IN THE COURT OF APPEALS OF IOWA

No. 3-230 / 12-1466
Filed May 15, 2013

SECURITY NATIONAL BANK, as Successor Conservator of JEFFREY WHEELER, STANLEY WHEELER and MARIAN WHEELER, Co-Guardians of JEFFREY WHEELER,
Plaintiffs-Appellants,

vs.

AMERICAN PIPING GROUP, INC., GETHMANN CONSTRUCTION COMPANY, INC., and OTHER UNKNOWN PARTIES,
Defendants-Appellees.

Appeal from the Iowa District Court for Scott County, Marlita Greve, Judge.

Jeffrey Wheeler, through his conservator, appeals a summary judgment ruling that a general contractor could not be held liable for the negligence of its subcontractor. **REVERSED AND REMANDED.**

Pressley Henningsen and Emily Anderson of Riccolo, Semelroth & Henningsen, P.C., Cedar Rapids, for appellants.

Patrick M. Roby and Robert M. Hogg of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellees.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

An injured worker, through his conservator, appeals a summary judgment ruling that Gethmann Construction Company, Inc.—as the general contractor—could not be held liable for the negligence of its subcontractor. Jeffrey Wheeler was performing iron work for subcontractor American Piping Group (APG) when he fell and suffered severe injuries at an ethanol plant construction site. Wheeler urges two exceptions to the common law rule that the general contractor is not liable: (1) Gethmann contractually assumed a non-delegable duty to provide a safe worksite, and (2) Gethmann retained sufficient control over the worksite to be liable for Wheeler's injuries.

Because we read Gethmann's contract with project owner, Badger State Ethanol, LLC (Badger), to place a nondelegable duty on Gethmann to provide a safe worksite, we find the first exception applies. Once Gethmann contractually assumed that duty, under Iowa law it could not delegate it to APG. The contract also manifested an intent to benefit third-party employees, like Wheeler. Having determined Gethmann's assumption of a nondelegable duty, we do not need to address the retained-control exception.

I. Background Facts and Proceedings

Badger owns and operates an ethanol plant in Monroe, Wisconsin.[1] Badger sought to expand its Monroe plant and accepted Gethmann's bid to be the general contractor for the expansion. Gethmann subcontracted with APG to provide labor and material to complete the "front end, mill building structural steel

[1] Because the district court resolved this case by summary judgment, we set forth the facts in the light most favorable to Wheeler, the nonmoving party.

fabrication and erection" for the project. APG enlisted Trillium Construction Services, a staffing agency for construction companies, to provide temporary employees for the project. Trillium assigned employee Wheeler to work for APG.

APG's safety director, Lonnie Louvar, discussed safety protocol with Wheeler. Louvar stressed the importance of being tied off—a safety procedure that required workers wear a double-wide lanyard attached to a retractable device while performing elevated work. Wheeler replied "he always works safe" and "there was no problem, that he had his own body harness and lanyards."

Both Gethmann and APG maintained safety policies and procedures. APG's policies placed responsibility on the superintendent and foreman for overall worker safety and for ensuring workers follow the policies and procedures. Gethmann expected subcontractors to provide safety equipment, guidance, and training similar to that which Gethmann provided its employees. Gethmann superintendent Bob Craft and project manager Jesse Van Hook were responsible for ensuring safety. Both Gethmann and APG policies required employees to be tied off at all times while laying down decking.

On February 4, 2006, Wheeler was welding beneath the second floor where his APG coworkers were attaching iron decking. APG Superintendent Kenny Cross and foreman Harvey Winkleman were overseeing the work. Workers were supposed to lay out and tack down one sheet of steel at a time, before moving to the next. Coworker Larry Wright testified that on the day of Wheeler's injury, workers were laying out five sheets of steel before securing each to the beams. Wright also testified no workers were tied off. Once Wheeler finished welding, he operated a lift to ascend to the second floor to join his

coworkers. Wheeler exited the lift without being tied off. A sheet of decking slipped from under his feet, causing him to fall twenty-three feet to the concrete floor below.

Wheeler filed suit on January 25, 2008.[2] Wheeler settled with APG, dismissing that defendant from the suit on August 10, 2012. Gethmann then moved for summary judgment claiming its status as a general contractor precludes liability under the rule that a contractor is not responsible for injuries caused by a subcontractor. On November 15, 2012, the district court granted summary judgment in Gethmann's favor. Wheeler appeals.

II. Standard of Review

We review the grant of summary judgment for correction of legal error. *Minor v. State*, 819 N.W.2d 383, 393 (Iowa 2012). Summary judgment is appropriate only if the evidence presented reveals no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012). We view the record in the light most favorable to the resisting party, according that party every legitimate inference reasonably deduced from the evidence. *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 501 (Iowa 2013). While summary adjudication is rarely appropriate in negligence cases, the determination of whether a duty is owed under particular circumstances is a matter of law for the

[2] Stanley Wheeler originally filed suit as Jeffrey Wheeler's guardian and conservator. Security National Bank is now the corporate fiduciary and court-appointed conservator acting on behalf of Jeffrey Wheeler.

court's determination. *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009).

III. Analysis

A. Liability of General Contractors

In Iowa, the general rule is "'the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'" *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 693 (Iowa 2009) (quoting Restatement (Second) of Torts § 409, at 370 (1965)). Limiting the liability of general contractors reflects the realities of the relationship between employers and their contractors. *Id.* at 698. The subcontractor has superior knowledge and expertise in the subject work and, therefore, stands in the best position to understand the associated risks and best precautions to mitigate those risks. *Id.* If general contractors did not have limited liability, they would be compelled to gain expertise in each subcontractor's field to implement the precautions necessary to manage the associated risks. *Id.*

But Iowa case law recognizes exceptions to this general rule. *See Farris v. General Growth Dev. Corp.*, 354 N.W.2d 251, 253 (Iowa Ct. App. 1984) (citing Restatement (Second) of Torts §§ 410–29, at 372–423 (1965) as containing exceptions to general rule).[3] For example, where a contract imposes responsibility on the general contractor for the safety of the employees of the subcontractor, the general contractor may not escape the responsibility of seeing

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[3] In *Van Fossen*, 777 N.W.2d at 697 n.8, the supreme court noted section 51 of the tentative draft of the Restatement (Third) of Torts proposed retaining the rule of limited liability for the employers of independent contractors, as well as the exceptions for nondelegable duties assumed by those employers. The parties in the instant case do not advance arguments under the Restatement (Third) of Torts.

that duty performed by delegating it to an independent contractor. *See Giarratano v. Weitz Co.*, 147 N.W.2d 824, 831–32 (Iowa 1967), *abrogated on other grounds by Van Fossen*, 777 N.W.2d at 695 n.6.[4] Neglect of such a contractual duty is a tort, and an action ex delicto will lie. *Farris*, 354 N.W.2d at 255.

At least two Iowa cases have applied the contractual-duty exception to impose liability on a defendant general contractor for negligently exercising the responsibility to provide a safe place for the subcontractor's employees to work. In *Giarratano*, an employee fell eighty feet from a roof while working for a subcontractor of the defendant general contractor. 147 N.W.2d at 826. The owner-general contractor agreement required the general contractor (1) to take all necessary precautions to provide a safe workplace for employees on the premises, including abiding by all laws and building codes; (2) to erect the necessary safeguards and signs on site; and (3) to assign an agent to prevent accidents and report to the architect. *Id.* at 828. The agreement additionally required:

> The contractor agrees to bind every subcontractor and every subcontractor agrees to be bound by the terms of the agreement, the general conditions, the drawings and specifications as far as applicable to his work, including the following provisions of this article, unless specifically noted to the contrary in a subcontract approved in writing as adequate by the owner or architect.

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[4] Gethmann argues *Giarratano* was "expressly disavowed" in *Van Fossen* and therefore does not apply here. *Van Fossen* addressed *Giarratano* and *Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116 (Iowa 1976) as follows: "Because of the conclusory nature of the analysis in *Giarratano* and *Trushcheff*, we do not find them instructive. To the extent our decisions in *Giarratano* and *Trushcheff* suggest a more expansive definition of peculiar risk than has been developed in *Porter*, *Downs*, and *Lunde*, we disavow them." 777 N.W.2d at 695 n.6. Contrary to Gethmann's argument, *Van Fossen* disavowed only the peculiar risk definition in *Giarratano*.

> . . . .
> This does not apply to minor subcontracts.
> . . . .
> The subcontractor agrees-
>
> > (a) To be bound to the contract by the terms of the agreement, general conditions, drawings and specifications and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.

Id. at 831. The agreement between the general contractor and subcontractor read: "In connection with your work, you are to bear the same responsibility to us as we do to the architect and owner as regards to the plans and specifications." *Id.*

Our supreme court recognized that a contract exempting parties from liability for negligence is not against public policy so long as it does not involve public interest or a statutory prohibition, but:

> [a party] who owes, and is personally bound to perform an absolute and positive duty to the public or an individual cannot escape the responsibility of seeing that duty performed by delegating it to an independent contractor, and will be liable for injuries resulting from the contractor's negligence in the performance thereof, whether the duty is imposed by law or by contract.

Id. at 831–32 (quoting 57 C.J.S. Master and Servant § 591). The court reasoned that in some situations an employer may have a duty it is unable to delegate to another, and in those cases the employer remains liable for nonperformance of the duty even if it hires an independent contractor to do the work. *Id.* at 832.

The court continued, where one party owes another a contractual duty to act, the party owing the duty holds an additional duty to act with due care in performing the contract so as not to injure the subcontractor's person or property—a duty that is "nondelegable." *Id.* In essence, while a contractor may delegate the performance of the contract, it retains the duty to act, or duty to act

with due care. *Id.* The *Giarratano* court held the principal contractor assumed a duty under its contract with the land owner for employee safety, a responsibility that could not be delegated even through hiring an independent contractor to perform the actual work. *Id.* at 832.

In *Farris*, 354 N.W.2d at 255, the agreement between a landowner and a contractor, an apartment complex developer, provided that the contractor must comply with the provisions of an accident prevention manual that contained a chapter on safety nets and a chapter on floor and wall openings. The contractor also agreed to take all reasonable safety precautions for the employees on the worksite. *Farris*, 354 N.W.2d at 255. Our court held the owner-contractor agreement imposed a nondelegable duty on the contractor to provide reasonable precautions for employee safety. *Id.*

The district court discussed both *Giarratano* and *Farris* in its summary judgment order, but determined they did not support Wheeler's position based on the language of Gethmann's contract with Badger. When we apply those precedents to the contractual provisions at issue, we reach a different conclusion.

B. Application of Exception to Gethmann

Wheeler contends the district court erred by not recognizing that Gethmann accepted a duty to provide a safe worksite in its contract with Badger and could not delegate that duty to APG. Wheeler also argues the court should have concluded he was a third-party beneficiary to the Badger contract. For the reasons detailed below, we agree with Wheeler that Gethmann assumed a nondelegable duty to keep the construction site safe and the intent of that

contractual provision was to benefit the class of workers to which Wheeler belonged.

1. *Gethmann's Contract with Badger Created a Nondelegable Duty to Provide a Safe Worksite.*

Wheeler contends Gethmann assumed a nondelegable duty based on excerpts of the "safety of persons and property" portion of the Badger contract:

> **§ A.10.2.1** The Design-Builder [Gethmann] shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to:
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> .1 employees on the Work and other persons who may be affected thereby;
>
> . . . .
>
> **§ A.10.2.2** The Design-Builder shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss.
>
> **§ A.10.2.3** The Design-Builder shall erect and maintain, as required by existing conditions and performance of the Contract Documents, reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying Owner and owners and users of adjacent sites and utilities.
>
> . . . .
>
> **§ A.10.2.6** The Design-Builder shall designate in writing to the Owner a responsible individual whose duty shall be the prevention of accidents.

Wheeler argues once Gethmann assumed the duty to provide a safe worksite in its contract with Badger, it could delegate the work of maintaining the safe worksite, but not the ultimate duty.

In response, Gethmann contends the following language, which precedes the provisions cited by Wheeler, expressly reserves those nondelegable duties for the subcontractor:

> **§ A.5.3.1** . . . [T]he Design-Builder shall require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Design-Builder by terms of the

> Contract Documents, and to assume toward the Design-Builder all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which the Design-Builder by these Documents, assumes toward the Owner.
> . . . .
> **§ A.10.1.1** The Design-Builder shall comply with all safety precautions and programs initiated and maintained by the Owner in connection with the Project and the Design-Builder's performance of the Work. In accordance with such safety precautions and programs, except to the extent specifically indicated in the Contract Documents to be the responsibility of others, the Design-Builder shall assume the duties and responsibilities set forth in Sections A.10.2 through A.10.6 below.

Gethmann argues because section A.101.1 creates an exception for safety precautions assigned to others, and section A.5.3.1 requires a subcontractor to be responsible for the safety of its own work, Gethmann did not assume a duty toward APG employees.

The district court concluded Gethmann did not assume a nondelegable duty, reasoning:

> Unlike the contracts in *Giarranto* and *Farris*, the contract between Gethmann and Badger specifically recognizes that Gethmann's duty regarding safety precautions and programs is limited and that others have a duty for safety as well. § A.10.1.1. The contract specifically indicates it is the responsibility of subcontractors to assume the responsibility for safety of the subcontractor's work. § A.5.3.1. Under the contract Gethmann assumed a duty to impose safety requirements on its subcontractors; Gethmann did *not* assume a duty for the safety of the entire construction site.

We disagree with the district court's interpretation of the contract terms in relation to the nondelegable duty to provide a safe worksite. The pertinent terms of Gethmann's contract with Badger are very similar to those reviewed in *Giarratano.* In both cases, the defendant general contractor assumed a duty under its contract with the construction site owner for the safety of the workers. *See Giarrantano*, 147 N.W.2d at 832. Once contractually assumed, the duty was

nondelegable. *Id.* We recognize the term nondelegable is somewhat of a misnomer, because the general contractor is free to delegate the duty of performing the task, but cannot avoid the liabilities arising from the delegated duties if breached. *See Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 703 (Iowa 1995).

Section A.5.3.1 of the contract requires APG to "assume toward the Design-Builder all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, *which the Design-Builder by these Documents, assumes toward the Owner*." (Emphasis added.) The italicized portion expressly acknowledges Gethmann assumed toward Badger the same duty it purports to pass to APG. At most, this language suggests that both Gethmann and APG must perform tasks to avoid hazards on the construction site. The liability buck stopped at Gethmann. *See Giarrantano*, 147 N.W.2d at 832.

2. *Wheeler was a Third-party Beneficiary.*

Because Wheeler's suit is for neglecting a duty arising from a contract from which he is not a party, he must also be a third-party beneficiary of the contract. *See id*. A beneficiary need not provide consideration or have knowledge of the contract, nor must the beneficiary be identified at the contract's effective date. *Id.* at 832–33. The beneficiary must only be a member of the class "for whose benefit the contract was made." *Id.* at 833.

The district court found Wheeler was not a third-party beneficiary of the contract because the language prohibits the agreement from being construed to create any contractual relationship between any person or entity other than

Badger and Gethmann. The court was also persuaded by the requirement that Gethmann and its subcontractors obtain workers' compensation insurance. It concluded: "These provisions support the finding that the contract was intended to protect Badger and Gethmann from liability rather than protect employees from the negligence of either party."

A provision in the first article of the agreement reads: "The Contract documents shall not be construed to create a contractual relationship of any kind between any persons or entities other than the Owner and Design-Builder." Wheeler considers this to be boilerplate aimed toward third-parties that were not contemplated by the agreement, arguing employees like Wheeler are specifically listed in section A.10.2.1. He relies on the *Goebel v. Dean & Associates*, 91 F.Supp.2d 1268, 1279 (N.D. Iowa 2000) holding that where contracting parties manifest an intent to benefit one party's employees by safely and properly installing a machine, the plaintiff employee was, at minimum, an incidental beneficiary that could pursue a tort claim. Wheeler contends because Gethmann retained a duty to keep the site and workers safe, as a worker he is a third-party beneficiary of the contract. We agree with Wheeler's contentions.

A contract that provides for employee safety creates a class of third party beneficiaries in those employees. *Farris*, 354 N.W.2d at 255. A beneficiary may be unidentified, unidentifiable, or have no knowledge of the contract at the time it is made. *Giarratano*, 147 N.W.2d at 382–33. Because Gethmann contractually assumed the duty to protect employees, Wheeler—like the employee in *Giarratano*—is a third-party beneficiary. *See id.* at 833.

The Badger contract language severing any potential "contractual relationship of any kind" does not impact third party beneficiary rights. Wheeler's suit is based on an action ex delicto; therefore it is a suit based in tort to enforce a breached duty assumed by the defendant, rather than enforcing a contractual right. *See id.* (quoting 4 Corbin on Contracts, § 777, which draws distinction between "an intent to create a 'right' in a third party and an intent that a performance beneficial to him should be rendered"). Gethmann could have cut off the rights of third-party beneficiaries, but chose not to. *See, e.g.*, *Walters v. Kautzky*, 680 N.W.2d 1, 4 (Iowa 2004) (expressly stating in contract "There are no third party beneficiaries to this Agreement. This Agreement is intended only to benefit the [Department of Corrections] and the Public Defender."). Accordingly, the limiting language did not negate Wheeler's status as a third-party beneficiary for his tort-based action.

Because the district court was incorrect in concluding as a matter of law that Gethmann was not liable for Wheeler's injuries, we reverse the grant of summary judgment. Under its contract with Badger, Gethmann incurred a nondelegable duty to keep the workplace safe and Wheeler was a third-party beneficiary of that contract. Because we find Gethmann's contractual assumption of a nondelegable duty for workplace safety precludes summary judgment, we need not address the alternative exception for retained control.

REVERSED AND REMANDED.