

**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

ATTORNEYS FOR APPELLANT:

**DAVID A. KLECZEK**  
Kleczek Law Office  
Peoria, Illinois

**ZACHARY A. WITTE**  
Fort Wayne, Indiana

ATTORNEY FOR APPELLEES:

**DANE L. TUBERGEN**  
Fort Wayne, Indiana

---

**IN THE  
COURT OF APPEALS OF INDIANA**

---

JENNIFER LOGSDON, )

Appellant-Plaintiff, )

vs. )

No. 02A05-0606-CV-302

INDIANA MICHIGAN POWER CO., )  
an Indiana corporation, )  
AEP ENERGY SERVICES, INC., and )  
AMERICAN ELECTRIC POWER )  
SERVICE CORP., )

Appellees-Defendants. )

---

APPEAL FROM THE ALLEN CIRCUIT COURT  
The Honorable Thomas J. Felts, Judge  
Cause No. 02C01-0406-CT-46

---

**December 5, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

## **BAKER, Judge**

Appellant-plaintiff Jennifer Logsdon, individually and as personal representative of the estate of her deceased husband, James Logsdon (James), appeals the trial court's grant of summary judgment in favor of appellees-defendants Indiana Michigan Power Co. (Indiana Michigan), AEP Energy Services, Inc. (AEP), and American Electric Power Service Corp. (American Electric) (collectively, the appellees), on her negligence claim against the appellees. Specifically, Logsdon argues that the trial court erroneously determined that the appellees were entitled to judgment as a matter of law because certain exceptions to the general rule of independent contractor non-liability apply under these circumstances. Logsdon also maintains that it was error for the trial court to grant summary judgment for the appellees because the designated evidence established that AEP, as the property owner, controlled the manner and means by which UtilX—the independent contractor—and its employees performed the work on the project. Concluding that summary judgment was properly entered for the appellees, we affirm the judgment of the trial court.

### FACTS

On May 11, 2001, the appellees, through American Electric, contracted with UtilX for the lubrication of some power lines in Allen County. AEP owned and operated the lines. Under the terms of the agreement, UtilX provided all of the materials, labor, and equipment that were needed to complete the process. UtilX trained its employees

regarding various safety procedures and supervised the implementation of those procedures.

The agreement between AEP and UtilX provided in relevant part as follows:

**SCOPE OF WORK  
AEP EAST (SIX REGIONS) AND UTILX CORPORATION**

**Scope**

The Contractor will supply all labor, tools, transportation, equipment and material necessary to perform injection of the “CableCURE” process on existing Underground primary cables.

**1.0 DEFINITIONS**

...

1.2 Contractor: “Contractor” means the entity contracting with Owner for the performance of Work. In performing this Contract, Contractor shall be an independent contractor.

...

**2.0 CONTRACTOR OBLIGATIONS**

2.1 Contractor shall at its expense provide everything necessary for the complete, proper and timely execution of the Work including, but not limited to, home office support, supervision, labor, tools, transportation, safety equipment, construction equipment, temporary utilities and facilities, equipment to be installed, materials and supplies, unless excluded in the Contract.

...

**5.0 SAFETY AND SECURITY**

5.1 Contractor shall perform the Work in a safe and careful manner, provide first aid facilities and transportation, and use such safety devices and methods as are necessary to protect its employees, agents, subcontractors, Owner’s employees and agents, other contractors and the public from bodily injury and property damage.

5.2 Contractor shall comply with and enforce all laws, rules and regulations applicable safety and health standards, including, but not limited to, the Occupational Safety and Health Act of 1970 (OSHA) and any revisions of OSHA or successor legislation.

5.3 Contractor shall comply with project and site safety and security rules and all procedures issued by the Owner, provided that such rules and procedures do not conflict with OSHA or other safety laws, rules or regulations. Contractor shall assign a competent person at all times to manage, coordinate and enforce its safety program during performance of the Work.

Appellant's App. p. 49-50.

The designated evidence reveals that prior to the beginning of each workday, UtilX personnel notified AEP of each location where its crews would be working. This notification afforded AEP the opportunity to respond to the inquiries of customers whose power may have been turned off during the maintenance process and to provide assistance in the event of an emergency.

James was an employee of UtilX. On December 12, 2002, James and some other UtilX employees were injecting AEP's underground cable with lubricant in accordance with the terms of the contract. At some point, Jeff Scott, one of the other workers at the site, received a radio dispatch from his area manager indicating that Scott should "close it in, and . . . regroup at the truck." Appellant's App. p. 46. Scott understood this directive to mean that he should recharge the cable. As Scott did not see James or any other employees near the transformers, Scott believed that it was safe to reenergize the line. However, when Scott performed this task, James was electrocuted and later died.

The designated evidence shows that Scott had received safety training that included, among other things, the proper procedure for energizing and de-energizing the

power lines. Specifically, UtilX employees were instructed to do the following: (1) notify all crew members by radio and confirm with each crew member that they are clear of the line that is to be energized or de-energized; (2) lift grounds; (3) notify the crew that the cable will be energized; (4) energize or de-energize the line; and (5) once the line has been energized or de-energized, confirm that fact with each crew member by radio. Prior to re-energizing the line on December 12, 2002, Scott failed to notify James or the other employee by radio that he was going to perform that function or confirm that the other employees were clear of the line.

On June 15, 2004, Logsdon filed a complaint against the appellees for wrongful death, alleging, among other things, negligent hiring, violation of OSHA requirements, and premises liability. In essence, Logsdon maintained that the appellees were liable for the negligent acts of the independent contractor, UtilX, which resulted in James's death. Thereafter, the appellees filed a motion for summary judgment, alleging that they were entitled to a judgment as a matter of law because AEP owed no duty to James. Following a hearing, the trial court granted the appellees' motion for summary judgment on March 7, 2006. Logsdon now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Ind. Univ. Med. Ctr. v. Logan, 728 N.E.2d 855, 858 (Ind. 2000). Summary judgment

should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Gunkel v. Renovations, Inc., 822 N.E.2d 150, 152 (Ind. 2005). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. Tibbs v. Huber, Hunt & Nichols, Inc., 668 N.E.2d 248, 249 (Ind. 1996).

## II. Logsdon's Contentions

Logsdon contends that the appellees' motion for summary judgment was improperly granted because the designated evidence established that the appellees had a duty to James based on two well-established exceptions to the independent contractor rule. More specifically, Logsdon argues that a duty was created through various OSHA requirements and that AEP was aware that UtilX was not following the procedures set forth in those regulations. Logsdon also maintains that summary judgment was improperly granted in the appellees' favor because AEP failed to take due precautions to avoid the injury and that AEP cannot escape liability because it negligently hired UtilX as an independent contractor.

In resolving these claims, we initially observe that a principal is generally not liable for the negligence of an independent contractor. Carie v. PSI Energy, Inc., 715 N.E.2d 853, 855 (Ind. 1999). The rule applies unless one of the following exceptions apply: (1) the contract requires the performance of intrinsically dangerous work; (2) the principal is charged by law or contract with performing the specific duty; (3) the act will create a nuisance; (4) the act to be performed will probably cause injury to others unless

due precaution is taken; and (5) the act to be performed is illegal. Id. Also, in PSI Energy, Inc. v. Roberts, 829 N.E.2d 943 (Ind. 2005), our Supreme Court recognized that in addition to proving at least one of the five exceptions, a person injured by the negligent act of an independent contractor must also show that the principal was negligent in the selection of the independent contractor. Specifically, the Roberts court observed:

Employees of the contractor should have no claim against a principal for their own or the contractor's failure to use ordinary care in carrying out the contractor's assignment. Nor should a principal be liable to a contractor or its employees simply by reason of employing the contractor to engage in inherently dangerous activity. We hold therefore that in the absence of negligent selection of the contractor, an employee of the contractor has no claim against the principal based solely on the five exceptions to the general rule of nonliability for acts of the contractor.

Id. at 953.

#### A. AEP Charged With Specific Duty

Proceeding to Logsdon's particular contentions, she first argues that AEP cannot escape liability because AEP was charged with the specific duty to implement OSHA regulations regarding the inspection and examination of various procedures on the lines as well as work crew certifications. This exception to the independent contractor rule applies where the principal is, by law or contract, charged with performing the specific duty that was breached by the independent contractor. Carie, 715 N.E.2d at 855. Notwithstanding Logsdon's claim that AEP's purported OSHA violations subject it to liability in these circumstances, our Supreme Court has observed that:

FMSHA regulations are analogous to OSHA regulations applicable to many workplaces. An OSHA violation does not in itself render a workplace owner liable in tort for the negligence of an independent contractor. See Ellis v. Chase Commc'ns, Inc., 63 F.3d 473, 478 (6th Cir.

1995) (holding in a suit against the owner of premises where employee of independent contractor was killed that even had there been a violation of OSHA safety regulations, the owner must owe a duty independent of OSHA in order to create liability).

Vaughn v. Daniels Co., Inc., 841 N.E.2d 1133, 1144 (Ind. 2006). In light of Vaughn, Logsdon has made no showing that the OSHA regulations she relies upon imposed any specific duty upon AEP with regard to James or other employees in performing their duties as employees of UtilX. As a result, this exception to the independent contractor rule does not apply in this instance.

#### B. “Due Precaution” Exception

Logsdon also contends that the “due precaution” exception to the independent contractor rule precludes the entry of summary judgment in the appellees’ favor. In essence, Logsdon claims that AEP failed to take the proper steps to avoid the harm to James.

In general, the due precaution exception to the independent contractor rule applies only when the “risk involved is something more than the routine and predictable hazards generally associated with a given occupation: it must be a risk unique to the circumstances of a given job.” McDaniel v. Bus. Inv. Group, 709 N.E.2d 17, 22 (Ind. Ct. App. 1999). Additionally, the exception contemplates that it is the independent contractor who will be held responsible for anticipating and guarding against routine or predictable dangers. Id. Moreover, “foreseeability is an essential element of the due precaution exception.” Id. at 23.



In McDaniel, an independent contractor's employee was killed when a nine-foot trench caved in while the employee was working on a sewer line. The subcontractor's employees had not taken any safety precautions, such as the use of shoring boxes, to prevent a cave-in. The estate of the subcontractor's employee brought a claim against the principal for negligence, and the trial court ultimately granted the principal's motion for summary judgment. On appeal, we affirmed the award of summary judgment, and noted that

[C]ave-ins do not represent a peculiar risk of trenching. The relevant statistics demonstrate that cave-ins are a routine and predictable hazard of trenching, and even the construction industry has acknowledged that reality by devising and promoting safety measures to prevent such accidents. Had [the subcontractor's] employees utilized those safety measures, the cave-in and [the employee's] death could have been avoided. There is no evidence that the . . . job involved a risk of cave-in that was somehow unique or distinguishable from the general risk of cave-ins associated with trenching, nor is there evidence that extraordinary precautions were necessary and should have been taken.

. . .

The due precaution exception contemplates that independent contractors will be held responsible for anticipating and guarding against routine or predictable dangers. To find otherwise would be to abrogate not only the general rule of nonliability but also the contractee/independent contractor relationship itself.

Id.

Like the circumstances in McDaniel where we determined that cave-ins were not a peculiar risk of trenching, electrocution is certainly a routine and predictable hazard of working with electric transmission lines where the line remains energized. Hence, AEP cannot be charged with foreseeing that a UtilX employee would disregard procedures designed to prevent the hazard of electrocution. Indeed, a contractee may reasonably

expect that an independent contractor will follow recommended procedures to ensure the safety of its workers. Id. at 23. As a result, Logsdon’s attempt to apply the due precaution exception to these circumstances fails.<sup>1</sup>

### C. Right to Control

Finally, although we have determined that none of the exceptions to the independent contractor rule apply, Logsdon claims that summary judgment for AEP was error because AEP “retained control at all times of its power lines located on its premises” and directed the manner and means by which UtilX and its employees performed the work on the lines. Appellant’s Br. p. 8. In support of this claim, Logsdon directs us to section 414 of the Restatement of Torts, which provides that:

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 of care to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Our courts have consistently held that, where an instrumentality causing injury was in the control of an independent contractor, a duty will not be found where there is no evidence that the landowner maintained any control over the “manner or means” by which the contractor engaged in its work. Adams v. Inland Steel Co., 611 N.E.2d 141, 144 (Ind. Ct. App. 1993); Phillips v. United Eng’rs, 500 N.E.2d 1265, 1267 (Ind. Ct. App. 1986). Also, if there is no evidence that the landowner controlled the manner or

---

<sup>1</sup> Because we have determined that none of the exceptions to the independent contractor rule apply in this instance, we need not address Logsdon’s contention that AEP was negligent in selecting UtilX as an independent contractor. See Roberts, 829 N.E.2d at 952-53 (recognizing that a negligent hiring claim need not be addressed when the requirements of an independent contractor exception were not met).

means by which the independent contractor performed its duties, there generally can be no duty predicated upon a right to control. Phillips, 500 N.E.2d at 1268.

In this case, the plain language of the contract between UtilX and AEP required UtilX to provide all of the materials, labor, and equipment necessary to complete the project. Appellant's App. p. 49. Moreover, UtilX was responsible for the development, training, and implementation of all the safety procedures for its employees. Id. at 50. In essence, UtilX alone held the responsibility of energizing and de-energizing the power lines. Other than being notified of the location of the work to be performed by UtilX crews, the designated evidence established that AEP was not involved in the performance, control, or supervision over the worksite or UtilX's manner of completing the project. As a result, Logsdon's claim fails on this basis. See Perry v. N. Ind. Pub. Serv. Co., 433 N.E.2d 44, 48 (Ind. Ct. App. 1982) (observing that where there was no contractual provision granting the contractor the right to control the "manner or means" by which the independent contractor completed its obligations, the relationship was that of contractor-independent contractor).

The judgment of the trial court is affirmed.

NAJAM, J., and DARDEN, J., concur.