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IN THE
COURT OF APPEALS OF INDIANA

J.R. BOZARTH, as Guardian for the Estate of AARON BOZARTH, Incapacitated Adult,

Appellant,

vs.

TODD & LANGLEY CONSTRUCTION, INC., and LIFEWAY BAPTIST CHURCH OF BLOOMINGTON, INC.,

Appellees.

No. 53A01-0512-CV-588

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable E. Michael Hoff, Judge
Cause No. 53C01-0404-CT-623

November 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

J.R. Bozarth, as Guardian for the Estate of Aaron Bozarth, Incapacitated Adult, (Bozarth) appeals from the trial court's grant of Todd & Langley Construction, Inc.'s (Todd & Langley) motion for summary judgment and the denial of Bozarth's motion for partial summary judgment in Bozarth's negligence action. Both motions involved the issue of whether Todd & Langley owed a duty of workplace safety to Bozarth, an employee of a subcontractor hired by Todd & Langley. Bozarth presents the following dispositive issue for review: Did the trial court err in concluding, as a matter of law, that Todd & Langley did not owe Bozarth a duty to provide him with a safe worksite?

We affirm.[1]

On August 5, 2003, Todd & Langley contracted with Lifeway Baptist Church of Bloomington, Inc. (the Church) to build the structural portion of an addition to the Church's main building.[2] That is, Todd & Langley contracted to install all concrete footings, walls, and floor slabs and to provide and erect a Nucor pre-engineered steel building. Todd & Langley subcontracted with Lofton Construction, Inc. (Lofton) for the

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[1] We deny Bozarth's request for oral argument.

[2] The Church hired additional contractors to address other aspects of the addition, such as excavation of the site, windows, doors, heating and air, plumbing, and interior finishes.

erection of the pre-engineered building. Aside from a written quote from Lofton, there was no written contract for this project between Todd & Langley and Lofton.

Lofton employed Bozarth on the project as a general laborer. On December 20, 2003, Bozarth was working at the Church on a mobile scaffolding approximately twenty-five feet above the ground. He was not wearing safety equipment at the time, though Lofton had previously provided him with a full-body harness and a six-foot lanyard. At some point, the scaffolding tipped over while being moved by Bozarth and another Lofton employee from above.[3] Bozarth fell onto the concrete floor and suffered severe injuries. He has remained in a coma since the fall.

On April 1, 2004, Bozarth filed a complaint against Todd & Langley alleging that Todd & Langley had breached its nondelegable duty to provide him with a safe worksite. He later filed an amended complaint in which he added the Church as a defendant. Thereafter, Todd & Langley filed a third-party complaint against Lofton. On May 24, 2005, Bozarth moved for partial summary judgment on the issue of whether Todd & Langley owed a duty to him as a matter of law. Todd & Langley responded on August 15 and moved for summary judgment, arguing that it owed no duty to Bozarth. Following a hearing, on November 16, 2005, the trial court granted Todd & Langley's motion for summary judgment and denied Bozarth's partial motion for summary judgment. Bozarth now appeals. Additional facts will be provided as necessary.

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[3] It appears most likely that the scaffolding tipped as it was being moved because the Lofton employee on the ground had not yet been able to unlock all of its wheels. It is also possible that an object on the ground stopped one of the wheels.

> When reviewing summary judgment, this court views the same matters and issues that were before the trial court and follows the same process. We construe all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. Summary judgment is appropriate when the designated evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law.

Helms v. Carmel High Sch. Vocational Bldg. Trades Corp., 844 N.E.2d 562, 564 (Ind. Ct. App. 2006), *aff'd in relevant part*, 854 N.E.2d 345 (Ind. 2006) (some citations omitted).

Under *Bagley v. Insight Commc'ns Co.*, 658 N.E.2d 584 (Ind. 1995), a principal (here, Todd & Langley) is not liable for the negligence of an independent contractor (here, Lofton) unless at least one of the following five exceptions applies:

> (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 performed will probably cause injury to others unless due precaution is taken; and
> (5) where the act to be performed is illegal.

Helms v. Carmel High Sch. Vocational Bldg. Trades Corp., 854 N.E.2d at 346 (quoting *Bagley v. Insight Commc'ns Co.*, 658 N.E.2d at 586). Here, Bozarth claims that the second exception applies because, according to Bozarth, Todd & Langley undertook a contractual duty to provide him with a safe worksite.

> Generally, construction of a written contract is a question of law for the trial court for which summary judgment is particularly appropriate. However, if the terms of a written contract are ambiguous, it is the responsibility of the trier of fact to ascertain the facts necessary to construe the contract. Consequently, whenever summary judgment is granted based upon the construction of a written contract, the trial court has either

> determined as a matter of law that the contract is not ambiguous or uncertain, or that the contract ambiguity, if one exists, can be resolved without the aid of a factual determination.

Helms v. Carmel High Sch. Vocational Bldg. Trades Corp., 844 N.E.2d at 564.

Bozarth initially argues that Todd & Langley assumed a nondelegable duty for workplace safety[4] when Roger Todd signed the building permit for the project, which required that the work be performed in conformity with applicable laws, regulations, and ordinances.[5] In *Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 844 N.E.2d 562, we squarely rejected such an argument and affirmed a grant of summary judgment in favor of the general contractor and against an injured employee of its subcontractor. *See id*. (concluding that the building permit, in which Carmel merely agreed to comply with all applicable laws of the State, did not affirmatively evince an intent by Carmel to assume a duty of care to Helms). Our Supreme Court summarily affirmed our holding that the second *Bagley* exception did not apply because no contractual or legal duty to provide a safe worksite for Helms was created under the building permit. *See Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 854 N.E.2d 345. Therefore, in the instant case, the trial court correctly determined that Todd & Langley did not assume a duty to Bozarth via the building permit.

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[4] More specifically, Bozarth claims this included a duty to maintain workplace safety, insure compliance with OSHA safety regulations, initiate and maintain a safety program, inspect for safety violations, and take all necessary precautions for the safety of all persons affected by its work at the construction site.

[5] The building permit provided in relevant part: "The undersigned hereby certifies that the statement and drawings submitted are true and correct, agrees to perform the work covered by the permit in conformity with the applicable laws, regulations, and ordinances". *Appellant's Appendix* at 72.

Bozarth further contends that Todd & Langley contractually assumed a duty to provide him with a safe worksite through its construction contract with the Church. In this regard, Bozarth relies on the following contractual language: "[Todd & Langley] shall construct in substantial conformity to the plans and specifications and complete in a good workman like manner." *Appellant's Appendix* at 74. Bozarth then directs us to the detailed shop drawings and plans provided by Nucor for erection of the pre-engineered building. In an initial section regarding building erection notes, the Nucor document provides in relevant part: "The general contractor and/or erector is responsible to safely and properly erect the metal building system in conformance with these drawings, OSHA requirements, and MBMA standards pertaining to proper erection." *Id*. at 80. Bozarth reasons that by agreeing in its contract with the Church to construct in conformity to the plans and specifications, Todd & Langley contractually agreed to conform to OSHA requirements and, thus, contractually assumed a duty of safety for everyone at the project. Further, Bozarth argues that the phrase "complete in a good workman like manner" may be reasonably interpreted to require compliance with safety standards, including OSHA.

In support of his contentions, Bozarth directs us to *Perryman v. Huber, Hunt & Nichols, Inc*., 628 N.E.2d 1240 (Ind. Ct. App. 1994), *trans. denied*, where this court held that a general contractor had contractually assumed a duty to require all workers on the project to comply with safety regulations and was, therefore, potentially liable for the death of a subcontractor's employee. In that case, the general contractor, Huber, Hunt &

Nichols, Inc. (HHN), entered into a construction management agreement (the CMA)[6] whereby it agreed that it would "'comply with all applicable state and federal statutes and other governmental regulations pertaining to employment, and that it will require like compliance therewith from all Trade Contractors…related to the Project.'" *Id*. at 1244 (record citation omitted). In addition, in the CMA, HHN agreed to be responsible for: (1) maintaining a competent full-time staff at the job site to direct and monitor subcontractors working on the project, (2) determining the adequacy of the personnel and equipment of the subcontractors, (3) providing all supervision, equipment, and work items not provided by the subcontractors, and (4) reviewing the safety programs of the subcontractors and making appropriate recommendations. *Perryman v. Huber, Hunt & Nichols, Inc*., 628 N.E.2d 1240. In sum, under the CMA, HHN had exclusive authority to manage, direct, and control work on the entire project and assumed full responsibility for its employees, agents, and subcontractors. *Id*.

In light of these facts, we held in *Perryman*:

> It is clear from the express terms of the CMA, that HHN accepted a contractual duty to require [the subcontractors] to install safety nets as required by the federal OSHA regulation or to install the nets itself.[ ] Because HHN assumed a contractual duty to comply with all employee safety regulations…and to require [the subcontractors] to comply with such regulations, it is potentially liable to Perryman.

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[6] HHN entered into the CMA for the construction of the Bank One Tower Project with Monument Tower Associates Limited Partnership (MTALP), the owner. All parties contracting with HHN or MTALP later agreed that the CMA took priority over all other contracts. In particular, the CMA was expressly incorporated into the contracts with the relevant subcontractors, including Perryman's employer.

Id. at 1244 (footnote omitted).[7]

Here, by contrast, the express terms of the contract between Todd & Langley and the Church[8] did not affirmatively evince an intent for Todd & Langley to assume a duty of care to Bozarth. *See Helms v. Carmel High Sch. Vocational Bldg. Trades Corp*., 844 N.E.2d 562; *see also Perryman v. Huber, Hunt & Nichols, Inc*., 628 N.E.2d at 1244 ("[w]here the contract affirmatively evinces the parties' intent to charge one party with a duty of care, actionable negligence may be predicated upon that contractual duty"). Todd & Langley did not contract with Lofton to provide a safe worksite, nor did Todd & Langley expressly agree in its contract with the Church to comply with laws pertaining to employment. And there is no evidence that Todd & Langley contractually agreed with the Church or Lofton to provide a safety supervisor or to make safety inspections. The evidence in this case is starkly different from that in *Perryman*, where HHN expressly agreed to undertake a duty to provide a safe worksite, and we do not find that precedent

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[7] The footnote reads:

> There are many other facts which support our finding that HHN assumed a contractual duty to comply with all safety regulations and to require others to do the same, including: (1) HHN employed Wooten as a full-time safety officer on the project site, (2) Wooten made daily inspections to make certain employees of all contractors were working safely and complying with safety regulations, (3) Wooten expected every contractor to follow safety regulations, (4) Wooten made certain that any unsafe condition at the project site was corrected, and (5) provisions contained in [the subcontractors' contracts] regarding HHN's supervision, control, insurance, indemnification, etc.

Id. at 1244 n.9.

[8] The construction contract was not detailed and spanned little more than a page, excluding attachments.

apposite here. *See Helms v. Carmel High Sch. Vocational Bldg. Trades Corp.*, 844 N.E.2d 562 (similarly distinguishing *Perryman*).[9]

We conclude that the designated evidence establishes Todd & Langley did not contract to provide a safe worksite for Bozarth. Because Bozarth cannot show that any of the exceptions to the general rule regarding a principal's nonliability for the negligence of an independent contractor apply here, we hold that the trial court did not err when it entered summary judgment in favor of Todd & Langley.

Judgment affirmed.

MATHIAS, J., and BARNES, J., concur.

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[9] The facts of *Williams v. R.H. Marlin, Inc.*, 656 N.E.2d 1145 (Ind. Ct. App. 1995) are also readily distinguishable. In that case, we found that a plain reading of the contract language indicated that Real intended to assume a duty of care for all employees on the site. The relevant contractual provisions in Real's contract with PDM were:

> ARTICLE XV. Lower Tier Subcontractor
>
> Subcontractor and each of its subcontractors and materialmen will observe and conform to the COMPANY [PDM] safety program and ... enforce an adequate safety program applicable to its own operations covered by this Subcontract.
>
> . . . . .
>
> ARTICLE XXII. Safety
>
> Subcontractor shall protect the property of Owner and of adjacent property. All necessary precautions for the safety of employees of Owner, COMPANY [PDM], Subcontractor and any other contractor, *and others* on the site shall be taken. Federal, state and local safety laws, rules, regulations, and all building and other applicable codes must be adhered to. All safety instructions of owner and of COMPANY must be adhered to.

Id. at 1155 (emphasis in original). The contract in the instant case does not even begin to contain such explicit language regarding safety. In fact, the contract between Todd & Langley and the Church makes no reference to safety.