

NOTICE
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2013 IL App (4th) 130337-U
NO. 4-13-0337
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
December 20, 2013
Carla Bender
4th District Appellate
Court, IL

TIM AUGHENBAUGH,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Macon County
DECATUR MEMORIAL HOSPITAL,)	No. 07L110
Defendant-Appellee,)	
and)	
DECATUR MEMORIAL HOSPITAL,)	
Third-Party Plaintiff,)	
v.)	
RATHJE ENTERPRISES, INC., d/b/a BODINE)	Honorable
ELECTRIC OF DECATUR,)	Thomas E. Little,
Third-Party Defendant.)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly granted summary judgment in favor of defendant hospital where plaintiff failed to establish defendant hospital owed him a duty of care.
- ¶ 2 In September 2005, plaintiff, Tim Aughenbaugh, was injured while performing electrical repair work at Decatur Memorial Hospital. In August 2007, plaintiff brought suit against defendant, Decatur Memorial Hospital, alleging the hospital was liable for his injuries. In September 2007, defendant filed a third-party complaint against Bodine Electric of Decatur (Bodine). Defendant hospital moved for summary judgment on plaintiff's cause of action pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2012)). The trial court granted defendant's motion. Plaintiff appeals, contending the trial court

erred in determining there was no genuine issue of material fact. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In September 2005, plaintiff was an employee of Bodine. At all relevant times, Bodine provided electrical services to defendant hospital pursuant to a 2001 contract. The contract provided, in pertinent part:

"2.01. [Bodine] and [Decatur Memorial Hospital] are independent entities. Nothing in this Agreement shall be construed or deemed to create a relationship of employer and employee or principal and agent or any other relationship other than that of independent parties contracting with each other solely for the purpose of carrying out the provisions of this Agreement.

2.02. Except as herein specifically provided, neither party hereto shall exercise any control or direction over the methods by which the other party shall perform its responsibilities, obligations, duties and work. However architectural and contracts specifications shall govern."

Bodine also agreed to follow defendant's contractor safety guidelines, which provided all contractors were required to provide the necessary equipment and tools to complete their work. Further, these guidelines provided, "All contractors are responsible for their personal conduct and the safety of their employees." The guidelines required all contractors to meet or exceed defendant's safety guidelines in addition to all federal workplace safety standards.

¶ 5 On September 7, 2005, defendant's maintenance supervisor, Mike Stogsdill,

contacted Bodine's foreman at Decatur Memorial Hospital, Chuck Mayer. Stogsdill told Mayer a motor on an air-handling unit had broken and needed emergency repairs. Mayer called plaintiff at home and told him to report to the hospital.

¶ 6 When he arrived at the hospital, plaintiff grabbed his tools from a Bodine "gang box" and met with Stogsdill, who told plaintiff the job was urgent. Stogsdill took plaintiff to the seventh-floor penthouse where the defective motor was located and informed him of the nature of the problem. Plaintiff determined the motor needed to be replaced. Based on the size of the motor, plaintiff concluded its replacement would take two people to complete. Plaintiff called Mayer and asked him to come to the hospital to assist in replacing the motor. Mayer asked plaintiff to retrieve information about the motor from its faceplate. When Mayer arrived at the hospital, he and plaintiff went to the hospital's maintenance shop to retrieve a "pulley puller" to assist with their repairs. Plaintiff and Mayer returned to the seventh-floor penthouse.

¶ 7 The air-handling unit in which the defective motor was located was shaped like a "Y." At the end of each branch of the "Y" was a blower motor, which caused conditioned air to be pushed through the ductwork. The shaft of the "Y" fed the conditioned air to other parts of the hospital, including the intensive care unit (ICU). As plaintiff began his work, the parallel motor in the other branch of the "Y" remained on. Because the parallel motor remained on, it created a backflow of air that pushed up toward the motor plaintiff was servicing. The resulting backflow caused the inside parts of the motor to turn in reverse.

¶ 8 Mayer began making calls to various supply houses to try to find a replacement motor. While Mayer was on the phone, plaintiff entered the air-handling unit to begin servicing the motor. Neither Stogsdill nor Robert Trolia, defendant's second-shift maintenance engineer,

were present in the area. The first step in this process was to remove a belt guard from the face of the motor. Plaintiff loosened the bolts on the belt guard, and as he went to remove it, one of the motor's belts caught his work glove and pulled his hand through the motor's pulley system. As a result, plaintiff sustained serious injuries to his right hand. The belt had pulled his hand so violently it also injured his shoulder.

¶ 9 The backflow of air which ultimately caused plaintiff's injuries could have been prevented in two ways. First, a damper could have been closed, which would have blocked the backflow from entering the branch of the "Y" plaintiff was servicing. Second, the parallel motor could have been shut off. The damper was not closed by plaintiff or Mayer because neither knew the damper was there. Defendant's personnel did not close the damper, and apparently, only Trolia knew about the presence of the damper. The parallel motor was left running.

¶ 10 Prior to removing the belt guard, neither plaintiff nor Mayer conducted the prejob hazard assessment required of them by Bodine. The evidence showed, however, the defective motor had been "locked out" twice, once by Bodine and once by defendant's personnel. The "lock out" procedure cuts electricity to the area which has been locked out. Before work began, Trolia informed Mayer the parallel motor could be shut off so their work could be completed safely.

¶ 11 In August 2007, plaintiff brought suit against defendant. In September 2007, defendant filed a third-party complaint against Bodine, seeking contribution for its comparative fault and indemnification. Defendant moved for summary judgment on plaintiff's cause of action pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2012)). The trial court granted summary judgment in favor of defendant, finding plaintiff had failed to establish

defendant owed a duty to plaintiff under either section 414 or section 343 of the Restatement (Second) of Torts (Restatement (Second) of Torts §§ 343, 414 (1965)).

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues it did not owe plaintiff a duty of reasonable care, because the relationship between it and Bodine was that of owner-independent contractor. Plaintiff alleged two alternative theories for recovery. First, defendant retained control over Bodine's work sufficient to bring it within section 414 of the Restatement (Restatement (Second) of Torts § 414 (1965)). Second, defendant was liable under the more traditional section 343 premises liability of the Restatement (Restatement (Second) of Torts § 343 (1965)).

¶ 15 A. Standard of Review

¶ 16 For a plaintiff to succeed in a negligence action, he or she must present sufficient evidence to show defendant owed plaintiff a duty. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 72-73, 861 N.E.2d 1102, 1109 (2007). Failure to establish the existence of a duty is fatal to a plaintiff's case. *Downs v. Steel and Craft Builders, Inc.*, 358 Ill. App. 3d 201, 204, 831 N.E.2d 92, 97 (2005). The existence of a duty is a question of law to be determined by the court. *Id.*

¶ 17 The issue before us is whether the trial court erred in granting summary judgment in favor of defendant. Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to resolve a question of fact, but rather to determine whether a question of fact exists. *Forsythe v. Clark USA, Inc.*,

224 Ill. 2d 274, 280, 864 N.E.2d 227, 232 (2007). In reviewing a summary judgment disposition, we construe the record strictly against the movant and liberally in favor of the nonmoving party. *Id.* If plaintiff fails to establish any one element of a cause of action, summary judgment in favor of defendant is proper. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). We review *de novo* an order granting summary judgment. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15, 989 N.E.2d 591.

¶ 18 B. Section 414 of the Restatement (Second) of Torts

¶ 19 As a general rule, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor. *Downs*, 358 Ill. App. 3d at 204-05, 831 N.E.2d at 97. In Illinois, an exception to this rule exists in section 414 of the Restatement, which provides:

"One who entrusts work to an independent contractor, but who retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965). See also *Downs*, 358 Ill. App. 3d at 205, 831 N.E.2d at 97.

Comment (c) to section 414 provides further guidance on this principle:

"In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a

general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414 cmt. c (1965). See also *Downs*, 358 Ill. App. 3d at 205, 831 N.E.2d at 97.

¶ 20 Whether the employer retained sufficient control over an independent contractor to bring it within section 414 is typically a question for the trier of fact unless the plaintiff fails to present evidence sufficient to create a question of fact. *Downs*, 358 Ill. App. 3d at 205, 831 N.E.2d at 97-98.

¶ 21 The best indicator of whether an employer has retained control over a contractor is the parties' contract. *Id.*, 831 N.E.2d at 98. "The interpretation of a contract is a question of law and therefore may be decided on a motion for summary judgment." *Id.* When interpreting a contract, a reviewing court must consider the entire document to give effect to the parties' intent. *Id.* This determination is guided by the plain and ordinary meaning of the language of the contract. *Id.* We find the contract between Bodine and defendant did not evidence an intent by defendant to retain control over the method of Bodine's work or worksite safety.

¶ 22 In this case, the parties' contract explicitly stated the parties were independent

entities and nothing in the agreement was to be construed to create a relationship of employer-employee or principal-agent between Bodine and defendant. Further, the contract provided neither party was to exercise any control or direction over the methods by which the other party was to perform its responsibilities, obligations, duties, or work. Defendant's safety guidelines, which Bodine agreed to, provided Bodine was responsible for its conduct and the safety of its employees.

¶ 23 Our analysis under section 414 of the Restatement will not end here, however, because, as plaintiff properly asserts, a duty to an independent contractor's employee may arise where the employer undertakes action contrary to the language of the contract. See *Downs*, 358 Ill. App. 3d at 206-07, 831 N.E.2d at 99. Plaintiff contends the course of action taken by defendant was contrary to the contract language—defendant directed and controlled Bodine's work on the occasion in question—and accordingly, defendant was liable for plaintiff's injuries.

¶ 24 Plaintiff failed to present evidence sufficient to raise a question of fact as to whether defendant exerted control over Bodine and plaintiff for purposes of section 414 of the Restatement. In this case, plaintiff arrived at Decatur Memorial Hospital and met with hospital personnel. Hospital personnel directed plaintiff to the motor which needed service. Plaintiff and Mayer were going to use the hospital's "pulley puller" to complete their work. When plaintiff arrived at the hospital, defendant's personnel explained their preference the parallel motor be left running so conditioned air would continue to circulate to the ICU. Defendant's personnel also displayed a sense of urgency. When plaintiff met with Stogsdill initially, Stogsdill told plaintiff the parallel motor could not be shut off because it provided conditioned air to the ICU. When Mayer arrived, Trolia told him the parallel motor could be shut off in intervals of one hour so

Mayer and plaintiff could complete their work safely. The extent of defendant's "control" over this project ended here.

¶ 25 The plaintiff failed to present any evidence defendant retained a right of supervision to the extent Mayer and plaintiff were not permitted to service the motor in entirely their own way. In fact, the record shows much evidence to the contrary. Neither Stogsdill nor Trolia told plaintiff or Mayer how to do their job. Neither Stogsdill nor Trolia told plaintiff or Mayer how to diagnose the problem. Neither Stogsdill nor Trolia told plaintiff or Mayer how to fix the problem. Neither Stogsdill nor Trolia told plaintiff or Mayer which tools to use. Neither Stogsdill nor Trolia supplied plaintiff or Mayer with tools, other than the "pulley puller." Accordingly, we find the trial court properly found defendant owed plaintiff no duty under section 414 of the Restatement.

¶ 26 C. Section 343 of the Restatement (Second) of Torts

¶ 27 Defendant argues the trial court properly determined defendant owed plaintiff no duty under section 343 of the Restatement, which provides for a traditional premises liability theory. To determine whether the owner or possessor of the premises on which a plaintiff is injured owes plaintiff a duty, a court of review must consider the "reasonable (1) foreseeability and (2) likelihood of injury, *** (3) the magnitude of the burden on defendant in guarding against injury and (4) the consequences of placing that burden on defendant." *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 389, 706 N.E.2d 441, 446 (1998). The foreseeability prong of the duty test may be analyzed with reference to section 343 of the Restatement. *Id.* at 389, 706 N.E.2d at 447. Under this section, the harm is foreseeable and a defendant is liable for injury caused to his or her invitees by a condition on the land if, but only if he:

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965). See also *LaFever*, 185 Ill. 2d at 389-90, 706 N.E.2d at 447.

¶ 28 In this case, Troia knew the failure to lock out the parallel motor would create a backflow of air in the opposite branch of the "Y." Further, Troia knew about a damper which would have prevented the backflow. Troia knew a backflow would cause a locked-out motor to move in reverse. Defendant's personnel failed to lock out the parallel motor and close the damper.

¶ 29 Plaintiff argues summary judgment is improper where, as here, "the record shows that a general contractor knows or should have known that a subcontractor's employee is subject to a dangerous condition, yet did not provide protection from that danger," citing *Wilkerson v. Schwendener*, 379 Ill. App. 3d 491, 497-98, 884 N.E.2d 208, 214 (2008). Plaintiff misinterprets *Wilkerson*. In *Wilkerson*, the issue before the appellate court was whether defendant knew of the dangerous condition created by installing floor joists by balancing on wall frames without fall protection. *Id.* at 497-98, 884 N.E.2d at 214. The court held an issue of fact existed as to defendant's knowledge of the condition and thus, the trial court's grant of summary judgment in favor of defendant was improper. *Id.* at 498, 884 N.E.2d at 214.

¶ 30 In this case, the issue before us is whether defendant owed plaintiff a duty of care, not whether defendant knew of the condition. Accordingly, *Wilkerson* does not control this situation. Further, plaintiff's argument fails to address the second prong of section 343 of the Restatement: whether defendant should have expected plaintiff and Bodine would fail to discover the danger or fail to protect themselves against it.

¶ 31 The evidence shows the hospital had no reason to expect plaintiff or Mayer would not discover the danger. Bodine considered itself the expert in this situation and defendant's personnel typically deferred to Bodine and its employees in electrical matters. Moreover, Mayer was aware, based on the configuration of the air-handling unit, air being pushed by the parallel motor would create a backflow of air in the area in which the defective motor was located. Before work began, Trolia told Mayer the parallel motor could be shut down in intervals so work could be completed safely and without a backflow. Bodine's official written safety guidelines at the time warned its employees to be aware of air energy as it affected lock out procedures, although air energy was not listed on its prejob hazard assessment card.

¶ 32 Further, defendant had no reason to expect plaintiff or Mayer would fail to protect themselves against danger. Bodine and its employees were required to complete prejob hazard assessments, but none were completed for this job. Bodine and its employees signed an acknowledgment of defendant's safety guidelines, which provided Bodine and its employees were responsible for their own safety. Accordingly, we find plaintiff did not offer evidence to create a question of fact as to whether defendant owed plaintiff a duty of care under section 343 of the Restatement.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's order granting summary judgment.

¶ 35 Affirmed.