

IN THE COURT OF APPEALS OF IOWA

No. 2-835 / 11-1898
Filed October 31, 2012

WILLIAM J. KELLY JR.,
Plaintiff-Appellant,

vs.

**RISER, INC., an Iowa Corporation, IOWA DIRECT EQUIPMENT
APPRAISAL, L.C., an Iowa Limited Liability Company, and
BETTENDORF COMMUNITY SCHOOL DISTRICT,**
Defendants/Appellees.

BETTENDORF COMMUNITY SCHOOL DISTRICT,
Cross-Claimant Plaintiff,

vs.

IOWA DIRECT EQUIPMENT & APPRAISAL, L.C.,
Cross-Claim Defendant.

BETTENDORF COMMUNITY SCHOOL DISTRICT,
Third-Party Plaintiff,

vs.

RISER, INC.,
Third-Party Defendant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes (November 1, 2011 summary judgment) and Nancy S. Tabor (November 24, 2010 summary judgment), Judge.

A plaintiff appeals multiple grants of summary judgment. **AFFIRMED.**

Jerry A. Soper of Soper Law Firm, P.C., Davenport, for appellant.

Patrick L. Woodward of McDonald, Woodward & Carlson, P.C., Davenport, for appellee Riser, Inc.

Jack L. Brooks of Brooks Law Firm, P.C., Rock Island, Illinois, for appellee Iowa Direct Equipment & Appraisal, L.C.

Benjamin J. Patterson and Cameron A. Davidson of Lane & Waterman LLP, Davenport, for appellee Bettendorf Community School District.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J. takes no part.

VOGEL, J.

Before William Kelly began working for a temporary workers' agency, Labor Ready, he signed a release that if he were injured on the job, his exclusive remedy would be through Labor Ready's workers' compensation carrier. Kelly was later injured and he did collect workers' compensation benefits from Labor Ready's insurance carrier. He also filed suit against three defendants: the property owner, Bettendorf Community School District (BCSD), the general contractor, Iowa Direct Equipment & Appraisal, L.C., and the subcontractor, Riser Inc. The district court, on the defendants' motions, entered summary judgment rulings, finding in their favor. Kelly appeals.

I. Background Facts and Proceedings

The district court found the following facts were undisputed in the November 24, 2010 order granting summary judgment to Riser, Inc, the subcontractor:

Kelly was injured while dismantling and disassembling bleachers in the Bettendorf High School gymnasium. On April 29, 2009, Bettendorf Community School District (BCSD) entered into a contract with Iowa Direct Equipment & Appraisal, L.C. (Iowa Direct) whereby Iowa Direct agreed to dismantle and remove the existing high school gymnasium bleachers and deliver and install a new bleacher system. Iowa Direct then hired Riser to dismantle and remove the bleachers. In order to perform this work, Riser entered into an employment contract with Labor Ready for temporary labor. Pursuant to the employment contract, Labor Ready provided temporary employees to Riser for the bleacher project on June 1-2, 2009. On June 2, 2009, seven temporary employees from Labor Ready, including Kelly, worked on the project. While working on the project, Kelly was injured when a support beam dislodged from a portion of the bleachers and fell on him. As a result of his injuries, Kelly received \$78,901.78 in workers' compensation benefits from Labor Ready's workers' compensation insurance carrier. Kelly also filed this case seeking damages for his injuries.

The contract between Kelly and Labor Ready contained the following waiver:

I am either a temporary worker for Labor Ready or I am applying for temporary work assignments with Labor Ready. I understand that Labor Ready provides temporary workers for its customers to work at the

customers' project site. In accepting any work assignment, *I acknowledge that I am a temporary employee of Labor Ready and not an employee of Labor Ready's customer.*

If I am ever injured in the course of my work for Labor Ready, I agree that I will look only to Labor Ready's Workers' Compensation coverage and not to Labor Ready's customer for any recovery. For myself, and on behalf of my heirs, executor, personal representatives and assigns, I waive, release, and forever discharge any claim that I may now have or that may later accrue against any customer of Labor Ready which directly or indirectly arises out of any injuries which may occur to me while on a temporary work assignment for Labor Ready. I understand that I am not waiving or releasing any claims which I may have against the Workers' Compensation coverage provided by Labor Ready.

(Emphasis added.)

Kelly filed his initial petition on October 2, 2009, and an amended petition was filed on August 25, 2010, alleging counts of negligence against BCSD (count I), Iowa Direct (count III), and Riser (count V). He also alleged Iowa Direct (count II) and Riser (count IV) were in breach of contract. Although many claims and cross-claims were part of the procedural background of this case,¹ Kelly is the sole appellant and only appeals the November 24, 2010 and November 1, 2011 summary judgments rulings.

Riser moved for summary judgment, which the district court granted finding Kelly released all claims against Riser as a "customer" of Labor Ready, for injuries he

¹ Riser filed a motion for summary judgment on March 11, 2010, which was denied on the basis that it was premature given the fact that Kelly's motion to amend his pleadings was granted. The court stated that the ruling denying Riser's motion for summary judgment was subject to reconsideration upon resubmission following the filing of its answer to the amended petition.

On January 7, 2011, BCSD filed a third-party petition seeking indemnity from Riser in the event it would be found liable to Kelly. On March 22, 2011, Riser filed a motion for summary judgment on the grounds that it had no duty to indemnify BCSD as a matter of law. The court agreed and granted Riser's motion for summary judgment on the grounds that no relationship existed between the parties such that Riser would have a duty to indemnify BCSD. BCSD then filed a cross-claim against Iowa Direct, seeking indemnity in the event that it is found liable to Kelly. BCSD argued that liability for Kelly's injuries "could only arise from the acts or omissions of Iowa Direct and its subcontractors." Iowa Direct responded with a motion for summary judgment on Kelly's claims and BCSD's indemnity claim. On September 9, 2011, BCSD also filed a motion for summary judgment on Kelly's claims.

suffered during the course of his temporary work for Labor Ready. The district court further found that Riser was a third-party beneficiary to the contract between Labor Ready and Kelly such that Riser was entitled to enforce Labor Ready's release. The court additionally held that Kelly was not a third-party beneficiary to the contract between Riser and Labor Ready and was therefore unable to maintain a breach of contract claim against Riser.

BCSD and Iowa Direct also moved for summary judgment. On November 1, 2011, the district court made the following findings: (1) Kelly was not a third-party beneficiary of the contract between BCSD and Iowa Direct; (2) neither Iowa Direct nor BCSD were liable for negligent supervision; (3) BCSD did not have sufficient control to support a claim of breach of the duty to maintain a safe workplace; (4) neither BCSD nor Iowa Direct was liable for negligent hiring; and (5) neither BCSD nor Iowa Direct was liable for negligence per se for allegedly violating Occupational Safety and Health Administration (OSHA) regulations. This appeal follows.² We first analyze the November 24, 2010 summary judgment order in favor of Riser and then the November 1, 2011 summary judgment in favor of BCSD and Iowa Direct.

II. Summary Judgment for Riser

We review a district court's order on a motion for summary judgment for correction of errors at law. *Ratcliff v. Graether*, 697 N.W.2d 119, 123 (Iowa 2005). Summary judgment is appropriate when the moving party shows there is no genuine

² Kelly states in his brief that he is appealing all summary judgment rulings except the ruling finding BCSD did not have a duty to Kelly as the possessor of land encompassing the construction site because of the lack of sufficient control. However, in addition to the parts of the district court rulings Kelly is attacking on appeal, the district court also held BCSD and Iowa Direct were not liable to Kelly for negligent supervision, as well as not negligent per se for alleged OSHA violations. Kelly has waived these issues by failing to raise them in his brief and cite supporting authority. Iowa R. App. P. 6.903(2)(g)(3).

issue of material fact. *Berte v. Bode*, 692 N.W.2d 368, 370 (Iowa 2005). Summary judgment should not be granted if reasonable minds can differ on how a material factual issue should be resolved. *Walker v. Gribble*, 689 N.W.2d 104, 108 (Iowa 2004). Kelly argues that summary judgment was improperly granted to Riser because the release he signed was (1) ambiguous as to warrant it unenforceable and (2) not enforceable by Riser as it was not an intended third-party beneficiary. Kelly also argues that he was an intended third-party beneficiary of the contract between Labor Ready and Riser and Riser breached the contract by not providing him with a safe work environment.

A. Waiver

Kelly signed a “Release of Claims Against Labor Ready Customers and Transitional (Light) Duty Work Agreement” as part of his application to work for Labor Ready. The district court held that the release provision is “unambiguous and releases any claims against Riser for injuries occurring to Kelly while performing temporary work for Riser. . . . Accordingly, in this Release, Kelly released and waived [his] contract and tort claims against Riser.”

A release is a contract, and is subject to applicable contract laws. *Huber v. Hovey*, 501 N.W.2d 53, 55 (Iowa 1993). Accordingly, we apply the law governing the construction and interpretation of contracts to determine the meaning of the terms and their legal effect. Interpretation involves ascertaining the meaning of contract words; construction refers to determining their legal effect. *Id.* In construing written contracts, courts are guided by the cardinal principle that the parties’ intent controls, and except in cases of ambiguity, that intent is determined by the contract itself. *Id.* An ambiguity exists when, after application of the pertinent rules of interpretation to the contract

language, a genuine uncertainty exists as to which of two reasonable constructions is proper. *Berryhill v. Hatt*, 428 N.W.2d 647, 654 (Iowa 1988). An ambiguity does not exist simply because the parties disagree on the meaning of a phrase. *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 108 (Iowa 1981). If a contract is not ambiguous, it will be enforced as written. *Spilman v. Bd. of Dirs.*, 253 N.W.2d 593, 596 (Iowa 1977).

Interpretation is reviewed as a legal issue unless it is dependent at the trial level on extrinsic evidence. Construction is always reviewed as a legal issue. *Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 25 (Iowa 1978). The district court found the language of the release and waiver was unambiguous. Moreover, the summary judgment record does not indicate extrinsic evidence was considered in determining the meaning of the language in the agreement documents. Therefore, we review the district court's determination on these issues as a matter of law for this court to finally decide. *Thornton v. Hubill, Inc.*, 571 N.W.2d 30, 33 (Iowa Ct. App. 1997). Our task is to determine the intent of the parties as evidenced by the language of their agreement. We agree with the district court the terms of the contract are clear and unambiguous. Therefore, the contract will be enforced as written. *Spilman*, 253 N.W.2d at 596.

The district court found the terms of the agreement clearly express the parties' intent that Kelly release "any claim" against Labor Ready's customers, such as Riser, for injuries occurring to Kelly while performing temporary work for Labor Ready. Iowa courts have long held that "broad exculpatory provisions would rarely immunize a

defendant for acts of affirmative negligence,” as a release from liability for negligence must be clearly expressed. *Sweeney v. Bettendorf*, 762 N.W.2d 873, 878 (Iowa 2009).

The release Kelly signed is not akin to the broad exculpating releases discussed in *Sweeney*, because here, unlike the concerns in the ambiguous releases, the language is unambiguous that if a Labor Ready worker (Kelly) is injured on the job, he will look to Labor Ready’s workers’ compensation as the sole source of recovery. The release does not limit its definition of “claim” to a specific category of claims. Instead, it explicitly includes any claim “which directly or indirectly arises out of any injuries which may occur to [Kelly].” Moreover, unlike the releases discussed in *Sweeney*, the release Kelly signed does not prevent Kelly from recovery; it does however, direct his recovery to Labor Ready’s workers’ compensation carrier. On that ground, it is distinguishable from the reasoning in *Sweeney*. The release is both valid and enforceable.³

B. Riser as a third-party beneficiary

Second, Kelly argues that the release he signed for Labor Ready is not enforceable by Riser. The district court allowed Riser to enforce the release finding that

³ While the broader issue of enforcement of the release was properly preserved for review, Kelly raises a public policy argument for the first time on appeal. He argues that in today’s economy, temporary workers are viewed by employers as “dispensable and easily replaced” and enforcing the release “either condones or promotes disregard for the safety of workers.” This argument was not addressed in the district court’s ruling on Riser’s motion for summary judgment. Because this issue was not decided by the district court, it is not a proper subject for appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

Even if this issue had been preserved, it would likely fail. Our court reached a holding directly contrary to Kelly’s position in *Jones v. Sheller-Globe Corp.*, 487 N.W.2d 88, 93 (Iowa Ct. App. 1992). Considering facts strikingly similar to the facts here, the court stated:

[W]e [do not] find any public policy interest subverted by the trial court’s ruling. The employee retains full workers’ compensation coverage. The employer, through [the temporary workers’ agency], provides for such coverage. Thus, any injury to the employee while acting in the course of employment is covered in the usual manner under Iowa’s workers’ compensation statutes.

Riser was an intended third-party beneficiary of the contract between Kelly and Labor Ready. In order to enforce a contract, the third-party beneficiary must show the contract was made for his express benefit. *Khabbaz v. Swartz*, 319 N.W.2d 279, 285 (Iowa 1982). Our supreme court applies the Restatement (Second) of Contracts approach to third-party beneficiary claims, rendering “the primary question . . . [as] whether the contract manifests an intent to benefit a third party.” *Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216, 224 (Iowa 1988). The intent of the promisee controls. *Id.* Intent can be gathered from the circumstances surrounding the contract. *Uhl v. Sioux City*, 490 N.W.2d 69, 72 (Iowa Ct. App. 1992).

Here, the district court found:

. . . Riser is a third-party beneficiary to the contract. The contract’s repeated reference to “customer” clearly and expressly indicates that the release was to benefit a third-party beneficiary customer. In addition, the terms of the contract make it clear that Kelly’s sole remedy is through workers compensation laws. The terms also make it clear that Kelly is releasing all claims against third-parties. This language indicates Labor Ready intended to relieve its customers from potential liability from claims by its temporary employees. In other words, this contract was entered into primarily for the benefit of Labor Ready’s customers. Accordingly, this contract was made for Riser’s express benefit and thus Riser is a third-party beneficiary to the employment agreement.

We agree.

It is clear from the language of the contract that both Labor Ready and Kelly, by this agreement, intended that the release would benefit Labor Ready’s customers, in this case Riser. By creating an enforceable right—the absolution of tort and contract liability for injuries suffered by Labor Ready employees—Labor Ready and its employees intended to, and in fact did, make Labor Ready’s customers third-party beneficiaries to the contract. The fact that the release does not specify Riser by name

does not diminish its protection for unnamed customers. The repeated reference to “customer” clearly and expressly indicates that the release was for the benefit of third-parties. Because Riser is a third-party beneficiary to the contract between Kelly and Labor Ready, it was entitled to enforce the release provision which the parties entered into, and the ruling of the district court granting Riser’s motion for summary judgment is therefore affirmed.

C. Kelly as a third-party beneficiary

Kelly also asserts the district court erred by finding he was not a third-party beneficiary to the contract between Riser and Labor Ready. He based his breach of contract allegation against Riser on the “Conditions of Service” provision of Labor Ready’s contract with Riser regarding workers’ safety. Specifically, he argues that the district court erred by ignoring the affidavit of a Labor Ready manager stating that the safety requirements in the Riser agreement with Labor Ready are for the protection of the Labor Ready workers.

The Conditions of Service provision states:

Customer shall comply with all applicable laws relating to health and safety, and shall include Labor Ready workers in Customer’s safety and health program, while they are in the care, custody, and control of Customer, and shall provide personal protective equipment (“PPE”) necessary or required for any work to be performed. If Labor Ready provides any site-specific PPE, Customer shall instruct supplied workers in proper use and care of that equipment. Customer agrees to provide site specific safety orientation and training to all supplied workers prior to the start of work which includes, but is not limited to: review of the Customer’s total safety program; on the job review of practices necessary to perform job assignments in a safe manner; the use and care of required PPE; identification of hazardous materials involved and instructions on the

safe use and emergency action (MSDS); the proper action to take in event of emergencies, including exit routes; how to report unsafe conditions and practices; how and when to report injuries, the location of MSDS's, and the location of first aid facilities. Customer agrees to indemnify, defend, and hold harmless Labor Ready for claims, damages or penalties arising out of violations of the Occupational Safety and Health Act of 1970, or any similar state law with respect to workplaces or equipment owned, leased or supervised by Customer and to which workers are assigned. Customer to record worker's work related injuries on Customer's OSHA log.

As discussed above, the paramount question when determining if a party is a third-party beneficiary is whether the contract manifests an intent to benefit a third party. *Midwest Dredging Co.*, 424 N.W.2d at 224.

The district court held that Kelly was not a third-party beneficiary to the contract between Riser and Labor Ready finding:

[I]t is clear from the terms that the contract was reached with the intent to benefit Labor Ready. . . . First, it was intended to provide Labor Ready with the right to indemnify. . . . Furthermore, the contract was also intended to relieve Labor Ready of its duty to provide its employees with safety training and procedures. . . . Further, the contract seeks to limit Labor Ready's potential liability under a workers' compensation claim by requiring its customer to provide a safe work environment to their workers.

We agree. The clear intent of the agreement between Riser and Labor Ready was to benefit Labor Ready by limiting its exposure to workers' compensation liability, and providing it with indemnity in cases where a worker is injured and workers' compensation benefits must be paid. There is no evidence to show that the promise intended to benefit Kelly. Therefore, Kelly has no right to assert a claim arising out of the contract between Riser and Labor Ready.

Moreover, the district court held that assuming arguendo Kelly was a third-party beneficiary of the contract between Riser and Labor Ready, summary judgment was still appropriate as Kelly's rights can rise no higher than those of the promisee. See *Olney*

v. Hutt, 105 N.W.2d 515, 518 (Iowa 1960). On appeal, Kelly does not contest or provide any argument countering this finding. Kelly does not allege Labor Ready suffered loss or damages as a result of any negligence by Riser. While Labor Ready's workers' compensation carrier had paid out money, this money was paid as a result of Labor Ready's contract of employment with Kelly as a covered employee, not Labor Ready's contract with Riser. Therefore, since Labor Ready has no right of action against Riser, Kelly has no such right. Riser's motion for summary judgment was properly granted on this ground as well.

III. Iowa Direct and Bettendorf Community School District's Motion for Summary Judgment

On November 1, 2011, the district court granted summary judgment to Iowa Direct and BCSD. On appeal, Kelly argues that the contract between Iowa Direct and BCSD imposed an express or implied obligation on Iowa Direct to maintain a safe work place for Kelly. That claim applies only to Iowa Direct. The second claim applies to both Iowa Direct and BCSD: the district court erred in excluding Kelly from the protection of Restatement (Second) of Torts section 411 (1965) that makes employers liable for harm to third persons when the employer fails to exercise reasonable care in employing a contractor.

A. Summary Judgment for Iowa Direct on contract claims: Kelly was not a third-party beneficiary

Kelly claims the district court erred in granting summary judgment on the basis that there was not a written term in the contract between BCSD and Iowa Direct that required Iowa Direct to provide Kelly with a safe work environment. Kelly claims that

the parties intended the contract between BCSD and Iowa Direct to include this term by implication. He also claims he was a third-party beneficiary of the BCSD-Iowa Direct contract and therefore can recover for a breach of that contract.

However, the district court, applying the same third-party beneficiary contract law discussed above, found that Kelly was not an intended third-party beneficiary of the contract between BCSD and Iowa Direct. There was no language in the contract that recognized a right to performance, a satisfaction of an obligation, or an intent to benefit Kelly. See *Midwest Dredging*, 424 N.W.2d at 224. Therefore, even if there were contractual provisions between BCSD and Iowa Direct dealing with workplace safety, Kelly would not be able to assert a breach of those provisions.

The district court also found that the contract between BCSD and Iowa Direct did not impose safety obligations on Iowa Direct. If an employer has no contractual duty to an owner regarding workplace safety, and does not retain control over the independent contractor's work, the employer is not liable for injuries sustained on the worksite. *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 229 (Iowa 1974). Therefore, summary judgment was properly granted to Iowa Direct.

B. Summary Judgment for Iowa Direct and BCSD under tort theory: negligent hiring under Restatement (Second) section 411

Finally, Kelly claims the district court erred in granting summary judgment to Iowa Direct and BCSD under a theory of negligent hiring. His claim before the district court was that BCSD was negligent in hiring Iowa Direct, and that Iowa Direct was negligent in hiring Riser, and he can therefore recover based on section 411 of the Restatement (Second) of Torts.

Restatement (Second) of Torts section 411, which establishes the standard of care imposed upon employers when hiring independent contractors, was adopted in *Jones v. Schneider, Inc.*, 797 N.W.2d 611, 615 (Iowa Ct. App. 2011). It provides:

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons.

Id.

In *Jones*, we held that the phrase “third persons” in section 411 did not include protection for employees of an independent contractor suing a general contractor for negligent hiring of its own employer. *Id.* One reason for this rule precluding employees of independent contractors from the protection of section 411 is that the cost of workers’ compensation insurance is expected to be borne by the employer who hired the injured worker. *Id.*

Kelly was an employee of an independent contractor on this project; he was covered by his employer’s workers’ compensation insurance; and received workers’ compensation benefits as a result of the incident. The purpose of section 411 is served and Kelly is not entitled to additional recovery under Restatement section 411.

The district court correctly applied *Jones* to conclude that the negligent hiring claim of section 411 “does not include protection for employees of an independent contractor” and therefore specifically excludes plaintiffs like Kelly. Kelly was the employee of an independent contractor. *See id.* We find Kelly’s attempt to distinguish *Jones* unpersuasive, and therefore affirm the district court.

IV. Conclusion

Regarding the November 24, 2010 order granting summary judgment to Riser, the district court was correct in finding Kelly cannot recover on either his tort or contract claims. The release covered all claims, and was enforceable by Riser as a third-party beneficiary, precluding Kelly from recovery on his tort claim. Regarding his contract claim, Kelly was not a third-party beneficiary of the contract between Riser and Labor Ready and therefore not able to survive a summary judgment motion on that claim either.

Regarding the November 1, 2011 order granting summary judgment to Iowa Direct and BCSD, Kelly's contract and tort claims fail here as well. The contract between Iowa Direct and BCSD did not create an obligation on Iowa Direct to maintain a safe work place for Kelly, as Kelly was not a third-party beneficiary to this contract. The district court was also correct in applying *Jones*, precluding Kelly from recovering under Restatement (Second) of Torts section 411 for negligent hiring. We therefore affirm on all grounds.

AFFIRMED.