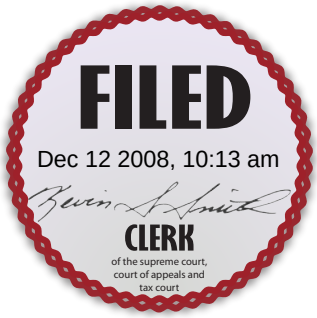

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IN THE
COURT OF APPEALS OF INDIANA

ARTHUR MARTINEZ and, LETICIA MARTINEZ,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 45A04-0804-CV-214
MERRILLVILLE YOUTH BASKETBALL JUNIOR PIRATES, INC.,	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Gerald N. Svetanoff, Judge
Cause No. 45D04-0609-CT-250

December 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Arthur and Leticia Martinez appeal the trial court's grant of summary judgment in favor of the Merrillville Youth Basketball Junior Pirates, Inc. ("the Junior Pirates") in the Martinezes' personal injury action. We affirm.

Issue

The sole restated issue is whether the trial court properly concluded that the Junior Pirates owed no duty to Arthur.

Facts

The Junior Pirates operate a youth basketball league. Their games are held at Merrillville High School ("the School") in the School's gymnasiums and field house. To use the gymnasiums and field house, the Junior Pirates signed a "Permit for Use of School Property" form issued by the Merrillville Community School Corporation ("the School Corporation"). App. p. 159. The permit required a School custodian to be present at the School while it was being used. Additionally, snow removal and ice salting in the School's parking lot was at all times performed by the School Corporation's maintenance staff, including on weekends. The permit also contained the following provision: "Liability: The renter agrees to save and hold harmless the Merrillville Community School Corporation and agrees to assume responsibility for all liabilities arising incident to the occupancy of the facility, it being understood and agreed that the school corporation assumes no obligations respecting the use of such premises." Id. at 160.

On December 4, 2005, the Martinezes went to the School to watch a Junior Pirates game. After getting out of his vehicle, Arthur slipped and fell in the parking lot on black ice. According to Arthur, the parking lot had been plowed of snow but it had not been salted. After entering the School, Arthur complained about his fall to a custodian. A School security guard overheard Arthur's complaint and told the custodian to call someone to come over and salt the parking lot. There was a play in the auditorium taking place at the same time as the basketball games; persons attending this event would have used the same parking lot as those attending the basketball games.

Arthur sued the Junior Pirates and the School Corporation for injuries suffered in his slip-and-fall; Leticia joined the suit, seeking damages for loss of consortium. Both the School Corporation and the Junior Pirates moved for summary judgment. The School Corporation contended that Arthur was contributorily negligent as a matter of law, while the Junior Pirates claimed they owed no duty to Arthur. The trial court denied summary judgment for the School Corporation but granted it as to the Junior Pirates. The Martinezes now appeal the granting of the Junior Pirates's summary judgment motion.

Analysis

We apply the same standard as the trial court when reviewing summary judgment decisions. Filip v. Block, 879 N.E.2d 1076, 1080 (Ind. 2008). Summary judgment is appropriate only if the designated evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Indiana Trial Rule 56(C); Liggett v. Young, 877 N.E.2d 178, 180-81 (Ind. 2007). We construe all

facts and reasonable inferences in favor of the non-moving party, and carefully review summary judgment decisions to ensure a party is not improperly denied his or her day in court. Liggett, 877 N.E.2d at 181.

Negligence 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 resulting from the defendant's breach. Yates v. Johnson County Bd. of Comm'rs, 888 N.E.2d 842, 847 (Ind. Ct. App. 2008). Summary judgment is appropriate if the undisputed material evidence negates one of these elements. Id.

"The question of whether a duty is owed in premises liability cases depends primarily upon whether the defendant was in control of the premises when the accident occurred." Id. This rule is intended "'to subject to liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm.'" Beta Steel v. Rust, 830 N.E.2d 62, 70 (Ind. Ct. App. 2005) (quoting Rhodes v. Wright, 805 N.E.2d 382, 385 (Ind. 2004)). "Although whether a duty exists usually is a question of law, the existence of a duty sometimes depends upon underlying facts that require resolution by the trier of fact, and this may include questions regarding who controlled property at the time and place of an accident." Yates, 888 N.E.2d at 847. Possession and control of property for premises liability purposes generally is a question of fact involving occupation and intent to control the particular area where an injury occurred. Id.

Our supreme court has looked to the Second Restatement of Torts for guidance on who constitutes a possessor of land for premises liability purposes:

> A possessor of land is
>
> > (a) a person who is in occupation of the land with intent to control it or
> >
> > (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> >
> > (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Risk v. Schilling, 569 N.E.2d 646, 647 (Ind. 1991) (quoting Restatement (Second) of Torts § 328 E (1965)). Additionally, "[a]ctual physical possession of property at the precise moment an accident happens is not always dispositive on the question of 'control' for premises liability purposes, if there was evidence that another party was in a better position to prevent the harm that occurred." Yates, 888 N.E.2d at 848.

Here, we conclude as a matter of law that the Junior Pirates neither were in actual possession or control of the parking lot at the time of Arthur's fall, nor were they in a better position than the School Corporation to prevent the fall. The facility permit, which specified that the Junior Pirates would be using two gymnasiums and the field house, stated in part, "The use of the building . . . shall be strictly confined to that designated on the permit. The school representative (custodian, kitchen supervisor, or others in charge) shall have immediate authority in any matter concerning the use of facilities." App. p.

160. The permit also required the presence of a custodian at the School at all times whenever the facility was in use; the Junior Pirates in fact attempted to partially waive this requirement but the School Corporation denied this request. This seems clearly to indicate that the Junior Pirates would exercise no control over other parts of the School grounds outside of the gymnasiums and field house, and that a School representative did exercise such control.

The undisputed evidence also is that the School Corporation at all times was responsible for controlling and maintaining the parking lot. There was designated evidence that the custodial fees charged to groups using the School included necessary services for maintaining the parking lots, including plowing snow and salting ice. The Junior Pirates lacked the necessary equipment to perform those tasks. The Director of Maintenance for the School Corporation further explained, "if there's an event going on, it's maintenance's job to take care of parking lots, so they would come out ahead of time and do that." Appellee's App. p. 44. Maintenance personnel were to ensure that the School parking lots were clear, even on weekends, because there was always "something going on" at the School. App. p. 154. We also note that another group was using the School's auditorium that day, which is directly across the hall from the field house, and persons going to the auditorium would have used the same parking lot as the Martinezes; there is no claim by the Martinezes that the group using the auditorium also owed them a duty. Rather, it is evident that although persons attending Junior Pirates games would have to use the School parking lot, the School Corporation never relinquished any control

over the parking lot and it was in the best position to maintain the parking lot's safety. Thus, only the School Corporation owed a common law duty to the Martinezes with respect to the parking lot.[1]

The Martinezes nevertheless maintain that the "hold harmless" portion of the facility permit represents an assumption of duty by the Junior Pirates, or that they are a third-party beneficiary of that provision. This part of the permit states, "Liability: The renter agrees to save and hold harmless the Merrillville Community School Corporation and agrees to assume responsibility for all liabilities arising incident to the occupancy of the facility, it being understood and agreed that the school corporation assumes no obligations respecting the use of such premises." Id. at 160.

We addressed a similar question in Morris v. McDonald's Corp., 650 N.E.2d 1219 (Ind. Ct. App. 1995). In Morris, a patron of a franchised McDonald's restaurant fell and injured herself, then she and her husband sued both McDonald's and the franchisee. McDonald's moved for summary judgment, successfully arguing to the trial court that it was completely shielded from suit by an indemnity provision in the franchise agreement. The provision required the franchisee to "indemnify and hold [McDonalds] harmless against all judgments, settlements, penalties, and expenses . . . incurred by or imposed on [McDonalds] . . . ." Morris, 650 N.E.2d at 1221-22. We reversed the granting of summary judgment, holding:

[1] Based on this conclusion that the School Corporation never relinquished control over the parking lot, we need not address the Martinezes' circular argument that the School Corporation acted as the Junior Pirates's "agent" in maintaining the parking lot.

> [T]he indemnity clause and the exculpation clause in the franchise operator's lease govern the relationship between McDonalds and [the franchisee], as parties to the contract. Indisputably, the Morrises were not parties to the franchise operator's lease. Therefore, the exculpatory and indemnity clauses in the operator's lease do not bind or determine the rights of the Morrises. The pertinent clauses merely transfer liability to [the franchisee], if liability is established by the Morrises against McDonalds. The clauses cannot insulate McDonalds from suit by a third party.

Id. at 1223 (footnote omitted).

The roles in this case are reversed, in that the Martinezes are a third party attempting to sue a party to an apparent hold harmless/indemnity clause who otherwise would owe no duty to them, while in Morris McDonald's was attempting to escape through such a clause any exposure to a lawsuit by a third party to whom it would otherwise owe a duty. Nevertheless, the general principles are the same. That is, an indemnity agreement does not affect the duties owed to third parties, or the rights of third parties with respect to the parties to the indemnification agreement. The agreement controls the relationship between the parties to it, and that is all. See Rhodes, 805 N.E.2d at 385. What effect this provision might have as between the Junior Pirates and the School Corporation is not before us today, and we offer no opinion on it. It is enough to say today that the provision has no effect on the Junior Pirates's liability or duty owed to the Martinezes, who were not a party to the facility permit.

Similarly, the Martinezes are not a third-party beneficiary to the permit, and certainly not to the liability provision they rely upon. A third-party beneficiary contract

requires the following: (1) the parties intend to benefit a third party; (2) the contract imposes a duty on one of the parties in favor of the third party; and (3) the performance of the terms of the contract renders a direct benefit to the third party intended by the parties to the contract. City of East Chicago v. East Chicago Second Century, Inc., 878 N.E.2d 358, 374 (Ind. Ct. App. 2007). The intent of the contracting parties to benefit the third party is the controlling factor. Id. "Such intention may be demonstrated by naming the third party, or by other evidence." Id.

The Martinezes fail to explain how or why an indemnity or liability-shifting provision between the Junior Pirates and the School Corporation would be of any benefit to them. At most it is a provision that determines who ultimately will pay if, and only if, a person is injured while attending or participating in a Junior Pirates game. The Junior Pirates did not, through the permit, undertake to perform any specific measures for the safety and welfare of persons coming to watch their games. Nothing in the permit alters the fact that it was the School Corporation, and only the School Corporation, that owed a duty to the Martinezes with respect to the parking lot.

Conclusion

The trial court correctly granted summary judgment to the Junior Pirates on the basis that they owed no duty to the Martinezes. We affirm.

Affirmed.

FRIEDLANDER, J., and DARDEN, J., concur.