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IN THE COURT OF APPEALS OF INDIANA

ROY SINKO and GRACE SINKO,

Appellants-Plaintiffs,

vs.

INDY POWDER COATINGS, L.L.C. and SHERMAN PARK, L.P.,

Appellees-Defendants.

No. 49A02-0701-CV-12

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cale J. Bradford, Judge
Cause No. 49D01-0411-CT-2196

NOVEMBER 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Plaintiffs-Appellants, Roy Sinko (Sinko) and Grace Sinko (jointly "Sinkos"), appeal the trial court's grant of summary judgment in favor of Defendant-Appellee Indy Powder Coatings, L.L.C.

We affirm.

The Sinkos present three issues for our review which we consolidate and restate as: whether the trial court erred by entering summary judgment in favor of Indy Powder.

Sherman Park, L.P. owns and operates a multi-tenant business park known as Sherman Park. Indy Powder is a tenant of Sherman Park, L.P. In the normal course of Indy Powder's business, semi trucks deliver and pick up items from several docks located on one side of the building that contains the business space that Indy Powder leases from Sherman Park, L.P. Indy Powder's docks can be accessed from two different entrances to Sherman Park. One entrance is located on Michigan Road and one entrance is located on Sherman Drive. If the entrance on Sherman Drive is utilized, the semi trucks must drive down an access ramp to reach the dock area. Along the edge of the access ramp is a swale[1] bordered by a low retaining wall that drops several feet to the concrete parking area below. At times, several trucks are lined up on the access ramp waiting for access to the docks of either Indy Powder or of one of the other businesses adjacent to Indy Powder. While they are waiting, some of the truck drivers exit their trucks. If, alternatively, semi trucks use the entrance located on Michigan Road, they can reach Indy Powder's docks without using the access ramp.

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[1] A swale is a "shallow troughlike depression that carries water mainly during rainstorms or snow melts." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1391 (4th ed. 2002).

Celadon Trucking Company was one of several trucking companies that moved products to and/or from Indy Powder, and, at the time of this accident, Sinko was an employee of Celadon. Specifically, on April 30, 2003, Sinko was driving a Celadon truck to Indy Powder. Upon arriving at Sherman Park, Sinko entered the business park via the Sherman Drive entrance. Sinko drove his truck onto the access ramp and exited his truck while awaiting his turn at the docks. When Sinko exited his truck, he stepped into the swale, lost his balance, and fell over the retaining wall onto the concrete below. As a result of the fall, Sinko suffered injuries. Based upon this incident, the Sinkos filed a lawsuit against Sherman Park, L.P. and Indy Powder.[2] Indy Powder subsequently filed a motion for summary judgment. Following a hearing, the trial court found that Indy Powder owed no duty to Sinko and granted its motion for summary judgment. This appeal ensued.

The Sinkos contend that the trial court erred by granting summary judgment in favor of Indy Powder because there exist genuine issues of material fact. On appeal from a grant of summary judgment, our standard of review is identical to that of the trial court. *Cox v. Northern Indiana Public Service Co., Inc.*, 848 N.E.2d 690, 695 (Ind. Ct. App. 2006). Summary judgment is appropriate only where the designated evidence shows there are no genuine issues of material fact and the moving party is entitled to judgment

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[2] Sherman Park, L.P. was not insured at the time of this incident and filed bankruptcy prior to the Sinkos filing their complaint in this action. Because of this, the Sinkos pursued their claim against Sherman Park, L.P. in the bankruptcy proceedings, and Sherman Park, L.P. is not a party to this appeal.

as a matter of law. Ind. Trial Rule 56(C); *Auburn Cordage, Inc. v. Revocable Trust Agreement of Treadwell*, 848 N.E.2d 738, 747 (Ind. Ct. App. 2006).

A trial court's grant of summary judgment is presumed valid, and the party appealing the grant of summary judgment has the burden of demonstrating that the trial court's decision was erroneous. *Cox*, 848 N.E.2d at 695. Appellate review of a summary judgment motion is limited to those materials designated to the trial court. *Pond v. McNellis*, 845 N.E.2d 1043, 1053 (Ind. Ct. App. 2006), *trans. denied*, 860 N.E.2d 590. A grant of summary judgment may be affirmed upon any theory or basis supported by the designated materials. *Cox*, 848 N.E.2d at 695. All facts and reasonable inferences drawn therefrom are construed in favor of the non-movant. *Pond*, 845 N.E.2d at 1053. Further, we carefully review a summary judgment determination to ensure that a party was not improperly denied its day in court. *Id*.

In a negligence action, the plaintiff must prove three elements to prevail: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) damage to the plaintiff proximately caused by the breach. *Sizemore v. Templeton Oil Co., Inc.*, 724 N.E.2d 647, 650 (Ind. Ct. App. 2000). In negligence cases, summary judgment is rarely appropriate because they are particularly fact sensitive; however, summary judgment is appropriate when the undisputed material evidence negates one element of a negligence claim. *Winchell v. Guy*, 857 N.E.2d 1024, 1026-27 (Ind. Ct. App. 2006).

The issue in the instant case is whether Indy Powder owed a duty to Sinko. Whether a duty exists is a question of law for the court to decide. *Sizemore*, 724 N.E.2d

at 650. The duty owed is determined by the status of the injured party. Here, neither party disputes Sinko's status as a business invitee. In general, a landowner has a duty to maintain the property in a reasonably safe condition for business invitees. *Pelak v. Indiana Industrial Services, Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005), *reh'g denied*, *trans. denied*, 855 N.E.2d 1001 (2006). In the context of a landlord-tenant situation, a landlord has a duty to maintain in safe condition the areas used in common by tenants and over which the landlord retains control. *Slusher v. State*, 437 N.E.2d 97, 99 (Ind. Ct. App. 1982). This duty extends to the business visitors of a tenant. *Id*.

Control over a premises is a primary factor in determining who is liable for injuries on the premises. *Pelak*, 831 N.E.2d at 769. This is so because the party who controls the land can remedy the hazardous conditions which exist upon it and has the right to prevent others from coming onto it. *Id*. In other words, the party in control of the land has the exclusive ability to prevent injury from occurring. *Id*.; *see also City of Bloomington v. Kuruzovich*, 517 N.E.2d 408, 411 (Ind. Ct. App. 1987) (law imposes duty on those who control property because they have exclusive ability to prevent injury from occurring on property). Further,

> As a general rule, [ ], a tenant of a part of demised premises is not liable for injuries resulting from the unsafe condition of parts of the premises for which he or she has assumed no responsibility and over which the landlord has retained control, such as a parking area, sidewalk, or a walk or stairway used by him in common with other tenants.

52A C.J.S. *Landlord and Tenant* § 930 (2003).

The lease between Sherman Park, L.P. as landlord and Indy Powder as tenant provides that "[Indy Powder] shall have no right whatsoever in the exterior of exterior

walls or the roof of the Premises or any portion of the Property outside the Premises, except as provided in Article 10 [signs] and Article 44 [parking and common use area and facilities]." Appellant's App. at 38. Article 44 designates the parking areas and the access ramp as areas under the exclusive control of Sherman Park, L.P. and states, in pertinent part:

> All parking areas, areas identified as "Common Areas" on Exhibit "A," [map of Sherman Park] access roads and facilities furnished, made available or maintained by Landlord in or near the Building or Demised Premises, including pedestrian sidewalks, landscaped areas, stairways, sanitary sewer systems, utility lines and other areas and improvements provided by Landlord for the general use in common of tenants of the Property [ ] shall at all times be subject to the exclusive control and management of Landlord and Landlord shall have the right, from time to time, to establish, modify and enforce reasonable rules and regulations with respect to all Common Areas.

Appellant's App. at 58. In addition to the lease, other designated materials indicate Sherman Park, L.P.'s responsibility for the common areas, including the parking lot and access ramp. Douglas Weir, President of Indy Powder, testified in his deposition that Sherman Park, L.P. was responsible for the parking lot and access road/ramp. Douglas Weir Depo., Appellant's App. at 139. Further, Clifford Rubenstein, President of Sherman Park, Inc.,[3] averred that Sherman Park, L.P. was the owner of the parking lot and access road/ramp at Sherman Park and that it was the duty of Sherman Park, L.P. to maintain the parking lot area and access road/ramp. Sherman Park, L.P.'s Answers to Interrogatories, Appellant's App. at 314-16.

[3] Sherman Park, L.P., a defendant in this action, is an Indiana limited partnership with the sole general partner being Sherman Park, Inc., an Indiana corporation, of which Clifford Rubenstein is president.

The designated materials here show that there is no question that the access ramp and the parking area surrounding it where Sinko allegedly fell is a common area of the Sherman Park business park and not under the control of Indy Powder. The parking lot and access ramp were used by several businesses that leased space in Sherman Park. The access ramp not only provided access to the docks of Indy Powder, but also to the docks of other businesses in adjacent buildings. Indy Powder did not lease the access ramp and parking lot from Sherman Park, L.P., and the lease between Sherman Park, L.P. and Indy Powder specifically states that Sherman Park, L.P. maintains exclusive control of the parking areas and access ramp. Thus, Indy Powder did not have control and authority over the access ramp and concrete parking area where Sinko allegedly fell and, therefore, Indy Powder owed Sinko no duty. *See Morris v. Scottsdale Mall Partners, Ltd.*, 523 N.E.2d 457 (Ind. Ct. App. 1988) (where mall retained control over stairway upon which mall and restaurant patron plaintiff fell, restaurant/tenant in mall owed no duty to plaintiff to maintain stairway in safe condition).

The Sinkos assert that the manner in which Indy Powder conducted its business and its alleged instructions to truckers to enter Sherman Park from Sherman Drive, making use of the access ramp inevitable, created a dangerous situation such that it owed a duty to Sinko. First, we again look to who is in control of the premises. Indy Powder is not the landowner, but instead is a tenant who is not in control of either the common areas, the access ramp or the parking lot. Second, even assuming that Indy Powder employees invited Sinko to enter Sherman Park via Sherman Drive and to use the access ramp or to wait on the access ramp instead of using the Michigan Road entrance, Indy

Powder did not create or cause the alleged defect that caused Sinko's injury. "[A] landowner is not liable for injuries caused by a defect in adjoining property unless he created or caused the defect *and* invited others to use the adjoining property." *Jump v. Bank of Versailles*, 586 N.E.2d 873, 881 (Ind. Ct. App. 1992). This rule is stated in the conjunctive. Therefore, both factors must be fulfilled in order to impose a duty upon a property owner. Although Indy Powder may be said to have invited others to use the access ramp, it did not create the alleged defect. Furthermore, as we stated previously, Indy Powder is not the landowner. Indy Powder is merely the tenant with no control as to the access ramp, swale and parking lot.

The Sinkos also claim that Indy Powder assumed a duty with regard to the access ramp. "A duty to exercise care and skill may be imposed on one who, by affirmative conduct, assumes to act, even gratuitously, for another." *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 692 (Ind. Ct. App. 2006). The actor must specifically undertake to perform the task he is charged with having performed negligently; otherwise, there can be no correlative legal duty to perform the undertaking carefully. *Id*. The existence and extent of such duty are ordinarily questions for the trier of fact, but when there is no genuine issue of material fact, the assumption of a duty may be determined as a matter of law. *Id*.

In the present case, there is no evidence of affirmative conduct or agreement on Indy Powder's part that supports the Sinkos' argument that Indy Powder assumed a duty with respect to the swale and access ramp. Sherman Park, L.P. maintained exclusive control of the parking areas, access ramp, including the swale, and the concrete wall.

There is no evidence that Indy Powder performed any inspections of that area or made any improvements or repairs to that area. The Sinkos note that some time previously Indy Powder made a repair to a portion of the common parking area. Weir stated that one time Indy Powder put some gravel in a pothole in the driveway in front of the loading docks. Weir indicated that Sherman Park paid for the repair but that Indy Powder "just provided the labor." Weir Depo., Appellant's App. at 139-40. Rubenstein acknowledged that the filling or paving occurred in a common area that would be Sherman Park, L.P.'s obligation to maintain. However, he further explained that Indy Powder made him aware that the area needed patching and that Indy Powder knew a contractor who could do the work at a lower cost than Sherman Park, L.P.'s contractor. Sherman Park, L.P. paid for the work to be done. Rubenstein Depo., Appellant's App. at 263.

This incident does not amount to an assumption of a duty on the part of Indy Powder. First and foremost, it does not involve the area in which Sinko allegedly fell. Additionally, it was a single incident of a tenant informing a landlord of work that needed to be done and then aiding the landlord in obtaining people to make the repair.

Based upon the foregoing discussion and authorities, we conclude, as did the trial court, that Indy Powder owed no duty to Sinko. Thus, the trial court properly entered summary judgment in favor of Indy Powder.

Affirmed.

NAJAM, J., and VAIDIK, J., concur.