ATTORNEY FOR APPELLANTS:

DOUGLAS D. SMALL
Foley & Small
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

MILFORD M. MILLER
STEPHEN J. HARANTS
Miller Murphy & Miller, L.L.P.
Fort Wayne, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ESMERALDA DIAZ and DAVID DIAZ,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 43A04-0603-CV-123
BASTIAN MATERIAL HANDLING CORP. and INDUSTRIAL SYSTEMS SERVICE, INC.,	)	
Appellees-Defendants.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex K. Reed, Judge
Cause No. 43C01-0403-CT-186

December 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Esmeralda Diaz and David Diaz ("Diaz") appeal the trial court's grant of summary judgment to Bastian Material Handling Corp. ("BMH") in the action filed by Diaz alleging that Mrs. Diaz had been injured due the faulty operation of an elevator lift at DePuy Orthopedics, Inc. ("DePuy").

We affirm.[1]

ISSUE

Whether the trial court erred in granting summary judgment to BMH.

FACTS

BMH is a material handling equipment provider; it sells equipment for moving materials used in the manufacturing setting. BMH has a branch office in Fort Wayne, the service area of which includes Warsaw. In December of 1988, BMH bought a hydraulically operated two-level vertical lift ("the lift") from Pflow Industries and had the lift installed at DePuy's facility in Warsaw by D.L. Hissen, Inc.

In late 2002, Mrs. Diaz was working at DePuy as a Kelly Services temporary employee. At DePuy, shipping containers, weighing from 5 to 25 pounds and approximately 9" high and 2½ X 2½' in size, were stacked on a wheeled cart, which was loaded on the lift on the first floor. Mrs. Diaz's job was to move the carts off the lift at the second floor, and to then unload and inspect the contents of the containers. On December 13, 2002, the lift arrived at the second floor with the floor of its carriage

[1] We heard oral argument on this case in Indianapolis on November 14, 2006. We thank counsel for their able advocacy.

somewhat lower then the second floor.[2] Mrs. Diaz pulled on the cart several times, attempting to "lift and pull" it to remove it from the lift, and one of the containers fell off the cart and struck her. (App. 209).

On March 10, 2004, Diaz filed a complaint alleging that Mrs. Diaz "was injured due to the faulty operation" of the lift. (Diaz's Br. at 2).[3] The amended complaint, filed July 28, 2004, named Pflow,[4] Industrial Service Systems ("ISS"),[5] and BMH as defendants and alleged that Diaz had been damaged as the result "the carelessness and negligence of the defendant in servicing and maintaining the elevator and/or due to a defect in the elevator." (App. 20)

On October 18, 2004, BMH filed a motion for summary judgment. BMH's motion asserted that it was "the supplier (not the manufacturer) of" the lift, and that because the lift had been "placed into the stream of commerce in December of 1988," the claim against BMH was "barred by the ten year statute of repose under Indiana's Product Liability Act, I.C. § 34-20-3-1." (App. 35). It designated an affidavit attesting to these facts; the December 1, 1988 purchase order from DePuy to BMH for the lift; and the bill to BMH from the installer for its late-December 1988 installation of the lift at DePuy.

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[2] Diaz's co-worker Hepler estimated that lift had stopped "maybe a half inch to an inch" below the floor level. (App. 117). Co-worker O'Brien estimated that the distance between the elevator floor and the building floor was "approximately an inch, inch and a half." (App. 160). Mrs. Diaz believed that it was "a couple inches." (App. 89).

[3] The original complaint is not included in Diaz's Appendix.

[4] Diaz stipulated to the trial court's dismissal of Pflow in October of 2005.

[5] ISS, as will be subsequently explained, was the subcontractor being utilized by BMH to respond to service requests by DePuy from late 2001 through 2002.

Diaz responded with a memorandum in opposition. Diaz argued that (1) there were numerous questions of fact; and (2) the statute of repose did not bar an action where there was negligent repair and maintenance of the product, and BMH was negligent in the repair of the lift. Diaz asserted that BMH was negligent for "failing to advise and inform [ISS]" concerning the "operational history of the . . . lift and the need to regularly replace the lift cables," and "its failure to take steps to replace the lift cables when it was called to correct the problem with the lift being out of alignment in November, 2002." (App. 61, 62). Finally, Diaz argued that two exceptions to the general rule that a principal is not liable for the negligence of an independent contractor apply: "BMH, by contract was under the specific duty of providing proper maintenance and repair for the . . . lift," and "the probable accident/injury exception." (App. 64, 65).

Diaz submitted as designated evidence the complete depositions of Mrs. Diaz; her two co-workers Vicki Hepler and Sylvia O'Brien; the owner and sole employee of ISS – Mark Maroney; the DePuy maintenance supervisor, Roger Mikel; the president of Pflow, Ted Ruehl; and the manager of BMH's office in Fort Wayne, Rick Sills. Diaz also designated numerous deposition exhibits, including Pflow, DePuy, BMH, GLD,[6] and ISS billings associated with the lift, the lift installation instructions, the lift owner's manual booklet, and photographs of the lift. This designated evidence reflects the following facts.

[6] GLD was the subcontractor utilized by BMH to respond to service requests by DePuy in the 1990s and until late 2001.

For "a couple of years" after the lift was installed in 1988, BMH had an agreement with DePuy to provide "preventative maintenance or . . . checkup type work periodically" on the lift. (App. 193). After that, BMH "would respond to service calls" made by DePuy, *id.*, but there was no written agreement between BMH and DePuy as to maintenance or repair on the lift. Further, all maintenance and repair work which BMH provided to DePuy for the lift was performed by subcontractors -- not BMH.

For some years up to and though May of 2001, BMH used Industrial Services/GLD ("GLD") of Mishawaka as its subcontractor for work on the lift at DePuy. In May of 2001, DePuy called BMH to report a problem about the elevation level of the lift. BMH dispatched GLD, which made a service call "to tension cables." (App. 459).

Between May and November of 2001, BMH began utilizing ISS, a Fort Wayne subcontractor, to respond to calls by DePuy for service on the lift. In November of 2001, DePuy called BMH to "come and check the cable[s]" on the lift. (App. 148). BMH dispatched ISS, and ISS adjusted the cables on the lift. In November of 2002, ISS was again dispatched by BMH to DePuy. ISS found the carriage slightly askew: "the carriage was about a quarter inch on one side lower and about a half inch on the other side" from being level with the building floor. (App. 130). ISS "leveled the carriage" by making "adjustments . . . on the cabling system and got everything lined back up." *Id.* ISS also "inspected . . . the cables to make sure [there was]n't any cracked or frayed cabling." *Id.*

The owner's manual for the lift advised the owner to "inspect the cables for any physical deterioration or damage." (App. 338). Specifically, the owner should "inspect for evidence of strand wear or breaking, kinking, and corrosion." *Id.*

According to Ted Ruehl, president of Pflow, there is no "specific time recommendation" for replacement of the cables on the lift; their "standard life" was "two to five years"; and they should be "changed when they start to deteriorate." (App. 175). The "main thing" that would indicate the need to replace the cable on the lift was "fraying in the cable where some wires are broken." (App. 178). Ruehl explained that the cable was a 3/8-inch "galvanized wire rope," was "made up of multiple wires," and can be bought "just about anyplace." (App. 176, 178, 176). "There is quite a bit of stretch that occurs" in the cables, Ruehl said, and that stretching may affect the alignment of the carriage. (App. 180). When the misalignment occurs, the cables can "be adjusted" to remedy the problem. (App. 176).

According to Roger Mikel, the long-time maintenance supervisor for DePuy, for a number of years DePuy had kept cables for the lift on site; he explained that this allowed for replacement of the cables when it was found by the subcontractor to need it. Mikel did not know why DePuy was no longer keeping replacement cables on site in 2002. Mikel believed that during his tenure at DePuy, from 1990 until mid-2005, the lift's cables had been replaced "at least three times." (App. 148).

BMH responded to Diaz's memorandum in opposition to summary judgment. Citing evidence submitted by Diaz, BMH further argued that it had no contractual duty concerning service of the lift; that BMH had not assumed a duty with respect to the lift; that in the absence of duty, none of the purported questions of fact were material; that the statute of repose barred the product liability claim; and that neither exception to the

general rule of non-liability of a principal for the negligence of an independent subcontractor that was argued by Diaz applied.

The trial court held a hearing on BMH's motion for summary judgment on January 26, 2006. BMH confirmed that its "basic argument" was that BMH did not "owe [Diaz] any duty." (Tr. 3). Diaz confirmed that because the statute of repose barred "any strict liability claim," the action was only "a negligence case." (Tr. 4). The trial court took the matter under advisement. On January 30, 2006, it issued an order finding that "by agreement of the parties and further, by review of the record, the statute of repose has expired and no relief is available to the Plaintiff under her claim relating thereto." (App. 14). The trial court further found that "there was no contract in existence between BMH and DePuy which created any duty upon BMH to service or repair the lift," and that "BMH assumed no duty with respect to the lift which would serve as the basis for establishment of proximate cause between the failure on the part of BMH and the Plaintiff's injuries." *Id.* The trial court then granted summary judgment to BMH.

DECISION

> Upon appeal from a trial court's ruling upon a motion for summary judgment, our standard of review is well settled. Summary judgment is appropriate when the designated evidentiary matter reveals that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Hammock v. Red Gold, Inc.*, 784 N.E.2d 495, 498 (Ind. Ct. App. 2003), *trans. denied*. The moving party bears the burden of making a prima facie showing that there are no genuine issues of material fact and that there is an entitlement to judgment as a matter of law. *Hammoc*k, 784 N.E.2d at 498. If the moving party meets these requirements, the burden then shifts to the nonmovant to establish genuine issues of material fact for trial. *Id*. Upon appeal, we are bound by the same standard as the trial court. *Id*. We consider only those facts which were designated to the trial court at the summary judgment

> stage. *Id*. We do not reweigh the evidence, but instead liberally construe the designated evidentiary material in the light most favorable to the non-moving party to determine whether there is a genuine issue of material fact. *Id*. Even where the facts are undisputed, summary judgment is inappropriate if the record reveals an incorrect application of the law to the facts. *Id*.

St. Joseph County Police Dept. v. Shumaker, 812 N.E.2d 1143, 1145 (Ind. App. 2004), *trans. denied*.

In order to effectively assert a negligence claim, Diaz must establish three elements: a duty to exercise reasonable care under the circumstances, a breach of that duty, and damages as a proximate result of that breach of duty. *Building Materials v. T&B Structural Systems, Inc*., 804 N.E.2d 277, 282 (Ind. Ct. App. 2004). Absent a duty, there can be no breach and, therefore, no recovery for the plaintiff in a negligence cause of action. *Id.* The existence of a duty is a pure question of law for the court to determine. *Id.*

Diaz first argues that summary judgment was erroneously granted because a series of questions of material fact exist. After listing twelve such purported questions, Diaz fails to develop legal arguments, supported by cogent reasoning and authority, *see* Ind. Appellate Rule 46(A)(8)(b), as to why such questions are "material" so as to preclude the grant of summary judgment on the claims made by Diaz.

Diaz next claims that grant of summary judgment was erroneous because the Product Liability Statute's repose provision "does not bar a claim by a plaintiff for post-sale, post-delivery negligence." Diaz's Br. at 13. We do not find the trial court's order to have granted summary judgment based on the statute of repose. Rather, the trial court

found that the statute of repose precluded the claim in Diaz's complaint "relating" to the alleged defect of the lift. (App. 14).

Diaz further asserts that "DePuy entered into a contract with BMH to repair the lift," and BMH "was negligent in the repair of the Pflow lift." Diaz's Br. at 15. The designated evidence does not establish that in late 2002, there was a contract between DePuy and BMH for the repair of the lift. Nevertheless, Diaz makes two arguments asserting BMH negligence in this regard.[7] Diaz contends that BMH was negligent in "failing to advise and inform its subcontractor the [sic] operational history of the Pflow lift and the need to regularly replace the lift cables." *Id.* Diaz cites no authority for such a basis of negligence. Further, the designated evidence was that with respect to the lift cables, specific cable repair action was determined by visually assessing the wear damage on the cables and that such assessments were performed by ISS, the subcontractor. Diaz also asserts that BMH "itself was negligent in the repair of the Pflow lift." *Id.* However, the undisputed fact is that BMH did not repair the lift; ISS did. It is the law in Indiana that if an entity such as BMH hires an independent contractor to perform work, then BMH is not liable for the negligent work of that independent contractor. *See Bagley v. Insight Communications Co.*, 658 N.E.2d 584 (Ind. 1995); *see also Carie v. PSI Energy, Inc.*., 715 N.E.2d 853 (Ind. 1999).

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[7] At oral argument, Diaz pressed the contention that BMH's "special knowledge" concerning the Pflow lift also was a basis for holding BMH liable. However, it offered no authority for this basis of liability, and we do not find such an argument developed in its appellate brief. The designated evidence was that the necessary condition of the cables was described in the owner's manual provided to DePuy, and that ISS inspected the cables to verify that the cables did not evidence the wear conditions warranting replacement.

Acknowledging this authority, Diaz argues that BMH's liability can be established under either of two exceptions. As Indiana's Supreme Court recently reaffirmed, a principal is not liable for the negligence of an independent contractor "unless one of five exceptions apply." *Helms v. Carmel High School Vocational Building Trades Corp*., No. 29S04-0609-CV-349 (Ind. Sept. 27, 2006). These exceptions are

> (1) where the contract requires the performance of intrinsically dangerous work;
> (2) where the principal is by law or contract charged with performing the specific duty;
> (3) where the act will create a nuisance;
> (4) where the act to be taken will probably cause injury to others unless due precaution is taken; and
> (5) where the act to be performed is illegal.

Id. at *1-2 (quoting *Bagley*, 658 N.E.2d at 586).

In support of the first exception, Diaz argues that "BMH, by contract was under the specific duty of providing proper maintenance and repair for the Pflow lift." Diaz's Br. at 19. However, there is no designated evidence of any contractual agreement between BMH and DePuy for the 2002 repair of the lift.[8]

Diaz also argues that the "facts of this case fit" the fourth exception, directing us to *Carie*'s explanation that

> the exception applies where, at the time of the making of the contract, a principal should have foreseen that the performance of the work or the conditions under which it was to be performed would, absent precautionary measures, probably cause injury.

[8] We also note that Diaz fails to explain, or offer evidence to support, how the repair of the lift was "intrinsically dangerous work." *Bagley*, 658 N.E.2d at 586.

Diaz's Br. at 19, quoting *Carie*, 715 N.E.2d at 856 (quoting *Bagley*, 658 N.E.2d at 588). Diaz does not address the initial qualification of the exception, that certain things be foreseen by the parties "at the time of the making of the contract." *Id.* As previously concluded, the designated evidence reveals no such contract here. Further, the exception applies when "the performance of the work . . . would . . . probably cause injury." *Id.* There is neither any argument nor any designated evidence indicating that the performance of the repair work on the lift would probably cause injury.[9]

Throughout Diaz's brief are contentions suggesting that BMH might be found liable based upon the negligent hiring or ISS. However, no such claim was presented in the complaint or argued to the trial court.[10]

As the party appealing the grant of summary judgment, Diaz had the burden of persuading us that the grant of summary judgment was erroneous. *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 908 (Ind. 2001). Diaz has failed to carry that burden. Because there is no evidence of a contractual relationship between BMH and DePuy, we find no error in the trial court's conclusion that BMH did not have a duty with respect to the service or repair of the lift. Because BMH had no duty, there can be no breach and, consequently, no recovery by Diaz on the negligence claim. *See Building*

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[9] In *Carie* and in *Bagley*, the plaintiffs sought to invoke the exception for injuries that occurred during the independent contractors' performance of the work for which they were hired. Here, Diaz was not injured during the performance of repair to the lift. If the fourth exception applied whenever there was an injury allegedly caused by the allegedly negligent work of the independent contractor, the exception would swallow the rule.

[10] At oral argument, Diaz's counsel conceded that no such claim had been made.

Materials, 804 N.E.2d at 282. Therefore, the trial court did not err in granting summary judgment to BMH.

Affirmed.

RILEY, J., and VAIDIK, J., concur.