IN THE COURT OF APPEALS OF IOWA

No. 1-287 / 10-1889
Filed June 15, 2011

TROY MCCORMICK and LYNN MCCORMICK,
Plaintiffs-Appellants,

vs.

NIKKEL & ASSOCIATES, INC. d/b/a
NAI ELECTRICAL CONTRACTORS, A Corporation,
Defendant-Appellee.

Appeal from the Iowa District Court for Cherokee County, Nancy L. Whittenburg, Judge.

Plaintiff appeals from summary judgment entered in favor of defendant.

REVERSED AND REMANDED.

Steve Hamilton of Hamilton Law Firm, P.C., Storm Lake, for appellants.

Ned A. Stockdale of Fitzgibbons Law Firm, L.L.C., Estherville, for appellee.

Heard by Vaitheswaran, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Troy and Lynn McCormick appeal from entry of summary judgment in favor of the defendant, Nikkel & Associates (Nikkel). This is an action against a subcontractor by the employer's employee. The employer, Little Sioux Corn Processors (Sioux), hired Schoon Construction Company (Schoon) who in turn hired Nikkel & Associates (Nikkel) as a subcontractor. Troy McCormick, an employee of Sioux, was electrocuted and contends an employee of Nikkel was negligent causing his severe injuries. The district court granted summary judgment concluding Nikkel owed no duty to McCormick. Because we conclude a duty exists, we reverse.

I. Background Facts.

The following undisputed facts appear in the record: Troy McCormick was severely injured on November 13, 2006, while working for Sioux.

Sioux operates an ethanol plant and was involved in an expansion project. Part of that expansion involved electrical upgrades and changes. Sioux hired Fagen Engineering, Inc. to design the new electrical loop and to specify the electrical equipment to be included in the loop. Sioux purchased the electrical equipment needed for the electrical loop from Graybar Electric. Sioux purchased numerous switchgears, a piece of electrical equipment that is wired to receive high voltage electricity and controls the flow of electricity within the distribution system. Sioux hired Schoon to bore-in and pull the electrical cables that connected the components of the new electrical loop and to place and install the switchgears on their mounting basements. Schoon hired Nikkel to do

"terminations," which involved hooking up electrical cables to terminals on the switchgears.

Sioux also purchased fault indicators, optional pieces of equipment that were to be mounted inside the switchgear cabinet. Ken (Buford) Peterson[1] was an employee of Nikkel; he was an electrician with some specialized experience in terminations and worked on the Sioux job. On November 7, 2006, Peterson offered to mount the fault indicators inside the switchgears, but the mounting holes were not the correct size, and the mounting brackets had to be modified before they could be installed. Sioux's maintenance manager, Russell Konwinski, told Peterson that Nikkel should not install the mounting brackets. Konwinski stated he would have Sioux employees modify the mounting brackets and install them in the switchgear cabinets.

The switchgear cabinets were secured by a penta-head bolt that could only be removed with a penta-head socket wrench, which Sioux had ordered along with the electrical equipment. The purpose of the penta-head bolt and wrench was to prevent unauthorized access to the switchgear cabinet.

It was Sioux's policy that all employees were to assume all electrical equipment was energized until the contrary was proven. It was also Sioux's policy that no work was to be commenced on electrical equipment until the equipment was de-energized, locked out, tagged, and the absence of energy verified.

[1] Various spellings for Peterson appear in the record and the briefs. Mr. Peterson did not spell his name for his deposition, however, this is the spelling used in the deposition, and we therefore employ it.

On November 13, 2006, Konwinski held a meeting with Sioux's maintenance employees and assigned Mike Jacobson, with the assistance of Troy McCormick and Jeff Sangwin, to remove, re-drill, and install the fault indicator mounting brackets in the switchgear cabinets. Jacobsen is an electrician. Sangwin and McCormick are not electricians and do not have training working with electrical equipment. Konwinski told the Sioux employees the electricity was not live, i.e., there was no electrical current flowing through the switchgears. However, the electrical circuit from the main panel to the switchgear was in fact energized by Peterson on or before November 7, 2006.[2] On November 13, 2006, no one de-energized, locked out, or tagged out any of the switchgear. Nor did anyone verify their electrical status. Konwinski gave the penta-head wrench required to open the switchgear to Jacobson on the morning McCormick was injured.

After successfully completing work on two of the switchgear cabinets, Jacobson was called away to another part of the plant. Jacobson gave the penta-head wrench to Sangwin and McCormick. After Jacobson left the area, Sangwin used the penta-head wrench to open the door of another switchgear cabinet. McCormick inserted a tool and was electrocuted.

Troy McCormick and Lynn McCormick filed this negligence suit against Nikkel asserting Troy "was working on a switchgear box, which was under the

[2] Sioux contends Konwinski instructed Peterson to alert him when the electricity to the new power loop was turned on. There is a dispute whether Peterson informed Konwinski the circuit was live. Peterson claims Konwinski and Jacobson were present when he energized the circuit. Konwinski and Jacobson deny they were present or were told the line was energized.

control" of Nikkel, and Nikkel "failed to inform Troy McCormick the switchgear had power."

Nikkel filed a motion for summary judgment, contending it owed McCormick no duty of care as it did not have control of the premises, the equipment, the power source, or the work that resulted in McCormick's injury.

The district court concluded Nikkel had no duty to McCormick as a matter of law. Summary judgment was entered in favor of Nikkel, and the McCormicks appeal.

II. Scope of Review.

> We review a trial court's grant of summary judgment for correction of errors at law. On motion for summary judgment, the court must: (1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The existence of a legal duty is a question of law for the court to decide.

Van Fossen v. MidAm. Energy Co., 777 N.W.2d 689, 692-93 (2009) (citation omitted).

III. Did the Trial Court Err in Concluding Peterson Had No Duty to McCormick?

In *Van Fossen*, 777 N.W.2d at 696, our supreme court discussed its recent ruling of *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009), in which the court adopted the framework of Restatement (Third) of Torts for the determination of the existence of a general duty to exercise reasonable care. The court wrote:

> Under the Restatement (Third) framework adopted in *Thompson,* an actor owes a general "duty to exercise reasonable

> care when the actor's conduct creates a risk of physical harm." Restatement (Third) § 7(a), at 90. However,
>
> > [i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.
>
> *Id.* § 7(b), at 90.

Van Fossen, 777 N.W.2d at 696. The *Van Fossen* court concluded the countervailing principle of retained control warranted the denial of liability. *Id.* at 697. "'[T]he issue of retained control is inescapably part of the duty issue, which is necessarily and properly determined as a matter of law by the court.'" *Id*. at 697 (quoting *Hoffnagle v. McDonald's Corp*., 522 N.W.2d 808, 813 (Iowa 1994)).

The district court here concisely summarized the *normally* limited nature of the duty owed by employers of independent contractors:

> The Iowa Supreme Court's "application of the retained control standard in the context of employer-independent contractor law has resulted in imposition of a duty of care only when the employer retains control of day-to-day operations." *Hoffnagle,* 552 N.W.2d 808, 813 (Iowa 1994) (citing *Farris v. Gen'l Growth Dev. Corp.*, 354 N.W.2d 251, 253-54 (Iowa Ct. App. 1984)). The Court has also stated that "the issue of retained control is inescapably part of the duty issue, which is necessarily and properly determined as a matter of law by the court." . . . The limited nature of the duty owed by employers of independent contractors recognizes the relationship between . . . employers and their contractors. *Van Fossen*, 777 N.W.2d at 698. *Employers often have limited, if any, control over the work performed by their contractors. Id.* "Employers typically hire contractors to perform services beyond the employers' knowledge, expertise, and ability. The contractors' knowledge and expertise places them in the best position to understand the nature of the work, the risks to which the workers will be exposed in the course of performing the work, and the precautions best calculated to manage those risks." *Id*.

(Emphasis added.)

It is this principle of an employer's limited control that McCormick seeks to invoke in the case before us in order to hold the subcontractor liable. *See Van Fossen*, 777 N.W.2d at 698 (noting one of the realities of the relationship between employers and contractors is that "employers often have limited, if any, control over the work performed by their contractors"). McCormick contends Nikkel, an independent contractor, had control of the switchgear cabinet when the electricity was energized and thus is liable for negligently failing to inform McCormick that electricity was live or flowing.

The district court noted, "Nikkel & Associates can only be liable if it controlled the work." The district court concluded that because "Sioux retained control over the electrical work that led to Troy McCormick's accident," Nikkel owed no duty to the employees of Sioux. *See* Restatement (Second) of Torts § 414, at 387 (1965) ("One who entrusts work to an independent contractor, *but who retains the control of any part of the work*, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." (emphasis added)).

The undisputed material facts are that Sioux (by Konwinski) informed Nikkel (via Peterson) that Sioux would install the fault indicators. Konwinski directed the Sioux maintenance staff to install the fault indicators and provided the equipment, which allowed them to gain access to the switchgear cabinets. Sioux's policy required that before any electrical work was done, employees were to verify an electrical line was not energized. We acknowledge that no part of the electrical work done on November 13, 2006, was in Nikkel's control.

McCormick relies upon section 384 of the Restatement and argues that Nikkel was acting on behalf of the employer and created a dangerous condition for which it can be liable. That section provides:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability and enjoys the same freedom from liability, as though he were the possessor of land, for physical harm caused to others upon and outside the land by the dangerous character of the structure or other conditions while the work is in his charge.

Restatement (Second) of Torts § 384, at 289. Thus, McCormick contends Nikkel (Peterson) "is subject to the same liability" as Sioux for physical harm caused by the dangerous condition created. *Id.*

Nikkel can only be liable for "conditions while the work is in his charge." *Id.* This principle of control is consistently recognized in our case law. *See Van Fossen*, 777 N.W.2d at 698; *Hoffnagle*, 522 N.W.2d at 813 (noting "the employer's control of the daily operation of the business determines its obligation and thus its liability"); *cf. Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 720-21 (Iowa 1999) (discussing whether owner/lessor of land retained sufficient control to except it from rule of nonliability); *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 524-25 (Iowa 1992) (holding that employer did not owe a duty to subcontractor's employee because it did not have control over the worksite).

However, even though Sioux was in control of the installation of the fault indicators on November 13, 2006, when the injury occurred, there is no evidence that Sioux was in control or gave specific direction to Nikkel in its performance of completing the terminations or the testing of the lines. Nikkel was in complete control of its own work when the alleged negligent act occurred. The test to

determine liability is based upon control at the time of the negligent act, not at the time of the injury. *Thompson v. Burke Eng'g Sales Co.*, 252 Iowa 146, 150, 106 N.W.2d 351, 354 (1960).

The summary judgment record shows Nikkel was hired to connect the electrical cable to the terminal on the switchgear. The summary judgment record also establishes Nikkel (by Peterson) energized the system leading to the switchgear. We believe there is a genuine issue of material fact as to whether Nikkel's conduct of energizing the electrical system created a risk of physical harm of a dangerous character. We note Nikkel's acknowledgement the switchgear cabinet could only be accessed by a special penta-head wrench due to the high voltage. Nikkel also admitted danger warning signs were displayed on the outside and inside of the switchgear cabinet doors. Because the act of charging the electrical line occurred while "the work [was] in [Nikkel's] control and charge," Restatement (Second) of Torts § 384, we agree with McCormick that a jury question was generated on whether Peterson (Nikkel) informed Konwinski (Sioux) the electrical line was charged.

Nikkel states it is undisputed Sioux's policy and OSHA regulations required that before any electrical work was done, employees were to verify an electrical line was not energized. Nikkel argues it had no reason to believe Sioux employees would not discover or realize the danger,[3] and because Sioux

[3] *See* Restatement (Second) of Torts § 343, at 215-16 ("A possessor of land is subject to liability for physical harm caused to his 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.")

employees failed to verify the electrical line was energized, it cannot be liable. It further argues it left the switchgear locked and thus in safe condition. Nikkel also points to the fact Sioux had been in control of the property for about seven days before McCormick was electrocuted. We believe these facts go not to the question of duty, but to questions of foreseeability,[4] factual causation,[5] and scope of liability,[6] all of which are generally questions for the jury. *Thompson*, 774 N.W.2d at 834, 836, 838.

We agree with McCormick that Nikkel had a general duty of due care in charging the electrical line to the switchgear box. We do not find this is one of the "exceptional cases" where we should modify this general duty. Because there is a genuine issue of material fact as to whether Nikkel informed Sioux the line was charged, summary judgment was not appropriate. We therefore reverse and remand for further proceedings.

REVERSED AND REMANDED.

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[4] "The assessment of the foreseeability of a risk is allocated by the Restatement (Third) to the fact finder, to be considered when the jury decides if the defendant failed to exercise reasonable care." *Thompson*, 774 N.W.2d at 834. "A lack of foreseeable risk in a specific case may be a basis for a no-breach determination, but such a ruling is not a no-duty determination." *Id.* at 835.

[5] *See generally Thompson*, 774 N.W.2d at 836-39 (adopting the negligence framework found in the Restatement (Third) of Torts). "Causation is a question for the jury, "'*save in very exceptional cases* where the facts are so clear and undisputed, and the relation of cause and effect so apparent to every candid mind, that but one conclusion may be fairly drawn therefrom.'" *Thompson*, 774 N.W.2d at 836 (citation omitted).

[6] *See Thompson*, 774 N.W.2d at 838 ("An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious."). Comment *f* to section 29 of the Restatement (Third) of Torts states, "scope of liability, although very much an evaluative matter, is treated as a question of fact for the factfinder." Restatement (Third) of Torts: *Liability for Physical & Emotional Harm* § 29 cmt. f, at 500-01 (2010).