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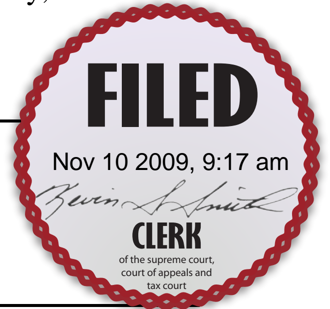
ATTORNEYS FOR APPELLANTS:

WILLIAM L. TOUCHETTE
Merrillville, Indiana

DAVID N. GILYAN
Hobart, Indiana

ATTORNEYS FOR APPELLEE:

JAMES M. PORTELLI
CALEB S. JOHNSON
Spangler, Jennings & Dougherty, P.C.
Merrillville, Indiana



IN THE
COURT OF APPEALS OF INDIANA

KENNETH E. SMITH, JR., and
CATHY SMITH,

Appellants-Plaintiffs,

vs.

JEFFERY HARBRECHT,

Appellee-Defendant.

No. 45A03-0902-CV-59

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0207-CT-70

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Kenneth Smith ("Smith") and Cathy Smith appeal the trial court's order granting summary judgment to Jeffery Harbrecht on Smith's claim for negligence resulting in personal injuries and Cathy's claim for loss of consortium. The Smiths raise two issues for our review, which we consolidate and restate as whether the trial court properly granted Harbrecht summary judgment. Concluding summary judgment was proper because Harbrecht did not owe Smith a duty, we affirm.

Facts and Procedural History

This case arises out of injuries sustained by Smith when working as a subcontractor on Gerhard King ("King") and Christine King's home construction project in which Harbrecht was another subcontractor. In a previous appeal, this court related the following facts:

> In 2000, the Kings began construction of a new residence on their property. [King] acted as a general contractor on the project and hired various subcontractors to perform most of the work. [King] visited the jobsite on a daily basis at the beginning, but as the construction progressed, he visited the site "every other day or every third day." [King] also performed some of the work, such as the flooring, himself. Additionally, during the construction, the Kings had problems with water in the basement, and [King] would pump the water out. The Kings hired Harbrecht to perform the framing and carpentry work and hired Lake Heating and Ventilating to perform the heating and air conditioning work. [Smith] is the owner of Lake Heating and Ventilating.
>
> In June 2000, Harbrecht had not yet completed the stairs from the residence's first floor to the basement, leaving an open hole in the floor.

Smith v. King, 902 N.E.2d 878, 879-80 (Ind. Ct. App. 2009) (citations omitted), clarified on rehearing, 907 N.E.2d 1088.

Harbrecht left the jobsite two to three weeks before Smith's accident and did not return during that time. Also two to three weeks before Smith's accident, King telephoned

Harbrecht and left multiple messages stating his safety concerns about the open stairway hole and requesting that Harbrecht begin installing the stairs or take measures to secure the hole. About one week before the accident, as a safety precaution, King nailed a four by eight piece of plywood against the stairway opening.

> In mid- to late-June 2000, according to [Smith], [King] called [Smith], instructed him to begin installation of the heating and cooling system, and told [Smith] that he would not need a key because the house was not secure yet. When [Smith] and his employee, Tom Cox, went to the residence to begin the installation, they discovered that the doors were locked, and they had to climb through an open soffit above a kitchen wall to enter the residence. However, they soon had to leave the residence because of a rain storm. A week later, [Smith] and Cox returned to the residence. [Smith] saw a four-by-eight piece of plywood "laying up against the opening" to the basement. [Smith] and Cox climbed down a ladder and went into the basement where they discovered two to three inches of water.
>
> [Smith] and Cox returned to the Kings' residence a few days later on July 5, 2000. [Smith] was using a tape measure over his head and was walking "sideways" when he stepped into the uncovered stairway opening and fell into the basement. The plywood sheet was not in place, and there was no water in the basement at that time. [Smith] sustained severe injuries as a result of his fall.

Id. at 880 (citations omitted).

On July 3, 2002, the Smiths filed a complaint against the Kings and Harbrecht for negligence resulting in personal injuries to Smith and loss of consortium to Cathy. The Kings filed a motion for summary judgment, which the Smiths and Harbrecht both opposed. On May 20, 2008, the trial court granted summary judgment to the Kings on all the Smiths' claims. The Smiths and Harbrecht appealed, and this court affirmed. Id. at 884. After Harbrecht petitioned for rehearing, we reaffirmed our original opinion and further concluded King, as general contractor, did not breach his duty of care to Smith because the open

stairway hole was known and obvious to Smith. Smith v. King, 907 N.E.2d at 1089. Transfer was not sought, and on August 4, 2009, the Smith v. King opinion was certified, terminating the litigation between the Smiths and the Kings.

On April 10, 2008, Harbrecht filed a motion for summary judgment. On October 10, 2008, the trial court issued an order granting summary judgment to Harbrecht on all the Smiths' claims. The trial court concluded in relevant part:

> . . . As in Helton [v. Harbrecht, 701 N.E.2d 1265 (Ind. Ct. App. 1998), trans. denied], the evidence designated to this Court establishes that Harbrecht was away from the construction site for two to three weeks before Smith was injured. This Court finds that the designated evidence also establishes that Harbrecht did not exert control over the construction or premises at the time Smith was injured. For that reason, Harbrecht owed no duty to Smith and Harbrecht's Motion for Summary Judgment should be granted on this basis.
> * * *
> . . . This Court concludes that Harbrecht is correct in his assertion that his actions did not cause Smith's fall, rather the injuries that Smith sustained were brought about by his own negligence. On the day he fell, Smith had actual knowledge of the presence and location of the opening but, unfortunately, ignored the hazard and lost track of where he was in relation to the opening. These facts based on Smith's testimony negate the existence of proximate cause which is indispensable to a negligence claim against Harbrecht.

Appellant's Appendix at 31-32. On December 12, 2008, the trial court denied the Smiths' motion to correct error. The Smiths now appeal.

Discussion and Decision[1]

I. Standard of Review

Summary judgment is appropriate only when the designated evidence "shows that

[1] Because we decide the issue on appeal in favor of Harbrecht, we deny as moot Harbrecht's motion to strike portions of the Smiths' reply brief, as well as the Smiths' motion for extension of time to file a response to Harbrecht's motion.

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." Scott v. Bodor, Inc., 571 N.E.2d 313, 318 (Ind. Ct. App. 1991).

We review the grant or denial of a motion for summary judgment de novo. Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528, 531 (Ind. 2006). We examine only those materials properly designated by the parties to the trial court. Trietsch v. Circle Design Group, Inc., 868 N.E.2d 812, 817 (Ind. Ct. App. 2007). We construe all facts and reasonable inferences in favor of the non-moving party, Am. Home Assurance Co. v. Allen, 814 N.E.2d 662, 666 (Ind. Ct. App. 2004), trans. dismissed, and resolve all doubts as to the existence of a material issue against the moving party, Tibbs v. Huber, Hunt & Nichols, Inc., 668 N.E.2d 248, 249 (Ind. 1996). The movant has the initial burden of proving the absence of a genuine issue of material fact as to an outcome-determinative issue and only then must the nonmovant come forward with evidence demonstrating the existence of genuine factual issues that should be resolved at trial. Jarboe v. Landmark Cmty. Newspapers of Ind., Inc., 644 N.E.2d 118, 123 (Ind. 1994).

The party appealing the trial court's summary judgment decision has the burden of persuading us the decision was erroneous. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 908 (Ind. 2001). If the trial court's grant of summary judgment can be sustained on any theory or basis in the record, we will affirm. Beck v. City of Evansville, 842 N.E.2d

856, 860 (Ind. Ct. App. 2006), trans. denied. However, we may not reverse the trial court's grant of summary judgment on the ground there is a genuine issue of material fact, "unless the material fact and the evidence relevant thereto shall have been specifically designated to the trial court." T.R. 56(H).

II. Smith's Negligence Claim

Smith's negligence claim against Harbrecht has three elements: 1) a duty owed by the defendant to the plaintiff, 2) a breach of that duty, and 3) injury to the plaintiff proximately caused by the defendant's breach. Rhodes v. Wright, 805 N.E.2d 382, 385 (Ind. 2004). Although summary judgment is "rarely appropriate" in negligence cases, id. at 387, a defendant is entitled to summary judgment if the undisputed facts negate at least one element of the plaintiff's claim. Id. at 385. The parties, as did the trial court, focus their dispute on whether Harbrecht owed a duty to Smith and whether Harbrecht's acts or omissions were a proximate cause of Smith's injuries. We find the issue of duty dispositive.

The existence and scope of a duty is generally a question of law for the court to decide. Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991). A construction contractor "has a duty to use reasonable care both in his or her work and in the course of performance of the work." Peters v. Forster, 804 N.E.2d 736, 743 (Ind. 2004). The duty is owed not to the world at large but rather to persons who might foreseeably be injured by the condition of the work, even after its completion and acceptance by the property owner. Briesacher v. Specialized Restoration & Constr., Inc., 888 N.E.2d 188, 192 (Ind. Ct. App. 2008). Therefore, it is not a precondition of the contractor's duty that the contractor be in control of

the premises when the accident occurs.[2] See Peters, 804 N.E.2d at 743 (concluding contractor could be held liable, despite claim contractor was not in control of ramp when plaintiff fell). However, a contractor owes no duty to a person whose injury as a result of the contractor's work was not reasonably foreseeable. Id. at 742-43. When assessing foreseeability in the context of duty, Indiana courts generally consider the specific facts and circumstances of the case to determine what consequences the parties should have foreseen as a result of their conduct. Carter v. Indianapolis Power & Light Co., 837 N.E.2d 509, 517 & n.13 (Ind. Ct. App. 2005) (citing Webb, 575 N.E.2d at 997), trans. denied.

In the prior appeal in this case, Smith v. King, we considered whether King, the property owner and general contractor, had a duty to Smith to take precautions regarding the stairway hole. We initially addressed Smith's claim, based on premises liability principles, that King was liable in his capacity as property owner. We concluded King did not owe Smith a duty because "the danger of the hole was known and obvious to [Smith], and the evidence does not support a reasonable inference that the Kings should have anticipated that [Smith] would fall through the hole" despite Smith's knowledge and the hole's obviousness. Smith v. King, 902 N.E.2d at 883. In our opinion on rehearing, we further addressed Smith's claim King was liable for negligence as a general contractor. We concluded the trial court properly granted summary judgment to King based on the same facts of the known and

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[2] In Peters, our supreme court changed Indiana law by expressly abandoning the "acceptance rule," under which contractors had no duty to third parties once the project owner accepted the work. Peters, 804 N.E.2d at 737-38. In light of this holding, at least one of the pre-Peters cases cited by the trial court and Harbrecht, Helton v. Harbrecht, 701 N.E.2d 1265, 1268 (Ind. Ct. App. 1998), trans. denied, is no longer good law for its proposition that a contractor not in control of the premises at the time of the accident therefore owes no duty to the injured party.

obvious danger and the lack of evidence King should have anticipated Smith's fall, specifically concluding King did not breach his duty of reasonable care. Smith v. King, 907 N.E.2d at 1089. Although we addressed the issue in terms of breach, our reasoning also would have supported a conclusion King did not owe Smith a duty to guard or warn against the hole, given the rule that a contractor's duty extends only to reasonably foreseeable plaintiffs injured by a reasonably foreseeable harm. See Peters, 804 N.E.2d at 743.

Our reasoning that "the danger of the hole was known and obvious to [Smith], and the evidence does not support a reasonable inference that the Kings should have anticipated that [Smith] would fall through the hole while measuring over his head for the heating and cooling system," Smith v. King, 902 N.E.2d at 883, also supports a conclusion Smith's injury was not foreseeable to Harbrecht, absent any evidence that Harbrecht, more than the Kings, should have anticipated Smith's fall. The undisputed facts are that Harbrecht left the jobsite two to three weeks before Smith's fall and did not return during that time. King was concerned the stairwell hole was a safety hazard and telephoned Harbrecht with this concern. Thereafter, King nailed a plywood sheet across the stairwell opening. These facts, although they support an inference Harbrecht was on notice that the stairwell opening was potentially unguarded, do not support an inference Smith's fall was foreseeable to Harbrecht any more than it was foreseeable to King. We have already concluded Smith's fall was unforeseeable to King, and we therefore conclude Smith's fall was unforeseeable to Harbrecht for purposes of his duty of care. As a result, Harbrecht was under no duty to Smith to secure the stairwell hole or protect against Smith's fall.

Smith cites several cases that are distinguishable for purposes of the duty analysis because they involved a subcontractor's liability for defective work or for conditions whose danger was latent rather than obvious. See Briesacher, 888 N.E.2d at 191-93 (masonry subcontractor had duty to employee of ironworks subcontractor who fell while attempting to reset rebar that was incorrectly placed by masonry subcontractor); Horine v. Homes by Dave Thompson, LLC, 834 N.E.2d 680, 684 (Ind. Ct. App. 2005) (roofing subcontractor, which defectively installed roofing paper, had duty to employee of fireplace-installation subcontractor who slipped and fell on roofing paper); Guy's Concrete, Inc. v. Crawford, 793 N.E.2d 288, 296 (Ind. Ct. App. 2003) (subcontractors owed duty to prospective purchaser who stepped on and fell through Celotex insulation material subcontractors placed over basement opening), trans. denied. Here, by contrast, the danger from the stairwell hole was known and obvious to Smith, and the Smiths did not designate any evidence Harbrecht's work was defective. We conclude Harbrecht did not owe Smith a duty to secure the stairwell hole or protect against Smith's fall, and, as a result, the trial court properly granted Harbrecht summary judgment on Smith's negligence claim.

III. Cathy's Loss of Consortium Claim

Loss of consortium is a derivative claim and, therefore, absent a valid claim by the injured spouse, the other spouse is not entitled to recover damages for loss of consortium. Watters v. Dinn, 666 N.E.2d 433, 438 (Ind. Ct. App. 1996). Because Smith's negligence claim fails, it necessarily follows the trial court properly granted summary judgment to Harbrecht on Cathy's loss of consortium claim.

Conclusion

Harbrecht did not owe Smith a duty and therefore cannot be liable to Smith for negligence or to Cathy for loss of consortium. As a result, the trial court properly granted Harbrecht summary judgment.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.