2012 App (1st) 111521-U

FOURTH DIVISION
March 29, 2012

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No. 1-11-1521

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM R. TUNBERG and KIM TUNBERG,	)	Appeal from the Circuit Court of
	)	Cook County, Illinois,
Plaintiffs-Appellants,	)	County Department,
v.	)	Law Division.
	)	
VACALA CONSTRUCTION, INC.,	)	No. 08 L 003556
	)	
	)	Honorable
Defendant-Appellee.	)	Lynn M. Egan
	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Sterba and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it granted the defendant's motion for summary judgment where the record established as a matter of law that the defendant owed no duty to the plaintiff under the voluntary undertaking doctrine.

¶ 2 This is an appeal from the circuit court's order granting summary judgment in favor of the defendant, Vacala Construction Inc. (hereinafter Vacala), in an action for negligence. On May 10, 2002, the plaintiff, William R. Tunberg (hereinafter Tunberg), was injured when he fell off a roof at the Deerfield High School construction site. At the time of the accident, Tunberg was

employed by Air Con Refrigeration & Heating, Inc. (hereinafter Air Con), which entered into a contact with the property owner, Township High School District 113, to install air conditioning units on the high school's rooftop. The defendant, Vacala, also had a contract with the property owner to provide "general trade work" for a limited portion of the job site.

¶ 3 As a result of this incident, together with his wife, Kim, Tunberg filed a complaint against Vacala, alleging that Vacala, acting as a general contractor, owed him a duty of care to maintain a reasonably safe working environment. Tunberg further alleged that Vacala's negligent management of the construction site (including failure to maintain a safe working environment and to properly cover, barricade or rope off the roof) proximately resulted in his injuries.

¶ 4 Vacala moved for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2008)), contending that it owed no duty of care to Tunberg to keep the construction premises safe because it had no special relationship with him (*i.e.*, it neither employed Tunberg at the time of the injury, nor acted as a general contractor at the construction site with duties of care to its subcontractors, such as Tunberg claimed Air Con, his employer, had been). In support of this contention, to its motion for summary judgment, Vacala attached contracts entered into between itself and the property owner.

¶ 5 In arguing against the grant of summary judgment in favor of Vacala, the plaintiffs conceded that the contract between Vacala and the property owner revealed that Vacala was not the general contractor for the construction site and therefore had no responsibility to Tunberg, but contended that a duty should nevertheless be imposed upon Vacala pursuant to the voluntary undertaking doctrine. See Restatement (Second) of Torts §324A (1965).

¶ 6 The circuit court disagreed with the plaintiffs and granted Vacala's motion for summary judgment. The plaintiffs now appeal contending that the circuit court erred when it found that Vacala had not assumed a voluntary undertaking to provide adequate safety measures, including fall protection at the Deerfield High School construction site, upon which Tunberg relied. For the reasons that follow, we affirm.

¶ 7 I. BACKGROUND

¶ 8 The record reveals the following undisputed relevant facts. On May 10, 2002, Tunberg was working on the roof of Deerfield High School science building as an employee of Air Con. Tunberg was responsible for installing air conditioning units on the roof of the north wing of the high school building. The process required the removal of air conditioning units from wooden pallets on which they were transported, as well as the disposal of the pallets once they had been dislodged. Tunberg took it upon himself to throw the pallets off the rooftop to the ground. While throwing one of the pallets off the roof, Tunberg fell and sustained several injuries, including a broken leg and arm.

¶ 9 As a result of his injuries, on April 1, 2008,[1] Tunberg, together with his wife, filed a complaint against Vacala alleging that Vacala was negligent, in that it: (1) failed to provide Tunberg with a safe, suitable and proper place with which to work; (2) failed to make a reasonable inspection of the premises and the work being done, when it knew, or in the exercise

[1]We note that the plaintiffs initially filed their cause of action immediately after the accident under case No. 2002 L 02202 in the circuit court, but that the cause was voluntarily dismissed with the right to refile pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2008))) on August 17, 2007.

of ordinary care, should have known that said inspection was necessary to prevent injury to Tunberg; (3) allowed an unsafe, unprotected and unguarded rooftop to exists, which it knew or should have known existed for several days prior to this occurrence; (4) failed to properly cover, barricade or rope off the roof when it knew or should have known that persons, including Tunberg, would be working on and around the roof; (5) failed to properly oversee job site safety for which it had primary responsibility; (6) failed to abide by several Occupational Safety and Health Administration (hereinafter OSHA) requirements including, *inter alia*, providing for frequent and regular inspections of the job site by competent persons, and properly training job site workers in proper protection against fall hazards; (7) failed to utilize proper safeguards required for construction and alteration and allowed the building to remain in a dangerous condition in violation of the Deerfield Municipal Code; (8) failed to implement a written job site safety program; and (9) failed to supervise work being done on the job site. Tunberg contended that as a direct and proximate result of Vacala's negligent management of the construction site, on May 10, 2002, he was injured when he fell off the rooftop in the course of attempting to discard a wooden pallet from the roof.[2]

¶ 10 On June 3, 2008, Vacala filed an answer to the plaintiffs' complaint, denying all the allegations therein. During discovery, Vacala first produced copies of relevant contracts regarding the Deerfield High School renovation and addition project. These contracts reveal that work on the project was broken down into modules identified by letters A through Q. They

[2]The complaint further alleged that as a result of this fall, Tunberg suffered numerous physical injuries, and his wife, Kim, suffered the loss of his companionship and support.

further reveal that Township High School District 113 (hereinafter the school district) signed a number of direct contracts with different companies for the purpose of completing the renovation project. According to the contracts, Legat Architects (hereinafter Legat) was the chief architect responsible for designing the renovations and thereafter monitoring compliance by all other contractors. In addition, the school district retained Durrant Construction (hereinafter Durrant) as the project manager and the school district's liaison with all contractors. Durrant was responsible for ensuring contract compliance and that the project was on schedule.

¶ 11 The documents also reveal that there was no contract entered into between Vacala and Tunberg's employer, Air Con. Rather, the school district entered into a direct contract with Vacala to perform general labor work on modules A, B, and C. The school district also entered into a separate direct contract with Tunberg's employer, Air Con, to perform mechanical/heating and cooling work on the project. Both contracts were standard construction contracts between a "contractor" and "the property owner." In addition, each contract specified that the company (Vacala or Air Con) was responsible for "all means and methods" of its own work including all obligations regarding the safety of its work. Specifically, Air Con's contract with the school district provides:

> "3.3.1 The Contractor shall supervise performance of the Work, using his best skill and attention. The Contractor shall be solely responsible for all construction, means, methods, techniques, sequence and procedures for coordinating all portions of work under the Contractor. The Contractor shall engage workmen who are skilled in performing the Work and all Work shall be performed with care and skill and in good workman like

manner under the full time supervision of an approved engineer or foreman. The Contractor shall be liable for all property damage including repairs or replacements or the Work and economic losses which proximately result from the breach of this duty. "

¶ 12 As part of discovery, Vacala also produced an affidavit by its superintendent, Gary Bleuer (hereinafter Bleuer), who had been assigned to the Deerfield High School construction project between October 2001 and July 2002. Therein, Bleuer explained that Vacala had entered into a direct contract with the school district to perform certain work with regard to Modules A, B, and C on the high school renovation project, and that it never entered into a separate contract with Tunberg's employer, Air Con. According to Bleuer, instead, Air Con had a direct/prime contract with the school district to perform mechanical piping and engineering work on Modules A, B, C, D, E, F, H, I, K N, P, G, and M of the project. This contract explicitly specified that Air Con was solely responsible for "the means and methods" of performing the contracted work. Bleuer further averred that Vacala did not have a contract to perform or provide the "means or methods" of construction of that portion of the work Tunberg was engaged in at the time of the accident. Rather, according to Bleuer, at the time of the accident, Tunberg was engaged in work that Air Con had contracted to perform directly with the school district.

¶ 13 During discovery, Vacala also produced a memorandum sent by Rodger Markham, Vacala's director of safety, to Pat Vacala on May 13, 2002, regarding Tunberg's accident.[3] In that memorandum, Markham wrote that on the day of the accident at about 11:30 a.m., he received a

[3]The memorandum was also sent to Ross Bennet, the vice president of Vacala, John Reagan the project manager for Vacala, and Ron Harness and Gary Bleuer, both superintendents for Vacala.

telephone call from Bleuer, informing him that Tunberg, "the foreman for Air Con" who is a subcontractor for Durrant, was throwing debris from the roof of the structure, when the pallet he was attempting to pitch over the side was caught by the wind, and the banding attached to the pallet entangled Tunberg and forced him over the edge with the pallet. According to the memorandum, two employees of Riggin Services, John Brydon and Nick Cradic witnessed the fall. The memorandum stated that an ambulance was called and that Tunberg was transported to a hospital in a helicopter with non-life threatening injuries. Tunberg sustained a compound fracture of the left arm and a broken leg.

¶ 14 According to the memorandum, Markham contacted Todd Green, the safety director for Air Con, who promised to send copies of all pertinent information to him regarding the incident, including Air Con's safety manual and procedures for "fall protection."

¶ 15 In the memorandum, Markham also noted that Tunberg committed four OSHA violations, including: (1) improper "fall protection;" (2) throwing debris from roof and not using debris chutes; (3) improper communication with general contractor; and (4) not using a safety monitor.

¶ 16 In addition, Markham noted that Bleuer had acted responsibly in this matter, but that even though Tunberg had "violated OSHA policies, we [Vacala] are ultimately responsible for safety on our site."[4]

¶ 17 Subsequently, the parties made their mandatory witness disclosures pursuant to Rule

[4]As shall be more fully demonstrated in Markham's deposition, at the time he wrote this memorandum, Markham had not read the contract between Vacala and the school district and was not aware that Vacala was not the general contractor at the construction site.

213(f) (210 Ill. 2d 213(f)), and the following nine witnesses were deposed: (1) Tunberg; (2) Rodger Markham; (3) Tom Goggin; (4) John Brydon; (5) Timothy Lally; (6) Ed Duffy; (7) Kenneth R. Johnson; (8) Matthew Tressler Olson; and (9) Nicholas Cradic.

¶ 18 A. The Plaintiff

¶ 19 Tunberg's deposition was taken on March 21, 2005. Tunberg testified that he is a journeyman pipe fitter with over 17 years experience in pipe fitting. He has had only two employers: Martin Peterson and Air Con. Both employers, as well as his union, have required him to attend OSHA training classes, which have included training on rooftop safety and fall protection for working at heights (such as using harnesses and lanyards).

¶ 20 In May 2002, Tunberg was employed as a foreman pipe-fitter for Air Con at the Deerfield High School construction site. He had been a foreman for Air Con for over seven years. According to Tunberg, Air Con generally acts as a subcontractor responsible for heating, refrigeration, ventilating, and process piping. At the Deerfield High School construction site, Air Con was responsible for installing heating and air-conditioning systems throughout the school.

¶ 21 Tunberg testified that he believed that there were two general contractors at the Deerfield High School construction site: (1) Vacala, who was in charge of the science wing addition to the high school[5]; and (2) Boller, who was in charge of the arts wing and the new gymnasium. Tunberg further stated that Legat was the architect for the project, and that Durrant was the project manager. Tunberg acknowledged that in coming to these conclusions he had not read any

[5]Tunberg explained that the entire project consisted of modules A, B, C, and K through Q, and that A, B, and C, referred to the science wing.

of the contracts between the relevant parties, but was merely guessing from his prior experience at construction sites.

¶ 22 Tunberg testified that while at the Deerfield High School construction site, once a week, he attended scheduling meetings, where all the contractors would come together to discuss scheduling and make sure that "no one was stepping on each other's toes," as well as to inform the laborers what they were required to do that week.[6] Tunberg acknowledged that these discussions never included safety concerns or instructions.

¶ 23 Tunberg next admitted that the only safety meetings that he ever attended were those organized by Air Con. In fact, since Tunberg was the foreman of Air Con, once a week he would hold a safety (or so called toolbox) meeting near the Air Con trailer where he would read to his crew memorandums and letters sent by Air Con regarding potential safety concerns. Tunberg testified, however, that specific safety concerns regarding the construction site were generally not addressed at these meetings. If Tunberg had any concerns about safety he was to bring it up with his superintendent and direct supervisor, Bill Stolarik. Tunberg could also contact the Air Con safety manager. When asked who the safety manager was, Tunberg stated that he could not recall this individual's name.

¶ 24 Tunberg next testified that five or six months prior to his accident, he spent a substantial amount of time on the roof of the science building installing and setting up air handling units, which are similar to air conditioning units but much bigger. According to

[6]According to Tunberg, these meetings were held at different locations each time, often at different trailers owned by different contractors at the site.

Tunberg, there were other contractors on the roof at that time, specifically DeFranco Plumbing, Climatemp, and Kelso Burnett. Tunberg could not recall, however, if any workers from Vacala were there. Tunberg averred that while on the roof installing the air handling units, he observed perimeter cabling, namely two cables that wrapped around the perimeter of the building attached with angle iron legs to the building. Tunberg believed that Pickus, another general contractor at the site had placed that perimeter cabling on the roof. He stated that it was standard practice for the general contractor to be responsible for putting up the perimeter cabling. Tunberg explained that it was his understanding that Pickus was responsible for erecting the steel for the building, while Vacala was responsible for the finished product of the building, *i.e.*, putting up the walls and the interiors.[7]

¶ 25 Tunberg testified that on May 10, 2002, at about 10 a.m., he had to set up nine air-conditioning units on the roof of the science building. He testified that he was directed to do so by Vacala. When asked to elaborate Tunberg was vague and stated that a couple of days before the accident, during one of the scheduling meetings, which happened to be held in Vacala's trailer, a Vacala superintendent, who Tunberg believed was called Gary, "made the instructions." Tunberg later changed his story and rather testified that he himself actually spoke at this meeting and informed all of the present contractors that he would be on the rooftop to install the air-conditioning units for Air Con. Tunberg then also admitted that he was not required to check in with Vacala's superintendent, Gary, before doing his job, that Gary could not

[7]The record reveals that at some point prior to Tunberg's accident, the perimeter cabling was removed from the roof. In his deposition, Tunberg stated that he did not know when the cable was removed or who had removed it.

stop him from doing anything at a given time and that Gary never gave him any type of direction on how to do his job, including how to or when install the air-conditioning units.

¶ 26 Tunberg next testified regarding the actual accident. He explained that with the help of a boom truck, he and two other employees under his supervision hoisted the nine air-conditioners up to the rooftop on a pallet wrapped in plastic with metal bands. Tunberg testified that he was instructed by Air Con to cut the metal bands and unwrap the units and install them on the rooftop. Air Con also instructed Tunberg to deposit the plastic and pallets in a dumpster owed by Air Con and located in front of Air Con's trailer,[8] a couple of hundred feet away from the science building. Since there was no chute on the roof, Tunberg intended to throw the pallets across the rooftop to the ground, and then go downstairs and collect them and drag them to Air Con's dumpster. Tunberg threw one pallet off the roof successfully. Once he tried to throw a second pallet, he fell of the roof.

¶ 27 Tunberg acknowledged that on the date of the accident, Air Con had lanyards, and that if he had requested one the company would have provided him with it. He admitted that in the past he had asked for lanyards, specifically when he was working on a height and felt he might be in danger of falling.

¶ 28 Tunberg acknowledged that all the personal safety equipment that he and his crew utilized at the site was owned and prepared by Air Con. He also admitted that his supervisor at Air Con, Bill Stolarik decided who would be working on the project each day, how many hours they would be working and exactly what they would be doing.

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[8]According to Tunberg Air Con and Vacala had separate trailers at the job site.

¶ 29 B. Rodger Markham

¶ 30 Rodger Markham was deposed on December 1, 2006 and testified to the following. Markham has a bachelors degree in occupational safety and health, and is certified in OSHA construction and industry (manufacturing, heavy metals) compliance. In May 2002, he had been employed as a safety director for Vacala for two years. According to Markham, his duties as safety director included informing all those at Vacala, from the president of the company down to Vacala's labor force, about the safety policies and procedures for Vacala. Markham further testified that he also did site inspections, performed OSHA ten-hour training for superintendents, wrote up investigation and accident reports for any of Vacala's employees injured at a construction site, and maintained an OSHA log pertaining to accidents for any of Vacala's employees.

¶ 31 Markham explained that his daily routine involved traveling to various sites with Vacala employees and inspecting them to make sure they were within OSHA regulations and compliance. Markham testified that his duties changed every day depending upon the construction site, and the type of activities involved at the site. For example, if there was a crane operating that day, his duty would be to make sure the perimeter was clear, that there was noone in the way of the lift and that Vacala workers who were operating the lift were certified to make the lift. Similarly, if there was anyone working at heights, he would check to see if there was "fall protection in place."

¶ 32 Markham testified that his responsibilities also included inspecting the site for trip hazards, cleaning up debris on the work site and overall keeping the work site in a tidy condition.

He checked to see that the site was clean and that there were no open and obvious hazards. He looked for the general safety of the work site as it pertained to Vacala employees. If he noticed an unsafe condition, Markham was responsible for remedying it, by informing the Vacala workers of the unsafe condition, or putting up a warning sign next to it. Markham could also stop the workers until the safety condition was remedied.

¶ 33 Markham was next questioned as to whether his responsibility to inspect and remedy unsafe conditions extended only to Vacala employees or anyone else on the job site. Markham explained that the answer depended upon whether Vacala was the general contractor at the construction site. According to Markham, if Vacala was the general contractor, he would be acting upon their authority and could remedy any unsafe condition, but if Vacala was not the general contractor, all he could do would be to make a suggestion to the foreman, superintendent or project manager of the particular contractor at the site, and then report the unsafe condition to his own field supervisor. He could not, however, remedy the situation on his own, unless the unsafe condition at the site directly affected Vacala employees. If that was the case, he could stop further work until the unsafe condition was remedied. Markham also testified that as a certified OSHA instructor and trainer, he could *personally* stop construction if he observed an OSHA violation, but not in the capacity as a Vacala employee.

¶ 34 Markham next testified regarding the Deerfield High School construction site. He stated that prior to May 10, 2002, he had visited the site two or three times a week for a couple of hours. Markham identified a photograph of the rooftop of the science building, from which Tunberg fell, and testified that during his inspections, he never observed any guardrails on the

roof of the building, even though work was done on that roof. He stated that he would expect some form of fall protection to have been on the roof, but indicated that he would not insist that any such protection be placed, unless he was certain that workers would be working near the edge of the roof.

¶ 35 Markham next identified the memorandum that he wrote on May 13, 2002, regarding Tunberg's accident. He acknowledged that in that memorandum he wrote that Tunberg had violated several OSHA regulations, and that he should not have been throwing pallets off the roof, especially not without fall protection, such as a harness or a lanyard. Markham testified that throwing pallets off the roof was a safety hazard and an OSHA violation and that because it could have potentially injured a Vacala employee if he had seen it he could have stopped it, and reported it to Bleuer.

¶ 36 Markham also acknowledged that in his memorandum he noted that although Tunberg had violated OSHA principles, "we [Vacala] are ultimately responsible or the safety on our site." Markham testified, however, that this sentence was "a mistake." He explained that at the time he wrote the memorandum, he was not aware that Vacala was not the general contractor at the site, and that he became aware of this fact only after he looked at the contracts between Vacala, Air Con and the school district, a couple of days before his deposition.

¶ 37 Markham testified that after reviewing those contracts he became aware that Air Con had directly contracted with the school district, and was solely responsible for the "means, methods, and techniques of construction regarding the work to be performed." Markham explained that Vacala's contract with the school district required them to perform "general trades work," which

was not to be confused with a general contractor. Specifically, the contract required Vacala to install cabinetry, unload trucks that had the cabinetry, make sure the walkways were free from any kind of tripping hazards, and order dumpsters if necessary to haul off debris. Vacala was not responsible for performing any of the steel erection, plumbing, electric work or roofing for the school, nor did it supervise (or in any way, oversee) the construction or installation of the HVAC equipment on the roof. Accordingly, Markham concluded that Vacala did not exercise any supervision or control over what Tunberg was doing at the time of his accident.

¶ 38 Markham also testified that it was his experience that in its contracts with subcontractors, Vacala would include specific language instructing the subcontractors to listen to Markham as the safety director. He stated that there was no such language in Air Con's contract with the school district, because Air Con was not Vacala's subcontractor. Markham opined that based on his reading of the contracts, the school district itself was the general contractor.

¶ 39 Markham also acknowledged that in his memorandum regarding the accident he wrote that Bleuer "secured the scene" after the accident. In his deposition testimony he explained that it was Vacala's policy that if any accident occurred on any site where Vacala had employees, as a Vacala superintendent, Bleuer was responsible for securing the scene and contacting the safety officer.

¶ 40 When next questioned about whether he conducted any safety meetings as part of his employ with Vacala, Markham responded that he had one-on-one meetings with Bleuer, who would then impart any safety knowledge discussed at those meetings to Vacala's labor force at the site. Markham also stated that he attended the original meeting of all the contractors hired by

the school district prior to the beginning of construction. He could not recall whether Air Con, Tunberg's employer, was there. Markham stated that the general contractor ran the meeting, but that he could not recall who the general contractor was. He stated that at the meeting he inquired who was responsible for the safety but that someone from Durrant, another company working at the site, condescendingly told him that "they knew all that safety stuff" and that they would not discuss it any longer. The meeting ended there.

¶ 41 Markham also testified that he authored Vacala's safety manual. According to that manual, all Vacala employees were instructed to "report all unsafe acts and/or conditions to supervisors immediately," and to "correct any unsafe condition that is within your authority." Markham explained that under this manual, a laborer who observed an unsafe condition was to report it to his foreman, and then the chain of command would go up to the site supervisor. If a Vacala employee observed an unsafe condition made by another contractor, he would report it to his foreman and the foreman would contact the appropriate contractor or subcontractor. Markham acknowledged that the safety manual is distributed only to Vacala employees, and Vacala subcontractors. The manual is distributed to the subcontractors with the contract documents.

¶ 42 Markham testified that it was his opinion that plaintiff's accident could have been prevented if there had been fall protection on the roof. He testified that the only type of safety protection he observed on the roof prior to the accident were anchors. He did not know who installed the anchors but testified they were placed on the roof during the steel erection phase for walking on beams. He testified that in order to make removing debris from the roof safe, Air

Con could have ordered a chute, or a lift to get the materials off the roof.

¶ 43 On cross-examination, Markham testified that if he had seen Tunberg, who was not an employee of Vacala on the roof, walking without any fall protection, he could, as a human being and an OSHA certified trainer, yell at him to be careful, but in order to get him to stop working in that unsafe condition, he would have to report first to his supervisor then the supervisor would have to contact the contractor form whom Tunberg worked (Air Con), and only that contractor then could stop Tunberg. Markham reiterated that he did not have the authority to directly stop employees of other contractors. He did, however, have the authority to stop an unsafe practice being followed by an employee of a subcontractor (*i.e.*, a company that Vacala, as a general contractor, subcontracted with to do some part of its work).

¶ 44 On cross-examination, Markham next testified that Tunberg was the foreman for Air Con at the time of the accident. As such, and under OSHA, he would have been responsible for making sure that there was appropriate fall protection for Air Con employees at the site. As the foreman, under OSHA, Tunberg was required to understand, supervise and follow all safety regulations. Markham further testified that he spoke with Todd Green, the Air Con safety director of Air Con, and that Air Con had safety procedures in place that should have been followed by Tunberg.

¶ 45 B. Tom Goggin

¶ 46 The deposition of Tom Goggin was taken on June 13, 2005. Goggin testified that in May 2002, he was employed by Air Con as a pipefitter. His direct supervisor was Bill Stolarik, and Tunberg was his foreman. Goggin averred that the Deerfield High School project included

several additions to the high school, including two separate wings, and a building connecting those two wings. Air Con was responsible for performing work on all three of those additions on the day of Tunberg's injury.

¶ 47 According to Goggin, on the morning of the accident, at around 9 a.m., Tunberg came to him and instructed him to go with him to the top of the science building roof to install air-conditioning units. Goggin averred that they used a boom truck to haul the units up onto the roof, and that they themselves climbed to the top using a ladder and an opening to the roof inside the building structure. The boom truck was owned by a company from which Air Con had purchased the air-conditioning units. The boom truck left the premises once the air-conditioning units were hauled onto the top of the roof. Goggin stated that it was Tunberg's idea to throw the pallets of the roof. He averred that he had never seen pallets thrown of the roof before in such a manner at any of his previous jobs; rather, the pallets were either taken down in the same manner the air-conditioning units were hoisted onto the rooftop (*i.e.*, with a crane or a boom truck) or they were lowered down with a rope. Goggin testified that he told Tunberg that it was "windy up on the roof," but that Tunberg responded that he would "show him how it was done."

¶ 48 Goggin stated that he and another pipefitter carried the pallets about seven feet to the edge of the roof, from where Tunberg was going to throw them to the ground. He explained that he had no problem seeing or determining where the edge of the roof stopped. There were no other laborers or any other contractors on the roof of the science building that morning. Goggin testified that he did not see Tunberg throw the pallets off the roof or fall, but that he heard Tunberg swear and turned around to see him disappear down the side of the building.

¶ 49 When questioned as to whether Air Con had a safety program, Goggin answered in the affirmative. He explained that Air Con held safety meetings once a week, and that generally the meetings were run by the foreman, in this case Tunberg. The workers were required to sign a meeting sheet confirming they attended the safety meeting. Goggin stated that he never attended a safety meeting regarding fall protection.

¶ 50 Goggin testified that while working on the Deerfield High School project, he never took orders from anyone other than Air Con employees. He did not know who Vacala was, nor what their involvement at the site would have been. He observed that they had a trailer at the site, but he never took orders from any of Vacala's employees.

¶ 51 When asked whether Air Con had harnesses and lanyards available to their employees at the Deerfield site, Goggin stated that they "probably did," and that they were "probably located inside the Air Con trailer."

¶ 52 C. John Brydon

¶ 53 The deposition of John Brydon was taken on May 20, 2005. Brydon is a rigging operator. In May 2002, he worked for Rigging Services Inc. on the Deerfield High School construction project. Rigging Services were responsible for ornamental iron work, welding and stairs, handrails and some roof vents. They did not work directly with any Air Con employees. On the day of Tunberg's accident, Brydon and his crew were decking the walkways from the existing building to the new building. Brydon observed Tunberg with the pallet in his hand attempting to throw it off the roof before he fell.

¶ 54 Brydon testified that a week before the accident there had been a perimeter cable on the

roof, but that he removed it at the direction of the general contractor, who he believed was Vacala. When asked to elaborate why he believed Vacala was the general contractor, Brydon admitted that he had no personal knowledge as to whether Vacala was the general contractor but stated only that he observed his direct supervisor and foreman, Nicholas Cradic, talking to a gentleman at Vacala's trailer every day. On cross-examination, he admitted that he had never seen any of the contracts between Vacala, Air Con and the school district. In addition, he admitted that noone from Vacala ever personally instructed him to remove the perimeter cable from the roof. He went even further and stated that he could not recall whether he actually removed the cable himself or if it was another Rigging Services crew member.

¶ 55 On cross-examination, Brydon also admitted that he never attended any of the job site scheduling meetings. With respect to safety meetings, he only attended those provided by Rigging Services.

¶ 56 D. Timothy Lally

¶ 57 The deposition of Timothy Lally was taken on September 25, 2006. Lally testified that in May 2002, he was the safety director for Metalmaster, a roofing contractor, involved in the Deerfield High School construction project. During the project, Lally visited the site on a weekly basis and met with Metalmaster foremen to inspect the roofing work and the metal siding done by Metalmaster at the site. Lally filled out safety inspections and then filed them with the company.

¶ 58 Lally also testified that he believed Vacala was the general contractor at the site. On cross-examination, however, he acknowledged he had never read any of the contracts between

Vacala, Metalmaster, the school district or any other contractor, and therefore had no personal knowledge as to whether Vacala and Metalmaster had contracted with each other with respect to work on the Deerfield project, and whether in fact Vacala was the general contractor. Lally further acknowledged that he had never worked on a job site where the majority of the contracts were entered into directly by the owner as opposed to the owner hiring a general contractor with numerous subcontractors.

¶ 59 Lally also testified that he believed Metalmaster had a fall protection system in place for its own employees, but could not remember when it was placed or removed from the rooftop from which Tunberg fell. He stated that Metalmaster generally never put up fall protection for the benefit of employees of other contractors.

¶ 60 E. Ed Duffy

¶ 61 Ed Duffy's deposition was taken on October 17, 2005. Therein, Duffy testified that in May 2002 he was a project director for Durrant, and that he was responsible for acting as a project manger and the owner's representative, dealing with the various aspects of the project from design through construction. Duffy explained that Durrant essentially acted as the owner's representative communicating between the owner and the contractors at the site.

¶ 62 Duffy testified that as project director for Durrant on the Deerfield High School construction project, he regularly visited the site two or three times a month for meetings with the Durrant representative at the site, Kenneth Johnson, as well as with the architects, the principals from the contractors, and representatives from the school district.

¶ 63 Duffy averred that he was familiar with the contract between Durrant and the school

district, and testified that according to that contract, Durrant was responsible for: (1) representing the school district in its dealings with the contractors and architects, especially focusing on scheduling the work so that it would coincide with the school districts calendar year; (2) monitoring the work of the architect and the contractors to verify they were proceeding on schedule; and (3) verifying that the work that was completed was such that payment requests could be processed. According to Duffy, Durrant was not responsible for the supervision of day-to-day activities of laborers or subcontractors or for any safety training. If a contractor or subcontractor was not performing a part of the work satisfactorily, Durrant would speak to the owner and the architect, both of whom had the ability to withhold money from them.

¶ 64 Duffy further testified that to achieve results, Durrant held bimonthly meetings with all of the parties to the project to discuss the progress of the work. The standard agenda included conversations about the current or recent progress in relation to the initial project schedule and the plan for progress in the next month so that all the contractors could hear what everyone else had planed to do in the next few weeks and could coordinate their work. At the meetings, Durrant also asked contractors, as well as the owners to bring forward any issues that could affect their work progress. Finally, according to Duffy, at the end of each meeting there was a standard statement made, which reminded each of the contractors that they were solely responsible for any construction means and methods and for any safety procedures. Duffy testified that Tunberg was present at several of these scheduling meetings.

¶ 65 Duffy also testified that he is familiar with the contracts entered into between the school district and the parties involved in the Deerfield High School construction project. He stated that

this project was unusual as it did not involve one general or prime contractor, but rather involved the school district directly contracting with separate contractors (probably six companies). Duffy explained that Air Con directly contracted with the school district, and that according to that contract, Air Con was personally responsible for safety.

¶ 66 Duffy also testified that there was one contractor among all of those that had contracted with the school district that was designated as the "coordinating contractor." He could not be certain but believed that this was Vacala. When asked to explain the duties of a "coordinating contractor," Duffy explained that the only responsibility this contractor would have would be to coordinate the overall project schedule and the sequence of work.

¶ 67 F. Kenneth R. Johnson

¶ 68 The deposition of Kenneth R. Johnson was held on October 17, 2005. Therein, Johnson testified that in May 2002, he was the field manager for Durrant at the Deerfield High School project. His responsibility was to observe the work on the site and chart its progress and then report back to Ed Duffy. Johnson spent his days at the site filing reports on the progress and signing pay applications for progress successfully completed at the site. Johnson stated, however, that he was not responsible for setting the schedules for the subcontractors. He believed that responsibility fell on the two general contractors, whom he believed to be Vacala and Boller. On cross-examination, however, Johnson admitted that he was not familiar with the contracts between Vacala and the school district, or Air Con and the school district, so that he had no personal knowledge as to whether Vacala, was, in fact, the general contractor at the site. He also admitted that he had no personal knowledge as to whether Vacala had any responsibility

to oversee the Air Con employees, or to supply them with any equipment. Johnson also testified that he had "no idea whose" responsibility it was to promote safe construction practices at the site.

¶ 69 G. Matthew Tressler Olson

¶ 70 The deposition of Matthew Tressler Olson was held on May 19, 2005. Olson testified that in May 2002, he was a superintendent or field foreman for DeFranco Plumbing at the Deerfield High School construction project. Olson testified that DeFranco had a general contract with the school district and reported directly to the school district and the architect. Olson had no personal knowledge of any of the contracts between the different contractors at the Deerfield site.

¶ 71 Olson testified that Vacala was not the owner's representative, or the general contractor. According to Olson, Durrant had the responsibility of acting as the liaison between the school district and the different contractors and subcontractors at the site. Olson believed that Vacala was responsible only for the "general trades," *i.e.*, walls, windows, siding, the roof, and clean up, although at times it coordinated the submission of scheduling paperwork between the different trades and the architect. Olson averred, however, that Vacala had no decision making power with respect to scheduling, and that it acted only in the ministerial capacity of forwarding the paperwork to Legat.

¶ 72 Olson further testified that Air Con had a general contract with the school district and was not a subcontractor of Vacala. Olson was familiar with Tunberg because as foremen they met at the weekly foremen meetings. Olson testified that these meetings were run by Durrant, and often a representative from Legat, the architect.

¶ 73 H. Nicholas Cradic

¶ 74 The deposition of Nicholas Cradic was held on June 17, 2005. Therein he testified that in May 2002, he was a foreman for Rigging Services at the Deerfield High School construction site, responsible for installing the handrails in the building addition.

¶ 75 On the day of the accident, Cradic was working on the roof of the adjacent building, when he heard a scream, turned around and observed Tunberg fall to the ground from the roof, with a pallet. Cradic testified that he assumed that Tunberg had been throwing pallets off the roof when he feel. He explained that he has thrown things off the roof before, and that he did not understand how Tunberg could fall, unless the pallet got stuck to Tunberg's glove and the pallet dragged him to the ground.

¶ 76 Cradic next averred that he believed Vacala was the general contractor at the site. When asked to explain, he testified that Vacala is a general contracting company, and that at his previous jobs they had acted as the general contractor. Cradic acknowledged, however, that he had no other basis for this asumption, and admitted that he had no personal knowledge of the contract between Vacala and the school district.

¶ 77 After the depositions were completed, and as part of discovery, the plaintiffs produced an affidavit by a construction expert, Dennis D. Puchalski. In his affidavit, Puchalski, averred that he is a construction expert with experience and familiarity with OSHA regulations retained by the plaintiffs for purposes of this litigation. Puchalski further averred that he reviewed: (1) Vacala's safety manual; (2) the contract between Vacala and the school district; (3) the plaintiffs' response to Vacala's motion for summary judgment; and (4) the depositions of Tunberg,

Markham, Duffy, Johnson, Lally and Goggin. Puchalski further averred that after reviewing these documents, he was of the opinion that "Vacala was acting as a general contractor on the day of the accident" and that it had "overall and ultimately responsibility for safety at the construction site."

¶ 78 Following discovery, Vacala filed a motion for summary judgment. Vacala argued that summary judgment was proper because at the time of the accident, the plaintiff and his employer, Air Con were solely responsible for the work he was performing. Vacala had no contract with Air Con and therefore owed no duty of care to the plaintiff. Vacala based this argument upon the plaintiff's own deposition testimony and Air Con's contract with the school district, and in support of its motion, attached the relevant portions of Tunberg's discovery deposition, as well as the relevant contracts between Air Con, Vacala and the school district.

¶ 79 The plaintiffs responded by conceding that the contract between Vacala and the school district revealed that Vacala was not the general contractor for the construction site and therefore had no responsibility to Tunberg, but contended that a duty should be imposed upon Vacala pursuant to the voluntary undertaking doctrine. See Restatement (Second) of Torts §324A (1965). The plaintiffs argued that Vacala voluntarily undertook the duty to supervise the safety of workers at the Deerfield High School construction site, and held itself out to all contractors at the site as the general contractor in charge of maintaining the premises (specifically the rooftop) in a reasonably safe working condition. In support of this argument, the plaintiffs attached relevant portions of the discovery depositions of Tunberg, Lally, Markham, Goggin, and Brydon and an affidavit by their construction expert concluding that Vacala was acting as the general

contractor.

¶ 80 The circuit court disagreed with the plaintiffs and granted defendant's motion for summary judgment, finding as a matter of law that the voluntary undertaking doctrine did not apply to impose a duty of care on Vacala. The circuit court explained it ruling in the following manner:

> "Although plaintiffs argue defendant voluntarily undertook the duty to ensure the safety of all subcontractors on the site, the record does not support this perspective. Indeed, the deposition of the defendant's safety director, Rodger Markham, refutes it since he clarified defendant's duties when it was not the general contractor. In such a situation, defendant only had the ability to stop the work of its own employees. The same was not true of any other contractor's employees. After review of the entire record, it is clear defendant did not undertake responsibility for general safety on the job site and certainly did not undertake the responsibility of supervising the actions of other contractors' employees. Thus, the record does not support the imposition of a duty on defendant for the benefit of plaintiff."

The plaintiffs now appeals contending that summary judgment was improper.

¶ 81 II. ANALYSIS

¶ 82 We begin by noting the well-established principles regarding grants of summary judgment. Summary judgment is appropriate "if 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 2008); see also *Fidelity National Title Insurance Co. of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record strictly against the moving party. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670 (1992). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). We review the circuit court's decision to grant or deny a motion for summary judgment *de novo*. *Home Insurance Co.*, 213 Ill. 2d at 315. In doing so, we may affirm on any basis found in the record regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Illinois State Bar Association Mutual v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004); see also *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill. App.3d 573, 576 (1996).

¶ 83 To state a cause of action for negligence, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff, that the defendant breached the duty, and that this breach proximately caused the plaintiff to be injured. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421 (2004). The question of whether defendant owed plaintiff a duty of care is a

question of law to be determined by the court. *Bajwa*, 208 Ill. 2d at 422.

¶ 84 In the present case, Vacala contends that it had no duty to protect Tunberg since it was merely one of many contractors at the construction site, and Tunberg was neither its employee nor stood in any contractual relationship with it. The plaintiffs concede that Tunberg stood in no special relationship with Vacala, but nevertheless argue that Vacala owed Tunberg a duty of care pursuant to the voluntary undertaking doctrine. See Restatement (Second) of Torts § 324A (1965). The plaintiffs contend that Vacala voluntarily assumed a duty of care and protection toward Tunberg by undertaking to supervise the safety of all workers at the Deerfield High School construction site, and by holding itself out to everyone at the site as the general contractor in charge of maintaining the premises in a reasonably safe working condition. For the reasons that follow, we disagree.

¶ 85 The "voluntary undertaking" theory of liability is set forth in sections 323 and 324A of the Restatement (Second) of Torts which provide in relevant part:

> "§323. Negligent Performance to Render Services
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if:
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.
>
> * * *

> §324A . Liability to Third Person for Negligent Performance of Undertaking
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance on the other or the third person upon the undertaking." Restatement (Second) of Torts §§ 323, 324A (1965).

¶ 86 "[T]he essential element of the voluntary undertaking doctrine is an undertaking," (*Castro v. Brown's Chicken and Pasta, Inc.*, 314 Ill. App. 3d 542, 548 (2000)) and the duty of care to be imposed upon a defendant is limited to the extent of the undertaking. (*Bell v. Hutsell*, No. 1-11-0724, slip. op. (Ill. May 19, 2011) (citing *Frye v. Medicare–Glaser Corp.*, 153 Ill.2d 26, 32 (1992) and *Pippin v. Chicago Housing Authority,* 78 Ill.2d 204, 210 (1979))). According to our supreme court the theory is to be narrowly construed. See *Bell*, No. 1-11-0724, slip. op. (Ill. May 19, 2011) (citing *Frye*, 153 Ill.2d at 33); see also *Jakubowksi v. Alden-Bennett Construction Co.*, 327 Ill. App. 3d 627, 641 (20020) ("The Illinois Supreme Court has indicated that a 'narrow construction' of voluntary undertaking is 'supported by public policy.' [Citation.]"). Moreover, with respect to the voluntary undertaking doctrine, our courts have repeatedly distinguished between nonfeasance and misfeasance. *Jakubowksi*, 327 Ill. App. 3d at 640. Specifically, " 'where a duty of care is imposed by reason of a voluntary undertaking, breach of that duty can be

found only where there is misfeasance rather than nonfeasance, unless plaintiff can show that he reasonably relied on the defendant for protection.' " *Doe v. Big Brother Big Sisters of America*, 359 Ill. App. 3d 684, 703 (2005) (quoting *Stephen v. Swiatkowski*, 263 Ill. App. 3d 694, 704 (1994)).

¶ 87 In the present case, the record supports the conclusion that Vacala did not undertake the duty to ensure the safety of all workers at the site or to provide safety measures for those working there so as to trigger the application of the voluntary undertaking doctrine. The record directly refutes the plaintiffs' assertion that Vacala represented itself out to everyone at the site as the general contractor and the party responsible for overall safety at the site. The record establishes that Vacala never held safety meetings for other contractors at the site, nor instructed other contractors on how to do their work. Rather, each contractor, including Tunberg's employer, Air Con, provided its own employees with weekly safety (or toolbox) meetings. More importantly, the record is clear that each contractor was personally responsible for the "means and methods" of its work, the day-to-day activities of its employees, as well as their safety. As Duffy, the project director for Durrant, the official liaison between the school district and the contractors at the site, testified, the contractors were repeatedly reminded of this fact at each of the biweekly scheduling foremen meetings, which Tunberg, as foreman for Air Con, himself attended. Duffy's testimony was unrebutted by any other fact in the record.

¶ 88 Moreover, the record establishes that Vacala did not have unlimited authority to stop work at the site to remedy a safety concern. In his deposition, Vacala's safety director, Rodger Markham specified that when Vacala was not a general contractor at a site, as it was indisputably

not in the present case, it did not have the ability to stop the work of any employee on the site to remedy a safety concern. Although Markham observed the absence of "fall protection" on the roof from which Tunberg fell, he testified that he could not insist that any such protection be placed, unless he was certain that Vacala workers would be working near the edge of the roof. Markham explained that he was responsible only for the safety of Vacala's employees, and not those of other contractors, and that he had the authority to stop work only if it was necessary to ensure the safety of Vacala workers. According to Markham, in order to stop a safety concern involving workers of other contractors, he would have had to talk to his superintendent and the superintendent would then have had to contact the contractor whose workers were involved in the unsafe condition. Only that contractor could then stop the work of his own employees.

¶ 89 Under these facts we conclude that Vacala's actions at the construction site, did not constitute a voluntary undertaking of a duty to provide safety to all workers at the site. See *e.g.*, *Castro*, 314 Ill. App. 3d at 550 (holding that a franchisor did not voluntary undertake a duty to provide security for stores where the franchisor did not mandate any security measures, it did not provide the franchisees with any written materials addressing security, and the franchisees were free to operate their stores in the way they saw fit and could implement any security measures they deemed necessary); *Chelkova v. Southland Corp.*, 331 Ill. App. 3d 716, 723 (2002) (holding that a franchisor of a convenience store did not voluntarily undertake a duty to provide security to the franchisee's employees where, although the franchisor made security recommendations to the owners, the owner was responsible for disseminating such information to its employees; these recommendations were not mandatory; the franchisor did not have the ability to enforce the

recommendations; the franchisor could not terminate the franchisee agreement if the franchisee failed to comply with the recommendations; although the franchisor had installed a security system for the owner, it did not instruct the owner on how to operate it; and the franchisor was not responsible for management of the employees or the day-to-day operations of the store); see also *Doe*, 359 Ill. App. 3d at 705 (holding that national non-profit mentoring program for children did not voluntarily undertake a duty to protect from sexual abuse a boy who was abused by a mentor selected for the boy by the regional affiliate of the national program, where the national program did not implement a child protection or child sexual prevention program that was mandatory for the regional affiliate, the national program did not specify any details of policies that regional affiliate was required to adopt or measures that it was require to take, national program did not monitor regional affiliate to determine whether it was complying with the national program's standards and regional affiliate was responsible for the running of its day-to-day operations and to adopt sexual abuse prevention policies as ti deemed necessary); *Bell*, No. 1-11-0724, slip. op. (Ill. May 19, 2011) (holding that homeowners' expressed intent to their son to prohibit underage consumption of alcohol at a party in their home did not constitute a voluntary undertaking of a duty to prohibit underage drinking and homeowners were not liable to mother for the death of her teenage son, who attended the party, consumed alcohol and then died in single-car accident afer leaving he party; our supreme court explained that the voluntary undertaking doctrine did not apply because the homeowners did not attempt to confiscate alcohol in the possession of underage party goers or ask offenders to leave, nor did they call a halt to the party, and thus never commenced substantive performance of their intended undertaking); *C.f.*,

Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 71 (1964) (held that defendant insurance company's gratuitous safety inspections and safety engineering services with respect to a hoist on a construction site gave rise to a duty to seven construction workers who were killed when the hoist cable broke and they plunged six floors to the ground; the court found there was a voluntary undertaking because: (1) defendant had repeatedly advertised that it provided safety engineering services that could increase an insured's worker safety and lower an insured's costs; (2) defendant's safety engineer made frequent safety inspections, which included careful inspection of the hoist; (3) defendant's safety engineer filed reports of his safety inspections with defendant and the insured, and the reports specifically mentioned the hoist and sometimes included recommendations for changes to improve safety; (4) the insured relied on defendant's safety inspections and did not employ a safety engineer or safety inspector of its own).

¶ 90 In coming to this conclusion, we have considered the decision in *Martin v. McDonald's Corp.*, 213 Ill. App. 3d 487, 489 (1991) cited to by the plaintiffs and find it distinguishable. In *Martin*, a robbery and murder took place after closing at a McDonald's restaurant. *Martin*, 213 Ill. App. 3d at 489. In that case, the court concluded that by the licensor's control of the licensee's security procedures defendant voluntarily undertook to provide for the security of its licensee's employees and, therefore, a duty to provide security arose. *Martin*, 213 Ill. App. 3d at 492. The court reasoned that although there was no legal duty to protect plaintiffs against the criminal acts of third parties, there was a voluntary undertaking by defendant's regional security supervisor who acted directly as the security supervisor for the licensee. The licensee did not have an operations manager or security manager of its own, and defendant provided detailed,

mandatory security measures to be followed by the licensee's employees. It also created a branch of its corporation assigned to deal with security problems and even prepared a security bible for the benefit of the licensee. Additionally, McDonald's also communicated to the store management what the security policies were and followed up with the licensee to make sure that all problems were corrected. *Martin*, 213 Ill. App. 3d at 491.

¶ 91 Unlike *Martin*, in the present case, as already elaborated above, there were no affirmative actions taken by Vacala that could lead to the conclusion that it undertook the duty to ensure the safety of all contractors' employees at the construction site, or that it held itself out to be the company in charge of the day-to-day operations, and safety of the site.

¶ 92 Although the plaintiffs' are correct that several individuals testified in their depositions that they believed that Vacala was the general contractor at the site (*i.e.*, Brydon, Lally, and Cradic), nothing in the record supports the conclusion that these beliefs came from any actions by Vacala or its employees. All of the deponents admitted that they had no personal knowledge of the contracts between Vacala and the school district, and none of them testified that anyone from Vacala ever personally instructed them on how to perform or appeared to supervise or oversee their work at the site. Rather, most of the deponents admitted that their belief that Vacala was the general contractor came from the fact that they had: (1) never previously worked at a site where there was no general contractor and the property owner contracted directly with all of the contractors at the site (*i.e.*, Lally); or (2) that Vacala was known as a general contracting company and that at previous construction jobs it had acted as a general contractor (*i.e.*, Cradic).

¶ 93 Moreover, even if we were to find that Vacala had undertaken a duty to provide safety to

all workers at the site, there is nothing in the record to support the conclusion that any action by Vacala increased the risk of harm to Tunberg or that Tunberg relied on the fact that Vacala had undertaken to secure the safety of the site (including the rooftop) when he suffered his injuries so as to trigger the application of section 324 of the Restatement (Second) of Torts. Restatement (Second) of Torts § 324A (1965).

¶ 94 First, although the record is unclear as to who placed or removed the perimeter cable from the roof, nothing in it supports the conclusion that Vacala was responsible for either putting up the cable or ordering its removal prior to Tunberg's accident so as to have increased the risk of harm to Tunberg.

¶ 95 Moreover, by his own deposition testimony, Tunberg admits that he did not rely upon Vacala for ensuring his safety on the roof. In that deposition, Tunberg acknowledged that he has had OSHA training and that as the foreman of Air Con he was responsible for his own safety and that of his crew. Once a week, he held safety meetings in Air Con's trailer for his crew. Tunberg also admitted that he was aware that there was no perimeter cable on the rooftop when he personally decided to throw the pallets off the roof. He also admitted that safety equipment, such as harnesses and lanyards were available to him inside Air Con's trailer if he wished to use them.

¶ 96 The plaintiffs attempt to argue that Tunberg relied on Vacala because Vacala's superintendent, Bleuer, directed Tunberg to place the air-conditioning units on the rooftop. This contention, however, is directly refuted by Tunberg's own deposition testimony. Although in that deposition Tunberg initially stated that he believed that someone named Gary from Vacala's trailer "made the instructions" regarding the installment of the air-conditioning units, later in his

deposition he changed his story and testified that he himself actually spoke at the foremen scheduling meeting and informed all of the present contractors that he would be on the rooftop to install the air-conditioning units for Air Con that day. Tunberg further acknowledged that Bleuer had no control over his day to day activities and specifically admitted that: (1) he was not required to check in with Bleuer before doing his job; (2) that Bleuer could not stop him from doing anything at a given time; and (3) that Bleuer never actually gave him any type of direction on how to do his job, including how or when to install the air-conditioning units. In addition, in his deposition testimony, Tunberg admitted that in hoisting the air-conditioning units onto the rooftop, he used the boom truck from the company from which Air Con itself had purchased the units, and that after throwing the pallets off the roof he intended to drag them to a dumpster owned by Air Con.

¶ 97 Under these fact, Tunberg cannot claim that he relied on Vacala's undertaking to secure the safety of the rooftop when he fell, or that Vacala's inaction somehow increased the risk of harm to him. See *e.g.*, *Lange v. Fisher Real Estate Development Corp.*, 358 Ill. App. 3d 962, 973-74 (2005) (a general contractor and a subcontractor were not liable under the voluntary undertaking doctrine for injuries suffered by a taxicab driver who was injured after pursuing a non-paying passenger, at night, onto a property that was under construction; even though the defendants installed fencing to block access to the construction site, inadequate barricades did not increase the risk of harm posed by the open and obvious condition, and the taxi driver could not rely on the undertaking to put fencing around the property absent knowledge that there was such an undertaking); see also *Bell*, No. 1-11-0724, slip. op. (Ill. May 19, 2011) (holding that

even if homeowner's expressed intent to their son to prohibit underage consumption of alcohol at a party hosted in their home constituted a voluntary undertaking, the homeowners were not liable to the mother for the death of her teenage son who attended the party, consumed alcohol and then died in a car accident after leaving, since homeowners' stated intent and subsequent inaction with respect to their intended undertaking did not increase risk of harm to victim or other party-goers nor was there any reliance or change of position on the basis of their stated intent, since there was no evidence that they communicated this intent to anyone else but their own son).

¶ 98 For the aforementioned reasons, we conclude that the facts of this case, as well as all of the supporting depositions, affidavits and pleadings on file, support summary judgment in favor of Vacala. See *e.g.*, *Bell*, No. 1-11-0724, slip. op. (Ill. May 19, 2011); *Castro*, 314 Ill. App. 3d at 550; *Chelkova*, 331 Ill. App. 3d at 723; see also *Doe*, 359 Ill. App. 3d at 705; *Lange*, 358 Ill. App. 3d at 973-74; *c.f.*, *Nelson*, 31 Ill. 2d at 71

¶ 99 Accordingly, we affirm the judgement of the circuit court.

¶ 100 Affirmed.