SUPERIOR COURT

OF THE

STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

DANIEL L. HERRMANN COURT HOUSE
WILMINGTON, DELAWARE 19801

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Re: ***James Kilgore v. R.J. Kroener, Inc. and Wallworks, Inc..***
C.A. No. 00C-08-147 RRC

Submitted: March 4, 2002
Decided: March 14, 2002

On Defendant R.J. Kroener Inc.'s "Motion for Summary Judgment Against the Plaintiff."
GRANTED.

Dear Counsel:

Currently before the Court is a "Motion for Summary Judgment Against the Plaintiff" filed by Defendant R.J. Kroener Inc. ("Kroener") directed towards Plaintiff James Kilgore ("Kilgore"). Because the Court finds that there are no material facts in dispute (the parties agree) and that Kroener owed no legal duty to Kilgore to have ensured the safety of the employees of the subcontractor that Kroener hired, summary judgment in favor of Kroener against Kilgore is **GRANTED**.

INTRODUCTION

This case presents the issue, under the particular facts of this case, of the degree of control a general contractor must exhibit over the performance of a subcontractor's

work before that general contractor will be found to have a duty to ensure the safety of the subcontractor's employees. Necessary to the determination of this question is consideration of the contractual provisions that the parties made regarding workplace safety, whether the general contractor voluntarily assumed a duty to so ensure the safety of the workers, and the parties' performance under the applicable contracts.

This is a personal injury case stemming from an accident that occurred on September 11, 1998 while Kilgore was working for Aloha Temporary Services ("Aloha"). Aloha had contracted with Defendant Wallworks, Inc. ("Wallworks"), which in turn had contracted with Kroener. Kroener was employed as the general contractor for the construction of a Circuit City retail electronics store to be built in Christiana, Delaware (the "Circuit City Project"). Kilgore was injured when a scaffold he was situated on rolled away from the area in which he was installing drywall and he fell to the cement floor underneath. The scaffolding was owned by Wallworks and had been erected by Wallworks.

Kilgore originally filed a Complaint that named only Kroener as a defendant. Kilgore subsequently filed an Amended Complaint against both Kroener and Wallworks, alleging that their negligence caused his injuries and that they should therefore be held jointly and/or severally liable. Specifically, Kilgore alleged that both Kroener and Wallworks were negligent by (among other things): failing to properly erect the scaffolding, failing to ensure that the scaffolding had rails, failing to ensure that the

scaffolding had locking wheels, and failing to comply with OSHA regulations applicable to the assembly and use of scaffolding.[1] Kilgore also alleged that both Kroener and Wallworks were liable in that they intentionally violated OSHA regulations regarding scaffolding safety, knew of the dangers of permitting workers to use scaffolding without rails, and that they displayed a conscious indifference to worker safety when a "top probability" of injury was apparent.[2] Finally, in the count against Wallworks, Kilgore averred that he was a third party beneficiary of a contract between Kroener and Wallworks which provided that the Circuit City Project workplace would comply with OSHA regulations and that the work performed there would be completed in a "workmanlike" manner; Kilgore claimed that Wallworks had breached this agreement and that Kilgore was injured thereby.[3]

This opinion does not address the issue of Kilgore's alleged third party beneficiary status or any claims for contribution and/or indemnification between Kroener and Wallworks.

THE CONTRACTS BETWEEN THE PARTIES

There are three writings potentially relevant to the issue at hand: a contract between Circuit City Stores, Inc. and Kroener (the "Circuit City Contract"); a contract between Kroener and Wallworks (the "Kroener-Wallworks Contract"); and a "Safety Pledge" executed by Wallworks, containing a "Jobsite Safety Guideline" distributed by Kroener (the "Kroener Safety Pledge"). The relevant provisions of each of these writings will be addressed *seriatim*.

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[1] Am. Compl. ¶¶ 12, 19.

[2] Am. Compl. ¶¶ 16, 23

[3] Am. Compl. ¶¶ 26, 27, 28, 29, 30, 31

The Circuit City Contract generally governed the relations between Kroener and Circuit City Stores, Inc., and provides that:

> 1.1 [Kroener] agrees to provide, perform and/or cause to be provided or performed all of the "Work". The "Work" shall include the following:
> (a) All of the labor, materials (including purchase orders and subcontracts therefore), equipment and services necessary for the proper management, construction, and completion of the [Circuit City] Project in accordance with the "Construction Documents" (as defined below);
> ….
> (d) The "Subcontracted Work" and the "General Contractor Work," both as defined below[.]
>
> 1.2 The terms "Subcontracted Work" and "General Contractor Work" shall have the following meanings:
> (a) "Subcontracted Work" shall mean all Work not performed by Contractor's own personnel.
> (b) "General Contractor Work" shall mean all Work to be performed by Contractor's own personnel….

Additionally, the Circuit City Contract provides for Kroener to have the following duties:

> 2.3 [Kroener] shall provide for the benefit of the [Circuit City] Project a competent and skilled field organization containing at all times a sufficient number of personnel to perform the Work and to supervise such performance….
> ….
> 2.5 [Kroener] at all times shall provide adequate and sufficient machinery, equipment, tools and supplies as may be required for the Work.

An exhibit to the Circuit City Contract titled "General Conditions to Construction Agreement," in a section captioned "Protection of Persons and Property," provides:

> 25.1 [Kroener] shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. [Kroener] shall designate a responsible member of [its] organization at the site whose duty shall be the prevention of accidents. This person shall be [Kroener's] superintendent unless otherwise designated in writing by [Kroener] to [Circuit City Stores Inc.].
> ….
> 25.3 ….
> 25.3..1 [Kroener] shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:
> 25.3.2 All workmen and other employees of [Kroener] and subcontractors on the [Circuit City] Project and all visitors and other persons who may be affected thereby[.]

Thus the Circuit City Contract fairly details the duties ascribed to Kroener in the performance of the Circuit City Project.

The Kroener-Wallworks Contract, in turn, provides for workplace safety and project completion as between those two parties. Specifically, the contract provides that:

a) "Wallworks, Inc.…agrees to furnish all labor, material, equipment, plant and service necessary to complete the CARPENTRY WORK for the [Circuit City Project]";
b) "All work at the [Circuit City Project] shall be performed in accordance with [Kroener's] Progress Schedule; as required by conditions at the site; or as directed by the Project Superintendent"; and
c) "[I]n the performance of this contract [Wallworks] shall…comply with [Kroener's] safety rules and regulations and also the most current OSHA regulations as prepared by the Federal Government."

Additionally, safety rules promulgated by Kroener and embodied in the "Jobsite Safety Guideline" packet distributed by Kroener to Wallworks (and acknowledged by Wallworks under an executed copy of a "Safety Pledge") provide as follows:

Statutory Requirements

Each Contractor, Subcontractor and Assigns is expected to be aware of and comply with OSHA federal, state, and local safety regulations. The project supervisor has copies of many of these regulations for your perusal; HOWEVER, IT IS YOUR RESPONSIBILITY TO OBTAIN IF NECESSARY.

….

Violations

When unsafe conditions or practices are observed by the project superintendent the subcontractor's foreman will be requested to correct them. If no action is taken, a violation notice will be issued and submitted to the office of the subcontractor and our corporate office. Any condition or activity that in the opinion of the jobsite superintendent, presents an immediate threat of bodily injury or harm will require immediate corrective action by the parties involved. If immediate action is not taken, R.J. Kroener, Inc., will take whatever steps are necessary to restore the area to a safe condition. All costs incurred by R.J. Kroener, Inc. due to such action will become the responsibility of the contractor and parties in violation.

….

Clothing

….

Approved hard hats must be worn on the jobsite at all times….

….

Crew Meetings

All subcontractor personnel are required to participate in weekly tool box safety meetings. These are short training sessions held by the project superintendent or safety representative to comment on one or two job hazards and safe practices to follow for avoiding accidents.

Subcontractors are required to either participate in the general contractors [sic] meeting or to conduct similar meetings for their personnel. [ ].

DEPOSITION TESTIMONY RELATED TO CONTRACT PERFORMANCE

In addition to the language of the contracts themselves, the Court has considered the deposition testimony of various persons performing under those contracts.

Larry Bice ("Bice"), a Kroener employee who interviewed both Wallworks's on-site personnel as well as Kroener's own on-site project superintendent following Kilgore's injury, testified that Kroener considered itself a "construction management" company only in charge of managing projects and operating as the "representative" of Circuit City Stores, Inc. for things such as scheduling and tracking delivery of supplies and material. In other words, according to Bice, Kroener "kept track" of subcontractors insofar as meeting contractual deadlines. Bice testified that Wallworks retained control over its own workers' individual workspaces, and that Wallworks's "control" extended to the safety measures that those workers followed.

Bice further testified that although the various contracts the parties were operating under spoke of safety programs that Kroener was to maintain (and in particular the Kroener Safety Pledge, which detailed "Crew Meetings" that subcontractor personnel were to attend), the subcontractors on the Circuit City Project were to in effect have their own meetings with their own personnel:

> Q. [By Wallworks's counsel] Do you determine whether [subcontractors are holding safety meetings with their personnel]?
> A. No. They are independent and we do give them some tools to help facilitate that. We do some printed tool box talks that we give them copies of if they choose to use them. We do not dictate that.
> Q. Did you give them out on this particular job?
> A. Yes, we do [sic]. We do that at every job…. We run Xerox copies and make them available to each of the subcontractors.
> Q. Now, would these have a single topic?
> A. Yes.
> Q. And it's kind of an informal thing?
> A. It's a subscription service and each week is a different topic that people who may not be conversant can use to read to their employees.[4]

Bice also testified, however, that when Kroener would observe a "questionable" safety practice, it would comment on it to Wallworks's supervisor. Bice apparently

[4] Bice Dep. at 8. (Ex. A to Kroener's Mot.)

carried a laptop computer with current OSHA regulations installed for just such a purpose. Despite this fact, Bice insisted that Kroener did not "pass or fail" a subcontractor whom it employed, but rather that the individual subcontractor is "responsible" for its own workers' safety. This fact is borne out by the testimony of William Archacki ("Archacki"), an on-site Wallworks's employee:

> Q. [By Kroener's counsel] Okay. Let me see if I can rephrase it for you. Did R.J. Kroener employees instruct any Wallworks employees or the temporary laborers in safety issues?
> A. No.
> Q. Was that the sole responsibility of Wallworks?
> ….
> A. Yes.
> Q. Were Wallworks employees given safety instructions?
> A. Yes.
> Q. How about temporary laborers?
> A. Yes.
> Q. Do you know who gave the safety instructions to the temporary laborers?
> A. Yes.
> Q. Who?
> A. Myself.[5]

Archacki testified that no violation serious enough to warrant Kroener's taking direct action per the "Violations" section of the Jobsite Safety Guideline had occurred during the performance of the Circuit City Contract.

Furthermore, Robert Hart ("Hart"), Kroener's on-site supervisor for the Circuit City Project, testified that Kroener employees would not themselves correct any safety violations that observed being committed by Wallworks's workers; rather, the Kroener employee would go to Wallworks's supervisory personnel and inform them of any supposed violation. This testimony is in accord with Bice's testimony concerning the scope of Kroener's supervision of safety measures.

Additionally, Archacki also testified as to who owned and erected the scaffolding from which Kilgore fell:

[5] Archacki Dep. at 24. (Ex. D to Kroener's Mot.)

Q. [By Kroener's counsel]. And then there was scaffolding on the job?
A. Yes.
Q. That was Wallworks's equipment?
A. Yes.
Q. Did anyone from R. J. Kroener, any employee, have any role in setting up that scaffolding?
A. No.[6]

CONTENTIONS OF THE PARTIES

In its motion for summary judgment, Kroener argues that because it did not retain sufficient control over either the Circuit City Project area or the work Wallworks itself performed, it owed no duty to Kilgore, and therefore cannot be held liable for his injuries. Kroener argues that control sufficient to impose such a duty was not inferable from its responsibility to ensure that Wallworks complied with the terms of the various contracts between the parties, and that the contracts themselves placed safety responsibility and any liability flowing therefrom on Wallworks itself.

In response, Kilgore argues that the various contracts among the parties establishes sufficient control on behalf of Kroener over Wallworks's performance so that Kroener can now be held liable for Kilgore's injuries. Specifically, Kilgore points to 1) the language in the exhibit to the Circuit City Contract wherein Kroener covenanted that it would be responsible for "initiating, maintaining and supervising all safety precautions and programs" in connection with the Circuit City Project; 2) the language that in performing the project, Wallworks would "comply" with Kroener's safety rules and regulations; and 3) the "Safety Pledge" provision that all subcontractor personnel were required to participate in weekly "tool box safety meetings" to be held by Kroener. Kilgore also points to the fact that Kroener's responsibilities included scheduling

[6] Archacki Dep. at 21. (Ex. D to Kroener's Mot.)

subcontractors, scheduling deliveries, and making sure that jobs were completed on time.[7]

The parties agreed at oral argument on this motion that no material facts are in dispute and that the question before the Court, looking at the facts in a light most favorable to Kilgore, is whether any legal duty existed on behalf of Kroener to have ensured Kilgore's safety so as to now hold Kroener potentially liable for the injuries Kilgore sustained while he worked on the scaffolding.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment is granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[8] The Court must view the facts in a light most favorable to the non-moving party.[9] Where the parties agree that there are no material facts in dispute, the issue the Court must decide when faced with an injury to an independent contractor's employee is whether the landowner or general contractor owed that employee any duty.[10] Where no duty exists, then summary

[7] In its Response, Kilgore also raised the additional grounds that Kroener was liable to him for the allegedly "negligent hiring" of Wallworks for construction of the Circuit City Project, and that "[t]he contract between Defendant Wallworks and Defendant Kroener, and specifically the indemnification provision, is an admission against interest by Defendant Kroener of its responsibility for its negligence." Pls.' Resp. ¶ 6. The Court finds the negligent hiring claim is barred because it was raised for the first time in Kilgore's response to Kroener's current motion. The Court also finds Kilgore's claim that Kroener's indemnification pleading is an "admission against interest" to be without merit; the Court views the subject provision and the recovery sought under it as simply alternative pleading should Kroener ultimately have been found to be liable.

[8] Super. Ct. Civ. R. 56(c); Burkhart v. Davies, 602 A.2d 56 (Del. 1991).

[9] Merrill v. Crothall-American, Inc., 606 A.2d 96, 99-100 (Del. 1992).

[10] See, e.g., Seeney v. Dover Country Club Apartments, Inc., 318 A.2d 619, 623 (Del. Super. 1974) (stating that where defendant moved for summary judgment on ground that there was no material fact in dispute (and plaintiff agreed) but defendant was not liable as a matter of law, defendant's liability was contingent upon existence of some breach of a duty to plaintiff).

judgment in favor of the landowner or general contractor against the injured independent contractor's employee is appropriate.[11]

DISCUSSION

In order to hold Kroener liable for Kilgore's injury under negligence principles, Kilgore must show that Kroener had a legal duty to protect him from the type of harm that caused his injury.[12] Whether a duty exists is "entirely a question of law, to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law; and it must be determined only by the court."[13] Generally, an owner or general contractor does not have a duty to protect the employees of an independent contractor from the hazards of completing the contract.[14] Here, there are no material facts in dispute, and the parties agree that Kilgore was working as an independent contractor under the various contracts governing the Circuit City Project; therefore, for Kroener to be held liable for Kilgore's injuries, an exception to the general rule of lack of duty must be present.

An owner or general contractor has a duty to protect an independent contractor's employees when the owner or contractor "retains active control over the manner in which the work is carried out and the methods used."[15] As this Court has previously held, "[w]hile the concept of active control is an elastic one, it is not inferred from mere

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[11] Id.

[12] Bryant v. Delmarva Power & Light Co. et al., Del. Super., C.A. No. 89C-08-070, Babiarz, J. (Oct. 2, 1995) Mem. Op. at *2 (holding in part that owner of land/general contractor could not be held liable to plaintiff in negligence because of a lack of duty where the owner/general contractor had neither exercised active control over plaintiff nor voluntarily assumed responsibility for plaintiff's safety).

[13] Id.

[14] O'Connor v. Diamond State Tel. Co., 503 A.2d 661, 663 (Del. Super. 1985) (holding that neither telephone company that owned poles nor contractor that had license to hang lines on poles owed duty to independent contractor's employee who was injured while attaching a line to such a telephone pole).

[15] O'Connor, 503 A.2d at 663.

retention by the owner or contractor of the right to inspect or to supervise the work for conformity with the contract."[16] The right to control "must go directly to the manner or methods used by the independent contractor in [the independent contractor's] performance of the delegated tasks."[17] It has been said that contractual agreements entered into between the parties present "additional relevant evidence" regarding the existence of a duty.[18]

Here, the record, considered in a light most favorable to Kilgore (the non-moving party), demonstrates that Kroener's role on the Circuit City Project site did not rise to the level of "active control" over the subcontractors necessary to find Kroener potentially liable for Kilgore's injuries. A fair reading of the contractual language itself indicates that Kilgore's conduct under the Kroener-Wallworks Contract did not rise to the level of control required by Delaware law—the Kroener-Wallworks Contract provides that Wallworks itself was to furnish all "labor, material, equipment, plant and service necessary" for the completion of the Circuit City Project, and that Wallworks's performance was to be "in accordance with" the time schedule Kroener had developed. The Circuit City Contract speaks only of Kroener "caus[ing] to be provided or performed" all work necessary to the completion of the Circuit City Project; in reality the scaffolding from which Kilgore fell was neither owned nor constructed by Kroener. Cases in which Delaware courts have found owners or general contractors to have

[16] Seeney, 318 A.2d at 621.

[17] Id.

[18] Cook v. E.I. duPont de Nemours and Co., Del. Super., C.A. No. 99C-01-023, Ableman, J. (Aug. 20, 2001) Mem. Op. at 3 (holding in part that a sufficient degree of control warranting landowner being held liable for plaintiffs injuries existed where the landowner provided tools to plaintiff, the landowner directed and restricted the movements of contract employees, and the landowner inspected contractor's on-site offices and vehicles).

retained active control were based on facts in which the owners or general contractors engaged in more extensive supervision of the worksite than Kroener did here.[19]

Nonetheless, in the absence of "active control" of a subcontractors' work, an owner or general contractor can, in some circumstances, still be held liable where the owner or general contractor has voluntarily assumed responsibility for workplace safety.[20] A duty to ensure workplace safety can be imposed upon a party who "by agreement or otherwise, undertakes responsibility for implementing the required safety measures."[21] Where a breach of this duty causes injury to a worker, the responsible party can be held liable under traditional principles of negligence law.[22]

Kilgore contends that Kroener's "pledge" to Circuit City Stores, Inc., that Kroener would be responsible for "initiating, maintaining and supervising all safety precautions and programs," and the fact that Wallworks would need to "comply" with Kroener's safety rules and regulations (including mandatory participation in weekly "tool box safety meetings" to be held by Kroener), demonstrate that Kroener had assumed responsibility for the safety of Wallworks's workers. This Court has held, however, that such precautions do not compel a finding that Kroener assumed responsibility for workplace

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[19] See, e.g., Rabar v. DuPont de Nemours & Co., 415 A.2d 499 (Del. Super. 1980) *implied overruling on other grounds recognized by* Figgs v. Bellevue Holding Co., 652 A.2d 1084, 1092 (Del. Super. 1994) (finding that defendant had retained sufficient control of the work area where defendant dictated the number of workers to be used by the subcontractor and supplied all construction materials, tools, equipment, and facilities); Cook, supra note 18.

[20] See Li v. Capano Builders, Inc., No. 97-549-SLR, 1999 WL 191570 (D. Del. March 26, 1999) (applying Delaware law and stating the rule that voluntary assumption of responsibility for workplace safety will place liability on owner or general contractor where independent contractor is injured, but finding facts of that case did not demonstrate such voluntary assumption).

[21] Figgs v. Bellevue Holding Co., 652 A.2d 1084, 1092 (Del. Super. 1994) (finding in part that subcontractor's contractual agreement to abide by OSHA regulations did not impose additional responsibility or liability with regard to the employee of another subcontractor, as the parties could have agreed to that if that had been their intent).

[22] Bryant at *7.

safety.[23] And in fact, Larry Bice's deposition testimony demonstrates that Kroener had in effect delegated safety responsibility to independent contractor personnel such as Wallworks; this is further support for a finding that Kroener did not retain or assume responsibility for Wallworks's safety.

The Court finds analogous support for its holding in this case in the case of Bryant v. Delmarva Power & Light Co. et al.[24], relied on by Kroener. In Bryant, the defendants (certain utility providers who had contracted for reconstruction of a utility tower located in the Delaware River) "pointed out and required correction of OSHA violations by contractors, addressed safety at project meetings, and allegedly retained the right to shut down the project if it was unsafe."[25] However, the Court found that the utility defendants' field representatives were engaged in a supervisory capacity that did not rise to the level of assuming responsibility for workplace safety, as these representatives were there to "advise" of any observed safety violations at the worksite; particularly noteworthy was the fact that the representatives did not directly order other workers to comply with safety regulations, but rather would "advis[e] [the contractor's] management of the problem and expect[ ] [them] to correct it."[26] The Bryant court found that "[a] property owner does not voluntarily assume responsibility for workplace safety by advising his independent contractor of observed safety violations where the independent contractor is contractually required to maintain workplace safety."[27]

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[23] Id. at *10-11.

[24] Del. Super., C.A. No. 89C-08-070, Babiarz, J. (Oct. 2, 1995) (Mem. Op.).

[25] Bryant at *10.

[26] Id.

[27] Id. at *11.

Here, the deposition testimony of Larry Bice, Robert Hart, and William Archacki demonstrates that Kroener's contractual performance consisted of maintaining a supervisory position, and not active control. The testimony of both Bice and Hart indicates that Kroener representatives, rather than taking corrective measures themselves, would go to Wallworks's representatives, whom Kroener expected to correct the problem. The fact that employee safety rested solely with Wallworks itself is corroborated by Archacki's deposition testimony when he states that he alone would give Wallworks's employees safety instruction, and that Wallworks alone set up the scaffolding from which Kilgore fell.

The sole cases cited and relied upon by Kilgore in his Response to Kroener's motion are inapposite: in both Cook v. E.I. duPont de Nemours and Co.[28] and Clemmons v. Whiting-Turner Contracting Co.[29], the existence of disputed material facts in part precluded an awarding of summary judgment.

In Clemmons, the Court's finding the existence of material facts in dispute was implicit, as the Court stated that "both [general contractor] and [subcontractor] had a duty of care and there is evidence from which a jury could find either…or both of them…negligent…."[30] Notably, the Court found that the existence of the dangerous condition (slippery mud) was "obvious" to the contractor; in this case, there has been no showing by Kilgore that the problem with the scaffolding was "obvious" or even known o Kroener—Kilgore's Response asserts only that Kilgore "was working on scaffolding

[28]Del. Super., C.A. No. 99C-01-023, Ableman, J. (Aug. 20, 2001) (Mem. Op.)

[29]Del. Super., C.A. No. 99C-01-299, Silverman, J. (Oct. 31, 2000) (ORDER)

[30] Id. at *2.

which moved."[31] The Clemmons court also found that the "active control" doctrine did not apply.

In Cook, the Court held that it was "an appropriate factual issue for the jury"[32] whether the landowner could be held to have exercised the requisite degree of control over the contractor necessary to hold that landowner liable for injuries to the contractor's employee; the landowner had provided tools to the plaintiff, had directed and restricted the movements of the contract employees, and had inspected the contractor's on-site offices and vehicles. No other cases were cited by Kilgore in its Response and no attempt was made in Kilgore's Response to distinguish the cases (such as Bryant) that were relied upon by Kroener in its motion.

CONCLUSION

A general contractor will normally be expected to oversee to some degree the safety precautions its independent contractors employ, but not every such exercise of oversight will necessarily lead to a finding of control or to a voluntary assumption of responsibility for workplace safety not otherwise required by contract. The existence of a duty will always be a fact-specific inquiry. Summary judgment is appropriate here because, there being no material facts in dispute, Kroener has not exhibited that degree of control over Wallworks's performance so that Kroener had a duty to ensure the safety of Wallworks's employees. Kroener neither maintained the degree of active control that would be necessary to hold it liable, nor did Kroener voluntarily assume responsibility for Kilgore's workplace safety. Thus, Kroener is not legally responsible for the injury

[31] Pl.'s Resp. ¶ 1.

[32] Cook at 4.

Kilgore sustained. Accordingly, Kroener's Motion for Summary Judgment Against the Plaintiff is **GRANTED.**

IT IS SO ORDERED.

Very truly yours,

cc: Prothonotary