STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1045

Alan Eleria and Darwin Yasis,
as co-trustees for the heirs of Dave C. Yasis, decedent,
Appellants,

vs.

City of St. Paul,
Respondent,
Charles R. Nelson & Associates, Inc., d/b/a CNA Consulting Engineers,
Respondent,
and City of St. Paul, third party plaintiff,
Respondent,

vs.

Lametti, Inc., third party defendant,
Respondent.

Filed December 28, 2010
Affirmed
Stoneburner, Judge

Ramsey County District Court
File Nos. 62CV095658; 62CV073579

Wilbur W. Fluegel, Fluegel Law Office, Minneapolis, Minnesota; and

Harry A. Sieben, Jr., Sieben, Grose, Von Holtum & Carey, Ltd., Minneapolis, Minnesota (for appellants)

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Gerald H. Bren, Foley & Mansfield, Minneapolis, Minnesota (for respondent Lametti)

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellants, co-trustees for the heirs of a tunnel worker who drowned while working in a St. Paul storm-sewer tunnel, challenge summary judgment dismissing their wrongful-death claim against respondents, the city and the city's independent-contractor consulting engineers. The district court concluded that respondents did not owe a duty to decedent, who was an employee of another independent contractor hired by the city to perform the tunnel work. Alternatively, the district court concluded that any duty of care owed by respondents was negated by decedent's assumption of the risk by failing to evacuate the tunnel at the first available opportunity. Because no genuine issues of material fact exist and because the record demonstrates that respondents did not owe a duty of care to decedent, we affirm without reaching the issue of assumption of risk.

FACTS

I. Relationship of the parties

Between June 2003 and March 2006, respondent City of St. Paul (the city) entered into a series of contracts with respondent CNA Consulting Engineers (CNA) to evaluate the St. Peter-Rondo storm-sewer tunnel system, determine its structural integrity, and provide options for its rehabilitation. The June 18, 2003 contract titled "Professional Consulting Services Agreement Between The City of Saint Paul, Department of Public

Works And CNA Consulting Engineers" (city/CNA contract) establishes CNA's obligations, in relevant part, in section 4:

> 4.1 CNA and its employees will comply with and will contractually require all subcontractors retained by CNA to comply with all statutes, ordinances, rules, regulations, and other laws applicable to its performance of Services.
> . . . .
> 4.4 CNA shall provide the Services in compliance with all reasonable health and safety rules of City that City has made known to CNA.
> . . . .
> 4.8 Except with respect to subcontractors retained by CNA, CNA shall not, as a part of the Services or in connection with visits to and observations at a work site, supervise, direct, or control any contractor's work, nor shall CNA have authority over or responsibility . . . for safety precautions and programs incident to the work of such contractors . . . .

A March 1, 2006 amendment to the city/CNA contract further provides,

> After written authorization from City to proceed with the Construction Services Phase, CNA shall:
> . . . .
> . . . visit the site . . . as CNA deems necessary in order to observe, as an experienced and qualified design professional, the progress and quality of the various aspects of Contractor(s)' work. . . .
> a. . . . CNA shall not, during such visits or as a result of such observations of work in progress, supervise, direct, or have control over any Contractor's work, nor shall CNA have authority over or responsibility for the means, methods, techniques, sequences, or procedures of construction selected by any Contractor, for safety precautions and programs incident to the work of any Contractor . . . .

In late 2006, after CNA concluded that there were cracks and holes in the tunnel's concrete liner that needed to be filled with grout, the city put the project out for bid. The

city provided all interested contractors with a document entitled "City of Saint Paul Department of Public Works November 7, 2006 Tunnel Conditions Report for St. Peter-Rondo Storm Tunnel Repairs CITY PROJECT 03-S-1948." Section 3.7 of the report states that the tunnel completely filled with water for about 30 minutes after two recent rain events in August 2006. And section 4.3 of the report notified bidding contractors that "provisions for evacuating the tunnel . . . will have to be made." The report warned that snowmelts and rains "will have to be closely monitored to provide time to evacuate the tunnels" and "the Contractor should anticipate that tunnel evacuation will be required . . . before any rain event."

The city awarded the job to third-party defendant Lametti Inc., a 53-year-old family-run business that holds itself out as a tunnel-repair expert. Lametti had helped build portions of the tunnel, and was recommended by CNA.

The city and Lametti entered into a contract (city/Lametti contract) for the tunnel repair. The city/Lametti contract provides, in relevant part:

> . . . [Lametti] shall provide and maintain all sanitary and safety accommodations for the use and protection of [Lametti employees] . . . as may be necessary to provide for their health and welfare.

Lametti was also contractually obligated to submit a safety plan to CNA that included severe-weather contingency plans. To comply with this contract requirement, Lametti provided CNA with a document titled "Tunnel and Shaft Entry (Confined Space) Saint Peter Rondo Storm Tunnel Repairs," which specifically recognized rainstorms as a

hazard, gave Lametti control of all access to the underground work site,[1] and required Lametti to supply top-side personnel to monitor inclement weather and communications, and arrange for evacuations.[2] If a hazard, such as rain, was observed by any Lametti employee, the plan directed that "all persons shall immediately be withdrawn from the area and the condition reported to the top-person and entry supervisor."

Lametti also provided CNA with a copy of its written Loss Control Program, which describes the project foreman's responsibility for "the safety of the crew, [and] the safe condition of the assigned work area" as well as "[t]he safety of [the] entire work area, including anybody, or anything not connected with crew, entering, working in, or leaving the work area" and to "see that all subcontractors comply with [Lametti's] safety policies."

On this project, James Sullivan, Lametti's foreman for the tunnel-rehabilitation project had the responsibilities assigned in the Loss Control Program, including responsibility for authorizing entry into the storm-sewer shafts and tunnels, overseeing tunnel operations, and ordering evacuation of the tunnel when warranted. When Lametti needed to evacuate its tunnel crew and any guest entrants, the top-side personnel or the site foreman would communicate the evacuation order to the crew underground by (1) shouting directly to anyone at the bottom of the shaft; (2) talking to those in the tunnel

[1] The plan provides that anyone wishing to enter the storm-sewer shafts and tunnels to be repaired, other than Lametti employees, would be considered Lametti's "guest entrants" and that the only guest entrants allowed access to the shafts and tunnels would be the city, CNA, and emergency response personnel.

[2] Under the plan, top-side personnel were individuals "stationed outside the confined space [i.e., the storm-sewer shafts and tunnels] that monitor[] the authorized entrants and perform[] other duties assigned."

via a two-way radio; (3) flashing lights on and off;[3] and/or (4) blowing an air horn. Where and how the tunnel crew would exit the tunnels depended on where the workers were working.

The St. Albans tunnel, where decedent Dave C. Yasis's tragic drowning occurred, is accessed through three shafts. The names of the shafts from northwest to southeast are Wilder, Avon, and Grotto. Only Wilder had a permanent ladder in place. Lametti provided a cage that could hold between two and four men (depending on their sizes) and a crane to lower and lift the cage for ingress/egress at the Avon and Grotto shafts.

II. Tunnel repairs

When the tunnel work began, the city did not have staff at the work site, did not oversee the work of either CNA or Lametti, and did not enter the tunnels except on rare occasions. The city relied on CNA to observe Lametti's work at the project site to ensure that it conformed to the contract and to measure the quantity of grout Lametti used so that the city would know how much to pay Lametti. The city relied on Lametti to carry out the actual work in the tunnel. Lametti was solely responsible for determining when it would work, how it would complete the contract specifications, and how many and which employees it would assign to the job.

Between May and July 2007, Lametti evacuated its tunnel crew between five and seven times due to water runoff or rain. One of these evacuations occurred on July 18, 2007. On that occasion, some of Lametti's tunnel crew, including Yasis, failed to

[3] If the lights flashed twice, it meant that someone needed to communicate with the tunnel crew on a nonemergency basis. If the lights flashed three or more times, it meant that the crew needed to immediately evacuate the tunnel.

evacuate the tunnel immediately after having been given the evacuation signal. Instead they remained in the tunnel for some time to secure tools. By the time the crew reached the Avon shaft, the nearest shaft to exit the tunnel, water was pouring down the shaft, causing the cage to smash against its sides such that the men were unable to use the cage to get out of the tunnel. The men had to walk to the Wilder shaft, where they exited the tunnel using the ladder. The crew made it to the Wilder shaft in approximately two minutes and, by then, the water had risen from ankle-deep to calf-deep. All crew members made it safely to the surface. But Yasis later told his brother that he "almost died" that day and that the ordeal was "pretty scary" because, as he was climbing up the ladder, "water was coming down pretty hard" and "rocks were rolling in."

Given the potential hazards involved with the project, Sullivan held weekly work-site safety meetings with Lametti employees to discuss various safety topics, including the dangers of rainstorms and evacuation procedures. During the meeting that followed the July 18 evacuation, Sullivan told the crew that they did not exit the tunnel quickly enough and reminded them that when they get a warning to evacuate, they must, consistent with Lametti's safety policies, drop everything—including their tools—and immediately head to an exit and get out. Yasis attended this meeting.

III. Drowning

On July 26, 2007, Lametti employees were sealing hairline cracks in the St. Albans tunnel liner. At some point in the afternoon, Sullivan learned that rain was imminent and that he needed to evacuate the crew from the tunnel. The tunnel crew was

informed that it needed to evacuate. Yasis and Nick Stickle ran to the Avon shaft, pushing a cart full of tools instead of dropping everything as they had been instructed.[4]

When Yasis and Stickle arrived at the bottom of the Avon shaft, Ken Clairmont, another crew member, was waiting there and the cage was at the bottom of the shaft, ready to lift the men out of the tunnel. Stickle got into the cage and asked Yasis and Clairmont at least twice whether they were going to get into the cage with him. Stickle testified that both Yasis and Clairmont knew that they should get into the cage and that they needed to evacuate. But both men refused. So, Stickle grabbed two expensive pumps and rode to the surface alone in the cage.

Yasis and Clairmont, along with three other Lametti crew members (David Gelbmann, Demetri Lametti, and John Harlow), remained in the tunnel, securing tools and equipment. By the time these men were ready to exit, too much rain was coming down the Avon shaft for the cage to be used. The five men headed to the Wilder shaft to use the ladder. Clairmont, who was among the last of the crew to begin heading toward Wilder, later recalled being "pounded by water," which was waist-deep, as they walked. And Demetri Lametti recalled that the water rose very quickly as they approached the Wilder shaft.

By the time Demetri Lametti, Gelbmann, and Clairmont arrived at Wilder, the noise from the water and wind was very loud and the only light source was from the workers' headlamps. As these three men ascended the ladder at Wilder, a wave of water and air hit them, washing away their hardhats and leaving them without any light.

[4] Stickle testified at his deposition that he and Yasis should have let go of the cart.

Demetri Lametti was the last of the three men to climb the ladder to safety. As he approached the first platform, he looked back down the ladder but did not see Yasis's or Harlow's hardhat lights. Demetri Lametti waited on the ladder for the two men until the water rose to a dangerous level. The bodies of Yasis and Harlow were found in the Mississippi River the next day.

Following the accident, Lametti conducted a safety-plan review and concluded that the tragedy occurred because the crew failed to immediately evacuate the tunnel when ordered to do so and as required by the safety plan.

IV. Wrongful-death suit

In 2009, appellants, co-trustees for the heirs of Yasis, filed a wrongful-death[5] lawsuit against the city and CNA. The city and CNA moved for summary judgment, asserting lack of duty, assumption of risk, and immunity. The district court granted summary judgment dismissing the wrongful-death action, concluding that, as a matter of law, neither the city nor CNA owed a duty of care to Yasis and, alternatively, that any duty that may have existed was negated by Yasis's assuming the risk of death by his own conduct. The district court did not address immunity defenses, indicating that it would do so if the matter were remanded.

In this appeal, appellants argue that genuine issues of material fact exist regarding respondents' duty to Yasis and the application of assumption of risk, making summary judgment inappropriate. Appellants also argue that the city is not entitled to immunity.

[5] The complaint asserted other claims not relevant to this appeal.

D E C I S I O N

Appellants argue that the district court erred by granting respondents' motions for summary judgment. A district court must grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). No genuine issue of material fact exists if the evidence "merely creat[es] a metaphysical doubt as to a factual issue." *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 886–87 (Minn. 2006). We apply a de novo standard of review to a grant of summary judgment, and we view the evidence in the light most favorable to the nonmoving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008). "We will affirm a district court's grant of summary judgment if it can be sustained on any grounds." *Presbrey v. James*, 781 N.W.2d 13, 16 (Minn. App. 2010).

"A plaintiff who alleges negligence in a wrongful-death action must prove that (1) the defendant had a duty; (2) the defendant breached that duty; (3) there was a death; and (4) the breach of duty caused the death." *Stuedemann v. Nose*, 713 N.W.2d 79, 83 (Minn. App. 2006), *review denied* (Minn. July 19, 2006). If the record lacks proof of any of the elements of the claim, the defendant is entitled to summary judgment. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001).

In this case, the district court granted summary judgment in favor of respondents based on its determination that appellants failed to establish that respondents owed a duty to Lametti's employees. "Existence of a legal duty is generally an issue of law for the court to decide, and we therefore address the issue de novo." *Servicemaster v. GAB Business Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996).

I. Respondents did not retain sufficient control over the work of Lametti's employees to create a duty to Yasis.

For more than one hundred years, the Minnesota Supreme Court has been reluctant to hold that an entity that hires an independent contractor is liable for injuries to that contractor's employees. *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1957). But the supreme court has found liability when the hiring entity retains detailed control over a project and then fails to exercise reasonably careful supervision over the project. *Id*. "Not just any amount of control by the hiring company is sufficient to impose direct liability. For liability to attach, the [hiring entity] must retain control over the operative detail of the work." *Id*. (quotation omitted).

> It is not enough that [the hiring entity] 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 and 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.

Id. at 5–6. Appellants argue that they have produced evidence creating a question of fact about whether respondents, as a result of contractual and statutory obligations, or through

their conduct, retained sufficient control over Lametti's work to make them liable for Yasis's death.

A. No material fact questions exist regarding contractual duty.

Appellants rely on a provision in the city/CNA contract that required CNA and its employees to "comply with" and to "require *all subcontractors retained by CNA* to . . . provide Services in compliance with all reasonable health and safety rules of the City." (Emphasis added.) But Lametti was not an employee or subcontractor of CNA. Lametti had a separate contract with the city. And the district court correctly noted that the city/CNA contract specifically excluded from the definition of "Services" to be provided by CNA any responsibility for safety at the work site for non-CNA employees.

Nothing in the city/CNA contract required CNA to be responsible for the safety of Lametti employees. To the contrary, the contract specifically deprived CNA of any supervision or control over the work of any subcontractor not retained by CNA. Under the city/CNA contract, CNA had the power to *recommend* that the city stop work or stop payments to Lametti if Lametti was not meeting engineering standards or complying with contract specifications between the city and Lametti. But the supreme court in *Sutherland* specifically stated that this level of control is insufficient to impose liability under the retained-control exception: "[t]here must be such a retention of a right of supervision that [the subcontractor was] not entirely free to do the work in [its] own way." 570 N.W.2d at 5–6.

As the district court concluded, Lametti's contract with the city made Lametti exclusively responsible for worker safety on the site. Under the city/Lametti contract,

Lametti agreed to "provide and maintain all . . . safety accommodations for the use and protection of [Lametti employees] . . . as may be necessary to provide for their health and welfare."

Appellants argue that Yasis was a third-party beneficiary of the city/CNA contract provision requiring CNA to "visit the site . . . in order to observe, as an experienced and qualified design professional, the progress and quality of the various aspects of [Lametti's] work." This argument is based on appellants' erroneous characterization of Yasis as an employee of a CNA subcontractor, and on the erroneous assertion that "the contract between the city and CNA can be read as an undertaking by CNA of the obligation to assure work site safety and the compliance by Lametti and its workers with safety rules." Because the record does not support either premise, appellants' third-party-beneficiary argument and assertion of CNA's contractual duty to Yasis are without merit.

Similarly, the record does not support appellants' assertion that Yasis is a beneficiary of the city/CNA contract under the intent-to-benefit test. *See Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984) (holding that, even if a party fails to meet the "duty-owed" test, the party may still recover by showing that the contracting parties intended to confer a benefit on him or her). The intent-to-benefit test is satisfied if "the circumstances indicate that the promisee (here, CNA) intends to give the beneficiary the benefit of the promised performance." *Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 427 N.W.2d 281, 285 (Minn. App. 1988). The requisite intent must be found in the contract as read in light of all the surrounding circumstances. *Buchman*

Plumbing Co. v. Regents of the Univ. of Minn., 298 Minn. 328, 334, 215 N.W.2d 479, 483 (1974).

Here, the city/CNA contract does not express any intent of either party to benefit Lametti or its employees. Rather, the contract specifically provides, in relevant part:

> [N]othing in or under this Agreement shall be construed to give any rights or benefits of this Agreement to anyone other than City or CNA, and all duties and responsibilities undertaken pursuant to this Agreement shall be for the sole and exclusive benefit of City and CNA and not for the benefit of any other party.

The district court correctly concluded that CNA did not owe any contractual duty to Lametti's employees. And because CNA is not contractually liable for injuries to Lametti's employees, there is no merit in appellants' argument that the city is vicariously liable for any injury to Lametti's employees.

B. No material fact questions exist regarding statutory or regulatory duty.

Appellants' arguments that the Minnesota Occupational Safety and Health Act (MOSHA), Minn. Stat. § 182.65–.676 (2010), creates a duty of respondents to Lametti's employees are also without merit. MOSHA only imposes obligations on employers (including independent contractors) with respect to their *own employees*. Minn. Stat. § 182.653, subd. 2.[6]

[6] Appellants mistakenly rely on *Zorgdrager v. State Wide Sales Inc.*, 489 N.W.2d 281 (Minn. App. 1992), to support their argument. In *Zorgdrager*, this court affirmed the district court's jury instruction, finding that a MOSHA violation by the *plaintiff's employer* constituted negligence per se. As the district court properly concluded, *Zorgdrager* does not stand for the proposition that MOSHA imposes a binding duty on a non-employer third party.

Appellants appear to argue that the affidavit testimony of Ivan Russel, one of appellants' experts, at least establishes an issue of material fact as to whether respondents owed Yasis a duty of care under MOSHA. But "[a]n affidavit from an expert cannot create a duty where none exists." *Safeco Ins. Co. of Amer. v. Dain Bosworth, Inc.*, 531 N.W.2d 867, 873 (Minn. App. 1995) (noting that legal opinions are ordinarily inadmissible), *review denied* (Minn. July 20, 1995).[7]

C. No material fact questions exist regarding creation of duty by conduct.

Appellants point to an incident that occurred prior to contract bidding, in which a city employee criticized an action of CNA during a tunnel tour as unsafe. Appellants do not explain how the city's concern about CNA's safety failures during an incident that occurred before Lametti was involved with the tunnel-rehabilitation project is relevant to appellants' assertion that the city, through its conduct, retained control over Lametti's work. And appellants fail to explain how CNA's engineering expertise or its right—but not obligation—to comment on unsafe behavior at the work site demonstrates that CNA or the city retained such "a right of supervision" that Lametti was "not entirely free to do the work in [its] own way." *See Sutherland*, 570 N.W.2d 5–6 (holding that

[7] Russell's only conclusion that mentions MOHSA is that CNA representative Krumm violated a MOSHA regulation by failing to have a "top person" during the pre-bid tunnel inspection. Russell's affidavit describes an employer who exposes employees to unsafe conditions as an "exposing" employer, an employer who creates an unsafe condition as a "creating" employer, and an employer who has the authority and capability to make corrections as a "controlling" employer. But Russell's affidavit does not relate any of these terms to the facts of this case. And the affidavit of appellants' other expert, Charles R. Dutill, II, P.E., asserts that CNA deviated from the applicable standard of care for consulting engineers but does not address the issue of whether a duty existed in the first instance.

manufacturing plant was not liable for injuries sustained by an independent contractor's employee where the plant hired the independent contractor but did not retain "detailed control" over the work project or over the task that the employee was performing when injured).

Lametti has never disputed that it exclusively controlled access to the underground work site, was responsible for top-side personnel to monitor inclement weather and communications, and was responsible for evacuations of its employees when warranted. There is no evidence in the record of any conduct by the city or CNA evincing the type of retained control necessary to impose liability for injury to Lametti's employees. The district court did not err by concluding that the evidence in the record demonstrates that Lametti had exclusive responsibility for safety at the tunnel work site.

II. No material fact question exists regarding voluntary assumption of duty.

Appellants, citing *Nickelson v. Mall of America Co.*, 593 N.W.2d 723, 725–26 (Minn. App. 1999), argue that even if respondents did not owe a duty under the retained-control exception, they voluntarily assumed a duty to protect Lametti's employees, including Yasis. We disagree.

In *Nickelson*, a Mall of America store employee who was injured by a shoplifter, sued the Mall of America, claiming that the mall's security personnel failed to intervene to protect her as the mall had promised. *Id*. at 725. This court held that "[b]ecause Mall of America voluntarily hired a security force, because those officers were directed to intervene in physical altercations and because Nickelson relied on the representation that such assistance would be forthcoming from security personnel," the mall, which

otherwise would not have owed a duty to Nickelson, "voluntarily assumed a duty . . . to intervene in the altercation to protect Nickelson." *Id*. at 726.

Here, by contrast, there is no evidence that the city or CNA by conduct or promise voluntarily assumed a duty to protect the safety of Lametti's employees. And, contrary to appellants' assertion, the record does not support that Lametti relied on respondents to protect Lametti's employees. It is undisputed that the city was rarely present at the work site. Although CNA was frequently on site and CNA personnel kept an informal watch on the weather, Sullivan testified that Lametti did not rely on CNA for weather information or work site safety. And there is no evidence to the contrary. Therefore, appellants failed to present evidence that raised a material fact question about voluntary assumption of a duty.

Because the district court did not err by granting summary judgment to respondents, dismissing appellants' wrongful-death claim against respondents on the basis that appellants failed to create a fact question on the issue of duty, we need not address the district court's alternative ground for dismissal, assumption of risk.[8] And, because the district court has not ruled on the city's immunity defenses, we decline to address appellants' immunity challenges. *See Sefkow v. Sefkow*, 427 N.W. 2d 203, 210

[8] Appellants have asserted that the city and CNA withheld from Lametti important safety information about the speed with which the tunnel could fill with water. This assertion was made in relation to assumption of risk, and therefore is not addressed in this opinion except to note that the assertion is not supported by any evidence in the record.

(Minn. 1988) (stating that this court's function is limited to identifying errors and correcting them).

Affirmed.