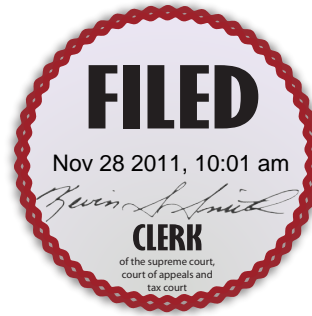


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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID RIPPE,)
)
Appellant-Plaintiff,)
)
vs.)
)
EDWARD C. LEVY COMPANY,)
)
Appellee-Defendant.)

No. 45A03-1102-CT-30

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
The Honorable Richard McDevitt, Magistrate
Cause No. 45C01-0404-CT-64

November 28, 2011

MEMORANDUM DECISION– NOT FOR PUBLICATION

BAKER, Judge

Appellant-plaintiff David Rippe appeals from a jury verdict in favor of appellee-defendant Edward C. Levy Co. (Levy) that found Levy not liable for the injuries Rippe sustained while an employee of an independent contractor at a Levy site. Specifically, Rippe argues that the trial court erroneously instructed the jury on premises liability and vicarious liability. First, we conclude that, in reading the jury instructions as a whole, the jury was not misled as to the law on premises liability. Second, having received very little of the trial transcript, we conclude that, on the record before us, we cannot say that the trial court erred in giving the instruction on vicarious liability. Thus, we affirm the judgment of the trial court.

FACTS

The facts that can be gathered from the record before us are limited.¹ The Edward C. Levy Company hired Perkins Trucking & Paving Company to transport slag products from Levy's site at the LTV Steel plant in East Chicago.² David Rippe was a Perkins truck driver assigned to transport the slag. In order to load his dump truck at the Levy site, Rippe had to drive under an overhead hopper, climb out of his truck, and personally operate the hopper's controls. Rippe had transported slag from the Levy site for approximately two and one-half years before the incidents at issue occurred.

¹ After so many days of trial, the plaintiff provided only the argument for jury instruction and no actual trial testimony. The only actual record available to help us develop the facts was provided by the appellee and is limited to the cross-examination of Rippe.

² Slag is a byproduct of the steel making process and is similar in form to rock or gravel. See Mayfield v. Levy Co., 833 N.E.2d 501, 503 (Ind. Ct. App. 2005).

Rippe claims to have suffered injuries on two separate occasions but under similar circumstances while loading slag at the Levy site in September of 2003. On September 22, 2003, Rippe was working the midnight shift. As he drove his truck toward the hopper, he observed a payloader digging under the hopper to remove the slag that had accumulated. Rippe claims that lights under the hopper had not been operational for the two and one-half years that he worked at the site. As he drove under the hopper, Rippe claims that he felt the truck go through an approximately three foot deep depression before coming to a halt. Then, without looking down, Rippe jumped out of his truck and fell when he hit the ground. A week later, on September 29, 2003, Rippe fell in the same manner while exiting his truck underneath the hopper.

Rippe did not seek medical treatment immediately following the September incidents. He first visited a doctor for his claimed injuries on November 24, 2003, and his next visit was not until March 2005.

On April 27, 2004, Rippe filed his complaint alleging that the hopper was unreasonably dangerous because the hopper lacked a proper stairway with handrails, and, as a result, he was injured. Specifically, Rippe claimed that he had to climb a pile of loose gravel in order to get to the hopper's controls and that he fell while attempting to climb the pile on September 22 and 29, 2003.

At trial, Rippe sought to recover damages from Levy for his injuries under a theory of premises liability. At the conclusion of the evidence, the trial court heard argument on the proposed jury instructions. Rippe objected to Levy's tendered jury

instruction number five, which described the extent of a landowner's duty to exercise reasonable care to keep its property in a reasonably safe condition for the employees of independent contractors. Rippe also objected to instruction number six which covered vicarious liability of a landowner for acts of an independent contractor. Over Rippe's objections, the trial court read both instructions to the jury.

On November 12, 2010, the jury unanimously entered verdicts in favor of Levy. For the first incident, the jury found that Rippe was 51% at fault, Levy was 9% at fault, and Perkins was 40% at fault. For the second incident, the jury found that Rippe was 100% at fault. Rippe now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The manner of instructing a jury is left to the sound discretion of the trial court. Callaway v. Callaway, 932 N.E.2d 215, 222 (Ind. Ct. App. 2010). Its ruling will not be reversed unless the instructional error is such that the charge to the jury misstates the law or otherwise misleads the jury. Id. Jury instructions must be considered as a whole and in reference to each other. Id. at 222-23. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Id. at 223. Any error in instructing the jury is subject to a harmless-error analysis: reversal and a new trial are warranted only if, at a minimum, the erroneous

instruction “could have formed the basis for the jury’s verdict.” Simmons v. Erie Ins. Exchange, Inc., 819 N.E.2d 1059, 1071 (Ind. Ct. App. 2008).

II. Premises Liability Instruction

Rippe argues that instruction number five³ misstated the law of premises liability as it applies to him because the superior knowledge of the landowner is only applicable in the narrow circumstances where the employee of an independent contractor is injured while addressing the condition that he was invited on the premises to correct—and not any condition. Instruction number five provides:

A landowner has a duty to exercise reasonable care to keep its property in a reasonably safe condition for employees of independent contractors, but a landowner is not liable for harm to an employee of an independent contractor unless the landowner has knowledge superior to the independent contractor with regard to any danger on the premises.

Appellant’s App. p. 15.

Generally, a property owner has no duty to furnish the employees of an independent contractor a safe place to work, at least as that duty is imposed on employers. Smith v. King, 902 N.E.2d 878, 881-82 (Ind. Ct. App. 2002). However, the property owner must maintain the property in reasonably safe condition for business invitees including independent contractors and their employees. Id. Further, the landowner owes a duty to warn independent contractors of hazardous instrumentalities maintained by the

³ Rippe provided copies of the proposed jury instructions. Appellant’s App. p 14-19. Levy provided copies of the trial court’s final instructions which are unnumbered. Appellee’s App. p. 7-18. We will refer to the jury instructions by their proposed number.

landowner, or latent or concealed perils located on premises. Zawacki v. U.S.X., 750 N.E.2d 410, 414 (Ind. Ct. App. 2001).

Indiana follows the Restatement (Second) of Torts formulation of landowner's liability to workers on the premises. Roberts, 829 N.E.2d at 957-58. Under the Restatement (Second),

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement of Torts, § 343. Further, Section 343A(1), which is meant to be read in conjunction with section 343, provides, “a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.”

While the comparative knowledge of landowner and invitee is not a factor in assessing whether the duty exists, it is properly taken into consideration in determining whether such a duty was breached. Rhodes v. Wright, 805 N.E.2d 382, 388 (Ind. 2004). In analyzing whether a landowner should have expected an injury and therefore breached its duty to an invitee, a court will consider the purpose and intent of the invitation and the

relative knowledge of the parties. Merrill, 771 N.E.2d at 1265. Facts showing only that a landowner knows of a condition involving a risk of harm to an invitee, but could reasonably expect the invitee to discover, realize, and avoid such risk, may be insufficient to prove breach of the duty. Roberts, 829 N.E.2d at 959.

In support of his contention that the instruction is erroneous, Rippe directs us to Roberts. In Roberts, our Supreme Court clarified the application of Section 343 with regard to independent contractors. Roberts was employed as an insulator for independent contractor Armstrong Contracting and Supply Co. (Armstrong). PSI hired Armstrong to conduct insulation work at several of its sites. Roberts was an employee of Armstrong's for several years who had worked with insulation containing asbestos without any protective breathing equipment. Roberts sued PSI energy on the theories of premises and vicarious liability after he contracted Mesothelioma, alleging that PSI knew that Armstrong did not require that its employees wear breathing protection and failed to act. Roberts received a general jury verdict and PSI appealed. Id. at 949-50.

In its analysis, the Court observed that liability in Roberts was premised on the condition (asbestos on the site) or activity (removing or installing asbestos) that was the reason for the plaintiff's presence on the property. Id. at 958. In the cases decided before Roberts involving an employee of an independent contractor suing a landowner, the "condition" or "activity" that gave rise to liability was a condition not created or addressed by the contractor (a preexisting hole in the roof) or activity conducted by somebody other than the plaintiff or the plaintiff's employer (demolition work by another

contractor). Id. The Court then recognized that landowners will hire independent contractors because they possess the better skill to perform the work and landowners may rely on that skill. Id. “This is one of the basic principles underlying the general rule of non-liability and applies in most instances involving a principal who hires an independent contractor.” Id. at 961. The Court held that “a landowner ordinarily has no liability to an independent contractor or the contractor’s employees for injuries sustained while addressing a condition as to which the landowner has no superior knowledge.” Id. at 960. We think that the language in Roberts makes clear that superior knowledge is a requirement for liability when the injured person is an employee of an independent contractor on the premises for the purpose of addressing the condition that caused the injury.

Here, Rippe was hired as a truck driver to haul slag from the Levy site. In order to do so, he had to drive his truck under a hopper and climb down from his truck to operate the hopper’s controls. In the alleged incidents, he twice fell into depressions as he stepped down from the truck. Rippe was not on the Levy site addressing the condition that he alleged injured him.

Levy still had a duty to maintain its property in a reasonably safe condition. The instruction limits Levy’s liability to instances only where it has superior knowledge as any danger on the premises. “Whether a landowner has superior knowledge goes to the question of breach, not duty, and it is one factor among many used to determine if there

was a breach.” Rhodes, 805 N.E.2d at 388. Therefore, we think that this instruction is a misstatement of law as it applies to Rippe.

Nevertheless, as stated above, we must read all instructions as a whole and in reference to each other before determining whether the jury was misled as to the law. Further, any error in instructing the jury is subject to a harmless-error analysis: reversal and a new trial are warranted only if, at a minimum, the erroneous instruction “could have formed the basis for the jury’s verdict.” Simmons, 819 N.E.2d at 1071.

We observe that the trial court also instructed the jury on the elements of premises liability in instruction number four, which mirrors the Indiana Pattern Civil Jury Instruction 25.11. That instruction reads:

Plaintiff Rippe was an invitee on the property of Levy. An occupant of property is liable for injury caused to an invitee by the property’s condition only if the occupant:

- (1) knew that the condition existed and realized that it created an unreasonable danger to an invitee, or should have discovered the condition and its danger;
- (2) should have expected the invitee would not discover or realize the danger of the condition, or would fail to protect himself against it; and
- (3) failed to use reasonable care to protect the invitee against the danger.

Appellant’s App. p. 14. Rippe concedes that instruction number four was a correct statement of the law, but he contends that “Levy had a duty to protect Rippe from dangers that Levy should have realized he would fail to protect himself against” and instruction five, “in effect, negated this duty by instructing the jury that Levy could not be liable unless it had superior knowledge as to any dangers on the premises.” Appellant’s Br. p. 5.

We do not think that instruction number five could have formed the basis for the jury's verdict. Although Rippe argues that instruction number 5 misled the jury and negated the duty that Levy owed Rippe, the jury found Levy 9% liable for Rippe's first claim of injuries. Therefore, contrary to Rippe's assertions, the jury properly understood that Levy had a duty to Rippe to maintain the property in reasonably safe conditions. Thus, we cannot conclude that the instruction formed the basis for the jury's verdicts. Accordingly, we conclude that the giving of instruction number five was harmless error.

III. Vicarious Liability Instruction

Rippe contends that the trial court erred in reading instruction six because the instruction is a misstatement of law and because his claim was not based on vicarious liability. The instruction reads:

A property owner is not liable for the negligence of an independent contractor it hires. The general rule of non-liability rests in part on the custom of hiring sophisticated independent contractors for jobs in which they possess special skill or knowledge in performing projects. In this case, Perkins Trucking is an independent contractor and Levy was entitled to rely on Perkins' skills as a trucking company moving slag in a steel mill. Levy is not liable for the negligence, if any, of Rippe's employer, Perkin's trucking.

Appellant's App. p. 16.

"The longstanding general rule has been that a principal is not liable for the negligence of an independent contractor." Roberts, 829 N.E.2d at 950. Indiana law recognizes five exceptions to this general rule, based on public policy concerns, which militate against permitting a principal to absolve itself of responsibility for some

activities by conducting them through an independent contractor. Id. The exceptions reflect the notion that, in certain circumstances, “the employer is in the best position to identify, minimize, and administer the risks involved in the contractor’s activities.” Id.

However, 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. Id. at 953. As our Supreme Court noted in Roberts:

A principal who hires an independent contractor to address a problem on the principal’s premises is no different from one who engages a contractor for work elsewhere and should have no broader exposure to liability for a contractor’s acts. As applied to impose liability on a landowner for a contractor’s omissions, imposition of liability for something equally known to the contractor amounts to a backdoor expansion of liability for the contractor’s actions. No case has found the duty to take “reasonable steps” to impose on the landlord an obligation to see that a contractor uses appropriate safety equipment. We think that “reasonable steps” do not extend to in effect, supervision of the independent contractor’s activities.

Id. at 961.

The Court found that a landowner who employs a contractor to perform specialized work is entitled to rely on the contractor to comply with appropriate safety standards. Id. at 959. Indeed, the contractor is obligated by law to furnish employment that is safe, furnish and use safety devices, safeguards, methods, and processes reasonably adequate to render employment and place of employment safe, and do everything reasonably necessary to protect the safety of the employee. Id.

Rippe argues that the instruction is a misstatement of law because “[i]f Levy knew that Perkin’s employees were exposing themselves to a dangerous condition upon its

premises, it could not rely upon Perkin's skills but, instead had to take steps to protect Perkins employees and the instruction inappropriately negated this duty to protect." Appellant's Br. p. 19.

As we read it, the instruction did not negate the duty that Levy owes to an independent contractor on its premises, but instead properly instructs the jury that the premises owner is generally not liable for the negligence of an independent contractor. Further, we do not think that the language in Roberts limits the language to instances where the independent contractor is injured by the condition he is on the premises to correct. Such a rule would wholly absolve independent contractors of negligent acts that they are not on the premises to correct and their legal duty to provide their employees with a safe workplace. Therefore, the jury instruction was a correct statement of the law, and the trial court did not err when it instructed the jury that, to the extent that the jury found Perkins was negligent, Levy should not be liable for Perkins' negligence.

Next, Rippe argues that he never made a claim based upon vicarious liability, and, accordingly, the instruction is unsupported by the evidence. More specifically, Rippe argues that Perkins is not a sophisticated contractor. We will therefore review the trial court record for evidence supporting the trial court's decision to read the instruction.

On appeal, Rippe chose to only provide the hearing on jury instructions, and Levy provided the cross-examination of Rippe. No actual evidence was presented at the hearing on the jury instructions, and Rippe's cross-examination is not relevant to the appropriateness of the giving of the instruction. Thus, the record before us is insufficient

to determine the propriety of giving jury instruction number six. Consequently, Rippe has waived the issue. See Fields v. Conforti, 868 N.E.2d 507, 511 (Ind. Ct. App. 2007) (stating that “any arguments that depend upon the evidence presented at the . . . trial will be waived [in absence of a transcript of the trial]”).

The judgment of the trial court is affirmed.

KIRSCH, J., and BROWN, J., concur.