IN THE COURT OF APPEALS OF IOWA

No. 9-241 / 08-1681
Filed July 2, 2009

BP PIPELINES (NORTH AMERICA) INC.
and BP PRODUCTS NORTH AMERICA, INC.,
Plaintiffs,

vs.

CURT BOCKENSTEDT and LEO
BOCKENSTEDT d/b/a C & L DRAINAGE,
Defendants.

CURT BOCKENSTEDT and LEO BOCKENSTEDT d/b/a C & L DRAINAGE,
Third-Party Plaintiffs-Appellants,

vs.

RICHARD FITZPATRICK and MARK FITZPATRICK,
Third-Party Defendants-Appellees.

Appeal from the Iowa District Court for Delaware County, Michael J. Shubatt, Judge.

Third-party plaintiffs appeal from a district court ruling granting summary judgment in favor of third-party defendants on third-party plaintiffs' contribution claim. **AFFIRMED.**

Stephen J. Powell and Jim D. DeKoster of Swisher & Cohrt, P.L.C., Waterloo, for appellants.

Brian L. Yung of Klass Law Firm, L.L.P., Sioux City, for appellee Mark Fitzpatrick.

David L. Riley of McCoy, Riley, Shea & Bevel, P.L.C., Waterloo, for appellee Richard Fitzpatrick.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

Curt Bockenstedt and Leo Bockenstedt, doing business as C & L Drainage, appeal from a district court ruling granting summary judgment in favor of Richard Fitzpatrick and Mark Fitzpatrick on the Bockenstedts' contribution claim. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

The summary judgment record reveals the following undisputed facts. Richard Fitzpatrick owns farmland in Delaware County, Iowa, that he leases to his son, Mark Fitzpatrick. A gasoline pipeline owned by BP Pipelines (North America), Inc. runs underneath that land. Signs marking the presence of the pipeline are located along the farm's fence line and the highway going past the farm.

In April 2002, the Fitzpatricks hired the Bockenstedts to install drain tile near waterways located in the back portion of the farm. Curt and his father Leo, both of whom are also engaged in farming, perform custom tiling and excavating work on the side through their business, C & L Drainage. On the evening of April 16, Curt was trenching the area where the Fitzpatricks wanted the drain tile to be placed when he hit what he believed was ledge rock with his tile plow. Richard, who was nearby at the time, also thought Curt had hit ledge rock. Curt continued trenching the following day. About a half an hour after he started working, Curt hit the pipeline with his tile plow and it ruptured. Approximately 8400 gallons of gasoline were released from the pipeline.

The Bockenstedts were fined $15,000 by the State for violations of the Underground Facilities Information Act, Iowa Code chapter 480 (2007), based on Curt's failure to contact the statewide notification center before excavating as required by section 480.4(1)(a). BP Pipelines also sued the Bockenstedts, seeking to recover the money it expended to repair the pipeline, remove the gasoline, and remediate any contamination caused by the spill. It alleged the Bockenstedts were generally negligent and negligent per se in failing to comply with chapter 480 prior to engaging in excavation. The Bockenstedts filed a third-party petition against the Fitzpatricks, seeking contribution for any damages owed to BP Pipelines.[1] In support of that claim, they alleged the Fitzpatricks were negligent in failing to warn them of the presence of the pipeline in the area being tiled.

BP Pipelines filed a motion for summary judgment on its claims against the Bockenstedts, which the district court denied. The court agreed with the Bockenstedts that chapter 480 does not expressly or impliedly provide a private cause of action for its breach, but it determined that genuine issues of material fact existed as to BP Pipelines' general negligence claim. The Fitzpatricks each filed motions seeking summary judgment on the Bockenstedts' contribution claim. The court granted those motions, finding the Bockenstedts did not identify any duty owed by the Fitzpatricks to BP Pipelines and thus no common liability existed between the parties. The Bockenstedts filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting the court to

[1] The Bockenstedts also asserted an indemnity claim against the Fitzpatricks, which the district court dismissed on summary judgment. The Bockenstedts have not challenged that portion of the court's summary judgment ruling on appeal.

> enlarge, amend or reconsider its Order with respect to their claim that they are entitled to contribution premised on the following grounds:
> (a) That the Fitzpatricks owed a duty of care to BP based upon their active participation in the tiling operation . . .
> (b) That the Fitzpatricks, as possessors of the premises in question, owed a nondelegable duty to BP to maintain the premises in a safe condition . . . and
> (c) That Richard Fitzpatrick did not escape any duty owed to BP by reason of his lease of the premises due to his retained control.

The court denied the motion.

Following the district court's summary judgment ruling, BP Pipelines settled its claim with the Bockenstedts. The Bockenstedts then filed an appeal from the court's dismissal of their contribution claim against the Fitzpatricks. They claim the court erred in concluding they did not share common liability with the Fitzpatricks.

II. SCOPE AND STANDARDS OF REVIEW.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 718 (Iowa 1999). Summary judgment will be upheld where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Van Essen*, 599 N.W.2d at 718.

While negligence actions are seldom capable of summary adjudication, the threshold question in any tort case is whether the defendant owed the plaintiff a duty of care. *Sankey v. Richenberger*, 456 N.W.2d 206, 207 (Iowa 1990). "Whether such a duty arises out of the parties' relationship is always a matter of

law for the court." *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994).

III. MERITS.

"The doctrine of contribution rests on the equitable principle that the parties subject to common liability should contribute equally to the discharge of that liability." *State ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 152 (Iowa 2001). "Common liability exists when the injured party has a legally cognizable remedy against both the party seeking contribution and the party from whom contribution is sought." *Id.* at 153; *see also* Iowa Code § 668.5(1). "Two or more persons must be liable to the injured party for the same damage, although liability may rest on different grounds or theories." *Palmer*, 637 N.W.2d at 153.

In applying the test of common liability, the Bockenstedts must show that BP Pipelines could have sued the Fitzpatricks directly for the damages it incurred as a result of the ruptured pipeline. *See Telegraph Herald, Inc. v. McDowell*, 397 N.W.2d 518, 520 (Iowa 1986). The Bockenstedts claim BP Pipelines could have done so based on the Fitzpatricks' own negligence in excavating near the pipeline without first contacting the statewide notification center as required by Iowa Code chapter 480. We do not agree.

"The elements of a negligence claim include the existence of a duty to conform to a standard of conduct to protect others, a failure to conform to that standard, proximate cause, and damages." *Van Essen*, 599 N.W.2d at 718. "Courts look to legislative enactments, prior judicial decisions, and general legal principles as a source for the existence of a duty." *Id.* Our courts have also often

relied on the Restatement (Second) of Torts when determining whether a given defendant owes a duty to a plaintiff. *Id*.

The Bockenstedts claim the duty the Fitzpatricks owed BP Pipelines is derived from (1) Iowa Code chapter 480, (2) various provisions of the Restatement (Second) of Torts, and (3) judicial decisions from other states. We will examine each in turn.

A. Iowa Code chapter 480.

Iowa Code section 480.4(1)(a) requires an excavator to contact the statewide notification center, commonly referred to as "Iowa One-Call," at least forty-eight hours prior to the commencement of an excavation. The notification center transmits the excavator's notice to each underground facility operator in the area, and provides the names of all operators in that area to the excavator. *See* Iowa Code § 480.4(2). Upon receiving notice from the notification center, the operator must mark the horizontal location of its underground facility in the planned excavation area. *Id.* § 480.4(3). The excavator is then required to use due care in excavating in the marked area to avoid damaging the underground facility. *Id.*

Accurate location and marking is crucial to minimize potential damage to both the underground facility and excavation equipment. *See* 1994 Op. Iowa Att'y Gen. 98. It also helps ensure public safety during the excavation process. *Id.*; *see also Jericho Water Dist. v. One Call Users Council, Inc.*, 887 N.E.2d 1142, 1143 (N.Y. 2008) ("Underground equipment that serves to carry gas, electricity, water and other things poses a problem for any project that involves

digging. Accidental contact with pipes and wires can be costly and dangerous, and thus excavators must know where the underground facilities are before they start to dig. The purpose of a one-call system is to make that information available as efficiently as possible."). Section 480.1A thus forbids a person from engaging in any excavation "unless the requirements of this chapter have been satisfied."

The district court determined this statute could not be the basis for the Fitzpatricks' duty of care to BP Pipelines because the statute places the onus for contacting the notification center on the excavator, not the landowner.[2] *See* Iowa Code § 480.4(1)(a) ("[P]rior to any excavation, an excavator shall contact the notification center and provide notice of the planned excavation."). The Bockenstedts claim the court erred in so concluding because the Fitzpatricks could be considered excavators within the meaning of the statute.[3] We do not agree.

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[2] The district court further determined the statute did not expressly or impliedly provide a private cause of action for its breach. *See Marcus v. Young*, 538 N.W.2d 285, 288 (Iowa 1995) ("In order for a negligence claim to lie for violation of a statutory duty, such provision must be made, either explicitly or implicitly, by the statute."). This determination is not challenged on appeal.

[3] Contrary to Richard's assertions otherwise, we believe the Bockenstedts are claiming that chapter 480 is evidence of the duty of care the Fitzpatricks owed to BP Pipelines rather than the basis for a cause of action itself. *See Lewis v. State*, 256 N.W.2d 181, 187 (Iowa 1977) (distinguishing between a cause of action for a statutory violation and use of a statutory standard of conduct as evidence in a common-law negligence action). Statutory enactment is one of the means by which the duty or standard of care required to establish a common-law negligence action can be shown. *See Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 37 (Iowa 1982); Restatement (Second) of Torts § 285 cmt. c, at 21 (1965) ("Even where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence.").

Section 480.1(5) defines an "excavator" as "a person proposing to engage or engaging in excavation." The Bockenstedts assert "Mark Fitzpatrick not only was engaging in excavation on his property through hiring Bockenstedts as independent contractors, but that he was actively participating in the tiling operation at the time BP's pipeline was struck." Mark testified in a deposition that he was helping "roll out tile" while Curt dug the trenches. We do not believe that makes him an excavator subject to the requirements of chapter 480. Nor do we believe, for the reasons that follow, that the Fitzpatricks' hiring of the Bockenstedts exposed them to liability for the Bockenstedts' failure to contact the notification center prior to excavating.

B. Common Law.

The Bockenstedts claim the Fitzpatricks owed BP Pipelines a duty of care as the possessors of the land that the underground gasoline pipeline owned by BP Pipelines crossed.[4] However, a landowner who employs "an independent contractor is not vicariously liable for injuries arising out of the contractor's negligence." *Lunde v. Winnebago Indus., Inc.*, 299 N.W.2d 473, 475 (Iowa 1980); *see also* Restatement (Second) of Torts § 409, at 370. The commonly-accepted reasoning for this rule "is the lack of control by the employer over the details of the contractor's work." *Lunde*, 299 N.W.2d at 475. However, "this general rule 'is riddled with a number of common-law exceptions that have

[4] We note our supreme court recently adopted a multifactor approach to be used in determining whether a landowner or occupier has exercised reasonable care for the protection of lawful visitors. *See Koenig v. Koenig*, _____ N.W.2d _____, _____ (Iowa 2009) (abandoning common-law distinction between invitees and licensees in premises liability cases). We do not believe we need to apply that approach here due to the Fitzpatricks' status as employers of an independent contractor.

practically subsumed the rule.'" *Kragel v. Wal-Mart Stores, Inc.*, 537 N.W.2d 699, 702 (Iowa 1995) (citation omitted).

Those exceptions are set forth in sections 410 to 429 of the Restatement (Second) of Torts. *See id.* The Bockenstedts urge a number of the exceptions apply here, specifically sections 410, 414, 422, and 424. None of these Restatement provisions were raised by the Bockenstedts in the district court proceedings or addressed by the court in its summary judgment ruling. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). The Bockenstedts did, however, argue in their rule 1.904(2) motion that Richard "did not escape any duty owed to BP by reason of his lease of the premises due to his retained control."[5] In support of that argument, they asserted "there is evidence that Richard directed Curt Bockenstedt where to lay the drain tile . . . and that he was paying a portion of the tiling project's cost."

The doctrine of retained control permits an action for negligence if the landowner who entrusted the work to an independent contractor retained control of any part of the work. *Downs v. A & H Constr., Ltd.*, 481 N.W.2d 520, 524-25 (Iowa 1992); *see also* Restatement (Second) of Torts § 414, at 387 ("One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety

[5] Although the Bockenstedts raised the issue of Richard's retained control as an exception to the general rule of nonliability for owners/lessors of land, *see Van Essen*, 599 N.W.2d at 720, we will afford them the benefit of doubt and address the issue in the context in which it is raised on appeal—as an exception to the general rule of nonliability for employers of independent contractors.

the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."). To establish control, the landowner

> must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or deviations . . . . There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts § 414 cmt. c, at 388; *see also Downs,* 481 N.W.2d at 522, 525 (ruling a contractor's inspection of the work, receipt of reports, suggestions, recommendations, alterations, and ability to start or stop work insufficient evidence of control over a subcontractor); *Hernandez v. Midwest Gas Co.,* 523 N.W.2d 300, 303 (Iowa Ct. App. 1994) (ruling a contractor's inspection every three hours, directions to wear hard hats and safety glasses, and ability to stop or resume work insufficient control over a subcontractor). The type of control envisioned by the retained control doctrine includes instructions as to the performance of specific tasks or the method of operation. *See Hernandez,* 523 N.W.2d at 303.

We do not believe Richard's direction to Curt as to where the drain tile should be laid establishes the degree of control necessary to invoke the retained control exception.[6] *See Amoco Pipeline Co. v. Herman Drainage Syst., Inc.*, 212

[6] Our conclusion in this regard also disposes of any claim that may have been preserved by the Bockenstedts that the exception in Restatement (Second) of Torts section 422 applies to the facts of this case. *See Lunde*, 299 N.W.2d at 479-80 (stating the amount of an owner's involvement in overseeing the construction must be substantial in order to impose liability under section 422).

F. Supp. 2d 710, 728-29 (W.D. Mich. 2002) (finding landowner's specification as to where he wanted drain tile installed was not a sufficient level of control for application of the retained control exception). Upon viewing the record in the light most favorable to the Bockenstedts, we find no evidence suggesting that Curt was not free to perform the work in his own way. *See* Restatement (Second) of Torts § 414 cmt. c, at 388. The district court thus did not err in concluding that the Bockenstedts did not identify a common law duty owed by the Fitzpatricks to BP Pipelines.

C. Judicial Decisions.

Finally, the Bockenstedts rely on decisions from courts in other states in arguing the Fitzpatricks, as landowners, owed a duty of care to BP Pipelines to avoid damaging the underground facility on their land. *See Mountain States Tel. & Tel. Co. v. Kelton*, 285 P.2d 168, 172 (Ariz. 1955) (finding subservient estate owners owed duty of care to underground facility operator "to not interfere with or obstruct [the operator's] use of the property" where the owners knew about the operator's easement); *American Tel. & Tel. Co. v. Leveque*, 173 N.E.2d 737, 743 (Ill. Ct. App. 1961) ("The law is that the *owner of property owes to an independent contractor at work on the owner's property* the duty of exercising reasonable care to have the premises in good condition for the contracted work, unless the defects responsible for the injury were known to the contractor." (emphasis added)).

We think these cases are inapposite because in Iowa our legislature has chosen to place the burden of ascertaining the location of underground facilities

prior to excavation on the excavator. *See* Iowa Code § 480.4(1)(a). It does not appear similar statutes existed in the above-cited cases relied upon by the Bockenstedts. *Cf. Chesapeake & Potomac Tel. Co. v. Props. One, Inc.*, 439 S.E.2d 369, 372 (Va. 1994) (finding excavator's failure to comply with statute requiring forty-eight hours advance notice of excavation work could not be attributed to the owner of the property).

IV. CONCLUSION.

The Bockenstedts did not identify any applicable duty of care owed by the Fitzpatricks to BP Pipelines. We therefore conclude the district court correctly determined no common liability existed between the Bockenstedts and the Fitzpatricks. The court's entry of summary judgment in favor of the Fitzpatricks on the Bockenstedts' contribution claim is accordingly affirmed.

AFFIRMED.