for his own safety, which is not a delegable duty. *Conover v. Northern States Power Co.*, 313 N.W.2d 397, 404 (Minn.1981).

Accordingly, the nature of the relationship between the parties was that of homeowners and independent contractor. Appellant has not presented any caselaw where a court has found a homeowner operates as a general contractor in this kind of situation, and Respondent is not aware of any such caselaw. There are a few cases, however, where the employee of an independent contractor has sued the employer of the independent contractor, which are helpful in analyzing the present case.

1. *Sutherland v. Barton.*

One such case is *Sutherland v. Barton*, 570 N.W.2d 1 (Minn.1997). In that case, Sutherland was an electrician and the employee of an independent contractor who, while working at the Waldorf Corporation plant, suffered fatal injuries when his metal tape measure came into contact with live buss bars. His widow brought a wrongful death action against Waldorf, claiming it was negligent in failing to shut off the power when the electrical work was being performed.

As in the present case, there were two issues presented *Sutherland*: (1) the nature of Waldorf's duty as a landowner to Sutherland as a business invitee at the Waldorf plant, *Id.*, at 7, which is the same as Issue I above, and (2) whether Waldorf was liable to

Sutherland, the employee of an independent contractor, *Id.*, at 4, which is similar to Issue II in the present case. On these issues, the court held that: (1) Waldorf had no duty to warn Sutherland about the known and obvious danger from the exposed buss bars, and (2) Waldorf, which did not retain detailed control over the work project or over the task on which Sutherland was working when he was injured, was not directly or vicariously liable for Sutherland's injuries. *Id.* The *Sutherland* court summarizes all the relevant law on these issues.

The first issue has been analyzed above. With regard to the second issue, the court stated that it has been hesitant to apply either direct or vicarious liability¹ to a company hiring an independent contractor for injuries to that contractor's employees. However, the court has been willing to do so in limited circumstances, such as when the company retains detailed control over a project and then fails to exercise reasonably careful supervision over that project, citing *Conover*, 313 N.W.2d at 401. For liability to attach, the company must retain control over the "operative detail" of the work, citing Restatement (Second) of Torts § 414 (1965). In other words, before the court will hold a company directly liable for injuries to an independent contractor's employees, it must have retained such a right of supervision that the contractor is not entirely free to do the work in his own way. *Id.*, at 5 -6. Indeed, in *Sutherland*, the court found that Waldorf

¹ *Sutherland* discusses the difference between direct and vicarious liability. "Direct liability" imposes liability when one party has breached a personal duty to another party through its own acts of negligence. *Sutherland*, 570 N.W.2d at 5. "Vicarious liability" imposes liability on one party for negligence of another party based on the relationship between the two parties. *Id.*, at 6.

did not retain sufficient control over Sutherland's work to be held liable for Sutherland's death. *Sutherland*, 570 N.W.2d at 6.

The present case differs in that Presbrey was not an employee of an independent contractor, but rather was himself the independent contractor. Even so, *Sutherland* would suggest that Respondents are not liable to Appellant for Presbrey's injuries. If the courts have been hesitant to apply liability to a company hiring an independent contractor for injuries to that contractor's employees, the courts should be even more hesitant to apply liability to a homeowner hiring an independent contractor for injuries to that independent contractor, especially when the independent contractor's injuries arose from a known danger to the property, which he was hired to correct.

Appellant focuses on certain facts that she says show James retained control over the worksite, including: (1) James admitted he picked up boards and pulled out nails, (2) James admitted he used a drill and crowbar to remove screws and nails from lumber, and (3) James admitted he was not told to do this. But these acts do not indicate that James retained any control over the "operative detail" of the work, which is necessary to impose liability, or that James had any supervisory role in the project whatsoever. These acts were all peripheral to the primary activity occurring on the property, which was the dismantling of an old deck and the construction of a new deck. If James had not performed these tasks, the primary activity would still have continued. The record is simply devoid of any evidence showing that Respondents controlled the operative detail of the deck project.

2. *Zimmer v. Carlton County Co-op. Power Ass'n.*

Another case with facts similar to the present case is *Zimmer v. Carlton County Co-op. Power Ass'n*, 483 N.W.2d 511 (Minn. Ct. App.1992). In *Zimmer*, the injured plaintiff was an employee of an independent contractor that was hired by defendant power company to maintain its power lines. The injured employee sued the power company, claiming, among other things, that it owed him a duty to ensure that his employer was qualified to do the maintenance work, that his employer hired employees who were so qualified, and that his employer followed safe procedures, all of which are different issues from those in the present case. The court held that the power company could not be held vicariously liable for the independent contractor's negligence that caused injuries to Zimmer, the employee of the independent contractor, but also considered whether the power company could be found personally, or directly, liable for Zimmer's injuries. Citing *Conover*, the court delineated two situations in Minnesota case law in which an employer has been held personally negligent and therefore liable for the injuries of its independent contractor's employees:

"This personal negligence . . . may consist of a breach of a duty to exercise reasonably careful supervision of a job site where employees of the independent contractor are working when the employer retains control or some measure of control over the project. . . . Even where the employer retains no control, he may still owe a duty of care, as a possessor of land, to persons coming on the premises, including the employees of an independent contractor. Ordinarily this duty would be to inspect and warn before turning over the jobsite." *Zimmer*, 483 N.W.2d at 513 -514, citing *Conover*, 313 N.W.2d at 401.

The *Zimmer* court found that neither situation applied to the facts of that case and further stated that the duty imposed on an employer as the possessor of land is to inspect the

premises for latent or hidden dangers and then to warn oncomers of those dangers. The court held that the power company did not have a duty to warn Zimmer of the dangers involved in power line work because his injuries were not caused by any latent or hidden defect in property, but rather by a danger known to him.

As in *Zimmer*, neither of the *Conover* exceptions apply to the present case. First, Respondents, as the employers, did not retain control of the worksite and were therefore not obligated to supervise Presbrey in how he accomplished the job. In fact, the trial court found that Presbrey had absolute control of the worksite. Second, because there was no “latent or hidden” danger on the property in question, Respondents did not have a duty to warn Presbrey. Any danger that existed on the property was obvious to Presbrey, who had been hired to correct the danger, or was created by Presbrey, who took control of the worksite and was in charge of everything that went on there.

Appellant argues that James loosened and removed old boards from the deck on the day of the accident and that this was the latent danger of which he did not warn Presbrey. As discussed above, James disputes that he loosened or removed boards from the deck, or that he worked at the site on the day of the accident. But even if he had done those things, the *Conover* case is clear that the duty to inspect and warn is imposed on the property owner *prior* to turning over the jobsite. At the time of Presbrey’s accident, Respondents had already turned the site over to Presbrey. The duty to warn is not ongoing where the property owner has not retained control of the site. Also as discussed above, removing nails and boards from the worksite does not amount to the requisite control needed to impose liability on the Respondents for Presbrey’s injuries.

Loose deck boards at a construction site are not a latent or hidden danger; they are to be expected. Appellant argues they were a latent danger in this case because she believes that if they had not been loose, Presbrey would be alive today, because, instead of falling, he would have grabbed hold of the boards and steadied himself. This theory is too speculative and, given that no one saw Presbrey fall, ignores all other possible scenarios that could have occurred in the moments before the accident. In the end, it is more logical to conclude that Presbrey's injuries occurred, not because he could not grasp the deck boards, but because he chose to work at the site in the rain and, as a result, lost his balance, either on a ladder or the scaffolding, and fell. Respondents had no duty to warn Presbrey of such an obvious danger.

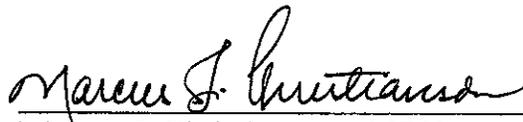
CONCLUSION

Paul C. Presbrey died as the result of an apparent fall he suffered at the home of Respondents Jonathan James and Carla James. Respondents hired Presbrey, an independent contractor, to rebuild two decks on their property and the fall occurred while Presbrey was working on one of those decks. Appellant brought this negligence action against Respondents, in which the trial court ordered summary judgment for Respondents, finding that any danger that existed at the worksite would have been obvious to Presbrey and that Presbrey had absolute control of the worksite. The trial court did not err. There are no genuine issues of material facts in this case and, further, there is a complete lack of evidence that Respondents breached a duty to Presbrey.

For all the foregoing reasons, Respondents Jonathan James and Carla James respectfully request the court to affirm the trial court's Order.

Dated this 4th day of November, 2009.

Respectfully submitted,

A handwritten signature in cursive script, reading "Marcus J. Christianson". The signature is written in black ink and is positioned above a horizontal line.

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