

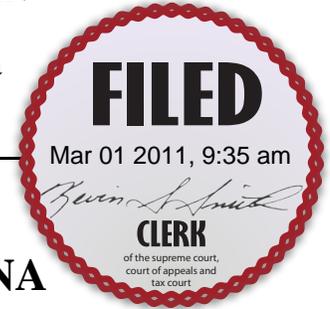
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**IN THE  
COURT OF APPEALS OF INDIANA**

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DENISE TINSLEY, Special Administrator of )  
The Estate of MARVIN TINSLEY, Deceased, )  
 )  
Appellant-Plaintiff, )

vs. )

No. 27A05-1008-CT-503

MARION T., LLC, LESTER LEE and )  
RAYMOND PARKER<sup>1</sup> )  
 )  
Appellees-Defendants. )

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APPEAL FROM THE GRANT CIRCUIT COURT  
The Honorable Mark E. Spitzer, Judge  
Cause No. 27C01-0710-CT-892

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**March 1, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**RILEY, Judge**

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<sup>1</sup> Raymond Parker is not a party to this appeal. However, pursuant to Indiana Appellate Rule 17 (A), a party of record in the trial court is a party on appeal.

## STATEMENT OF THE CASE

Appellant-Plaintiff, Denise Tinsley, Special Administrator for the Estate of Marvin Tinsley (Estate), appeals the trial court's grant of summary judgment in favor of Appellees-Defendants, Marion T, LLC, (Marion T), Lester Lee (Lee),<sup>2</sup> and Raymond Parker (Parker), with respect to the Estate's claim for negligence resulting in Marvin Tinsley's (Marvin) death.

We affirm.

## ISSUES

The Estate raises three issues for our review, which we restate as the following:

- (1) Whether the trial court erred when it held that Marion T did not have a duty to protect Marvin;
- (2) Whether the trial court erred when it held that Marion T did not act as a general contractor; and
- (3) Whether the trial court erred when it struck portions of Michael Hayslip's (Hayslip) affidavit.

## FACTS AND PROCEDURAL HISTORY

In March 2005, Marion T purchased the former RCA/Thomson television plant in Marion, Indiana. Marion T is an Indiana company owned by a group of individuals, including Lee, who currently acts as Marion T's property manager. In the fall of 2005,

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<sup>2</sup> The trial court granted summary judgment in favor of Lee on June 30, 2010. That summary judgment ruling is not being appealed by the Estate.

Marion T contracted with MKT, Inc. (MKT), whose principal owner was Marvin, to perform salvage operations at the plant. These operations included removal of any nonstructural items of value within the plant. During the salvage operation, MKT maintained an independent office on the worksite. The salvage operation was not supervised by Marion T. In fact, Marion T only maintained one employee at the plant—Matt Queen (Queen), who was the property manager at the time of the accident. Queen’s primary purpose was to provide access to authorized people and to exclude unauthorized people at the plant.

On October 3, 2005, Parker received a call from Queen asking him to come to the MKT office inside the plant to discuss a possible employment opportunity. Marvin had asked Queen for a recommendation for someone who was knowledgeable about the plant for assistance with the salvage and the possibility to hire. Queen suggested Parker, who had been a former employee at the RCA/Thomson plant and knew the configuration of the plant very well but had been laid off and was currently unemployed. As a result of Queen’s call on October 3, Marvin requested that Parker assist MKT in checking the building for power, as they were going to be removing electrical panels from the plant. Additionally, Parker was asked to map out the electrical panels and the circuit breakers. During this time, according to Parker, he was interviewing with MKT and attempting to negotiate an employment contract, although no contract was ever negotiated and Parker was never paid for his services.

The next day, Parker arrived at the MKT office to assist Marvin and Shawn Price (Price), an MKT employee. Parker and Price spent about thirty minutes checking three different sets of electrical panels to determine if the cables to them were energized. After all

of the cables were checked and both men determined that power was off in all of the cables, Marvin and another MKT employee arrived to cut the wires.

Before Marvin and the MKT employee began cutting the cables, they asked Parker and Price if it was “safe enough [to] cut the cables.” (Appellant’s App. p. 96). Parker and Price responded that the cables were safe to cut because they had checked them three times. At one point, Parker offered to get Marvin insulated cable cutters, which “would have been a lot better for them and a lot safer, just in case something happened.” (Appellant’s App. p. 96). However, Marvin declined the request. Then, Marvin and the MKT employee began cutting through cables with a salvage saw and cut through sixteen cables without incident. As they got to the second electrical panel, Marvin began to cut through one of the cables that was energized and caused a blast. Marvin was electrocuted.

On October 13, 2007, the Estate filed a personal injury complaint and request for jury trial. On November 30, 2007, Marion T and Lee filed their answer, affirmative defenses, and jury demand. On October 5, 2009, Marion T and Lee filed their motion for summary judgment. On March 19, 2010, the Estate filed its brief in opposition to Marion T and Lee’s motion. On April 26, 2010, Marion T and Lee filed their reply in support of their motion for summary judgment. A hearing was held on the evidence on April 30, 2010. On June 20, 2010, the trial court granted Marion T and Lee’s motion for summary judgment. On July 26, 2010, the trial court certified the Estate’s petition for interlocutory appeal, which this court granted on October 1, 2010.

Tinsley now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

### I. *Standard of Review*

Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). In reviewing a trial court's ruling on summary judgment, this court stands in the shoes of the trial court, applying the same standards in deciding whether to affirm or reverse summary judgment. *Rider v. McCammet*, 938 N.E.2d, 262, 266 (Ind. Ct. App. 2010). On appeal, we must determine whether there is a genuine issue of material fact and whether the trial court has correctly applied the law. *Id.* In doing so, we consider all of the designated evidence in the light most favorable to the non-moving party. *Id.* The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's ruling was improper. *Id.* When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff's cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff's claim. *Id.* Accordingly, the grant of summary judgment must be reversed if the record discloses an incorrect application of the law to the facts. *Id.*

Here, the Estate filed a claim of negligence against Marion T. In a negligence action, the plaintiff must prove three elements: (1) a duty owed to the plaintiff, (2) a breach of that duty by the defendant, and (3) the breach proximately caused the plaintiff's damages. *Id.* A negligence action is generally not appropriate for disposal by summary judgment. *Pelak v. Indiana Indus. Servs., Inc.*, 831 N.E.2d 765, 769 (Ind. Ct. App. 2005). However, a defendant

may obtain summary judgment in a negligence action when the undisputed facts negate at least one element of the plaintiff's claim. *Id.*

Negligence “cannot be inferred from the mere fact of an accident.” *Id.* (quoting *Hale v. Comty. Hosp. of Indianapolis, Inc.*, 567 N.E.2d 842, 843 (Ind. Ct. App. 1991)). Rather, all the elements of negligence must be supported by the specific facts designated to the trial court or reasonable inferences that might be drawn from those facts. *Id.* An inference is not reasonable when it rests on no more than speculation or conjecture. *Id.*

## II. *Duty*

The Estate argues that the trial court erred when it granted summary judgment in favor of Marion T; specifically, the Estate contends that because Marion T was in control of the salvage operations, it owed a duty to MKT to provide a safe work environment. The duty a property owner owes to an employee of an independent contractor is well-settled. Generally, an owner of a property is under no duty to provide an independent contractor with a safe place to work. *Pelak*, 831 N.E.2d at 770. However, an owner has a duty to maintain the property in a reasonably safe condition for business invitees, including employees of independent contractors. *Id.*

Here, Marion T argued, and the trial court agreed, that it did not have control over the area where MKT performed the salvage operations. Whether a duty is owed depends primarily on whether the defendant was in control of the premises when the accident occurred. *Rhodes v. Wright*, 805 N.E.2d 382, 385 (Ind. 2004). “The rationale is to subject to

liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm.” *Id.*

Furthermore, when an injury is caused by an instrumentality, a duty will not be found when there is no evidence that the landowner maintained any control over the “manner or means” by which the contractor engaged in its work. *Bethlehem Steel Corp. v. Lohman*, 661 N.E.2d 554, 557 (Ind. Ct. App. 1995). Where an instrumentality causing injury is in the control of an independent contractor, the contractor’s employee seeking to hold the property owner liable for the injury must show either the owner assumed control of the instrumentality or had superior knowledge of potential dangers involved in its operation; otherwise, the landowner owes no duty to such employee. *Id.* at 556.

The Estate claims that the present case is similar to *Beta Steel v. Rust*, 830 N.E.2d 62, 66 (Ind. Ct. App. 2005), where the issue before this court was whether Beta, the property owner, owed a duty of care to an employee of an independent contractor that Beta hired to perform work at its facility. *Id.* Beta was advised by its electrical engineer/consultant that an electrical control cabinet lacked ground fault protection as required by electrical safety regulations, and without it, human life was at risk. *Id.* Beta told its consultant that it would install a ground fault protection system later, but never did. *Id.* at 67. Approximately nine years later, Beta hired an independent contractor to complete a project where the control cabinet was located. *Id.* The employee stepped on the control cabinet, which buckled and came into contact with energized components and caused the employee’s death. *Id.* We found that a factual question existed as to whether Beta controlled the property based on

evidence that Beta had been fully responsible for the installation of the electrical control cabinet, the installation of the cabinet had been faulty, the nature of the job required persons to work in close proximity to the cabinet, Beta clearly had superior knowledge regarding the cabinet, and Beta was in a better position than the subcontractor to prevent the harm. *Id.* at 71.

Marion T points to *Pelak*, where an independent contractor's employee, Pelak, sued the property owner for injuries after falling through a two-to-three foot gap while walking on a catwalk. *Pelak*, 831 N.E.2d at 765. The property owner filed a motion for summary judgment, claiming that it did not owe a duty to provide a safe work environment for Pelak because it did not control the manner and means by which the dangerous condition was installed. *Id.* at 768. The trial court granted the defendant's motion. *Id.* We discussed the Restatement (Second) of Torts § 414, which states:

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 the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

*Id.* at 770. Based on this, we stated that “[t]here is no persuasive public policy argument for imposing on a landowner a duty to guard a contractor's employees from an instrumentality exclusively controlled by the contractor.” *Id.* The rationale is that “a contractor has the superior experience, equipment, knowledge, staff and incentive to protect its employees.” *Id.*

We find this case to be more like *Pelak* and unlike *Beta*, because here, it is clear from the designated evidence that Marion T did not have control over the means and method of

MKT's work. First, MKT set up a separate office within the plant and brought in its own employees to conduct the salvage work. It was Marvin, and not Marion T, who requested that Parker check the building due to Parker's previous employment at the plant and his familiarity with the building. In fact, Parker was under the belief that MKT would eventually hire him because of his knowledge of the plant. Marvin also engaged Price and an additional MKT employee to determine whether the electricity was turned off before cutting through the cables.

Second, there was only one employee of Marion T on the premises— Queen, who was the property manager and “gatekeeper” of the plant, but who had no responsibilities related to the salvage operation. (Appellant's App. p. 123). In fact, Queen was not qualified to advise anyone whether power was or was not on in certain parts of the building. There is no evidence that Queen directed MKT how to do their work, or even identified an area of the plant in which MKT was to be working. Furthermore, it was Marvin who had the option of utilizing the insulated cable cutters to confirm whether it was safe to cut through the cables and decided not to use them. Marvin's decision not to use the insulated cable cutters and rely on his own equipment demonstrates that he had control over the manner in which MKT conducted the salvage. Based on this, it is clear that Marion T did not have control over the salvage.

Furthermore, this case is also unlike *Beta* where Beta knew that the lack of the ground fault protection system could cause harm. The Estate has not provided any designated evidence to show that Marion T knew or should have known of an alleged defect which led

to the accident. Instead, it is more palpable that Marvin, as the contractor, was in a better position to know of the dangers associated with salvaging, especially since Marion T hired MKT “based upon the understanding that MKT was experienced and knowledgeable in performing salvage operations.” (Appellant’s App. p. 68). In fact, Marion T would certainly be entitled to expect that Marvin would be aware of the general hazards of electrocution associated with cutting electrical cables and protect himself and his employees against such danger. It is also clear that Marvin had knowledge of the danger of the job which was demonstrated by the fact that he and Price tested the cables before cutting them.

The Estate also ostensibly suggests that Marion T had a duty to inspect the plant prior to hiring MKT, especially since “Marion T purchased the [] plant without any warranties from the seller and had the opportunity to have inspections done prior to closing.” (Appellant’s Br. p. 8). The Estate relies on the Restatement (Second) of Torts § 343, which states that “[a]n invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.” Restatement (Second) of Torts § 343 cmt. d. We find this argument to be unpersuasive, as the Estate failed to designate any facts or arguments as to how an inspection may have prevented the accident. Marvin and other MKT employees knew that electrical lines existed at the plant and even performed their own inspections for safety risks. Marvin was clearly aware of the dangers. Consequently, the Estate’s argument lacks significance, as

the undisputed evidence shows that Marvin and MKT were evidently aware of the risk of striking energized, electrical lines.

### III. *Marion T as Contractor.*

Next, the Estate argues that Marion T's relationship with MKT "had qualities that would give rise to a general contractor-subcontractor relationship." (Appellant's Br. p. 11).

A general contractor is defined as someone who:

[c]ontracts to perform specified construction work in accordance with architect's plans, blueprints, codes, and other specifications: Estimates costs of materials, labor, and use of equipment required to fulfill provisions of contract and prepares bids. Confers with clients to negotiate terms of contract. Subcontracts specialized craft work, such as electrical, structural steel, concrete, and plumbing. Purchases material for construction. Supervises workers directly or through subordinate supervisors.

*Callander v. Sheridan*, 546 N.E.2d 850, 852 (Ind. Ct. App. 1989). It is clear that Marion T was not a general contractor as the Estate has not provided designated evidence to show that Marion T performed any of these tasks. As owner of the plant, Marion T hired MKT to come in and perform salvage operations and did not undertake any other supervisory tasks.<sup>3</sup>

### III. *Hayslip's Affidavit*

Finally, the Estate argues that the trial court erred when it struck portions of Hayslip's affidavit; specifically, entire paragraphs "instead of striking the allegedly improper legal conclusions only." (Appellant's Br. p. 13). The decision to admit or exclude proffered

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<sup>3</sup> Because we determine that Marion T did not act as a general contractor, we need not determine whether the salvage work was considered "intrinsically dangerous" as an exception to the notion that a principal is generally not liable for the negligence of an independent contractor. *Carie v. PSI Energy, Inc.*, 715 N.E.2d 853, 855 (Ind. 1999).

expert testimony is in the discretion of the trial court. *Merrill v. Knauf Fiber Glass GmbH*, 771 N.E.2d 1258, 1263 (Ind. Ct. App. 2002). This court will reverse a decision to exclude evidence only if that decision is clearly against the logic and effect of the facts and circumstances before the trial court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.*

Hayslip, who was retained as an expert witness on behalf of the Estate, is described as “a certified safety professional, licensed attorney and licensed professional civil engineer.” (Appellant’s App. p. 128). At issue here are the following paragraphs taken from his affidavit which the trial court struck:

3. Based on my training, knowledge experience, skill and education as a certified safety professional, professional civil engineer, project manager, and corporate safety and risk director, it is my opinion that the Defendants (Marion T and Mr. Lester Lee) individually and collectively created or allowed to exist a condition in the workplace where Marvin Tinsley was killed and where death or serious bodily harm was substantially certain to occur.

4. My opinion is centered and based on three simple facts:

First, each of the two identified Defendants failed in their duty to provide and/or coordinate site specific hazard information on the control of electrical energy with the Plaintiff. This information was or should have been readily available to each of the defendants within the grounds of the complex including but not limited to the location in and around building 22.

Secondly, both identified Defendants failed in their respective duties to make or provide a safe work environment that the Plaintiff reasonably might rely upon.

Thirdly, both identified Defendants failed in their individual duties to warn Marvin Tinsley of the associated work hazards and available controls within his work environment.

Finally, but for the breach of any of these three duties by each of the two identified Defendants (either separately and/or collectively) a hazardous and dangerous condition was created or permitted to exist in the workplace that directly resulted in the death of Marvin Tinsley where in my opinion his death or serious bodily harm was substantially certain to occur. Next I shall discuss each of these three duties; namely, to coordinate information, to make safe and to warn.

5. The coordination of site specific information is an important and fundamental element in avoiding electrical hazards: For instance NFPA 70E, Edition 2004 [] requires that “Outside Personnel” (Mr. Tinsley) shall be informed of existing hazards. NFPA 70 E also mandates that a documented coordination meeting between on-site employers (Marion T) be held with contractors like Mr. Tinsley.

So when Marion T and Mr. Lee failed to conduct and document a coordination meeting with Mr. Tinsley to share critical information under their control they were negligent. This information included but was not limited to an updated single line diagram, an electrical safety program, a coordination survey, [A]rc [F]lash [H]azard [A]ssessment and an emergency survey [].

As an aside: at a facility this size with almost 1 million square feet under roof an Arc Flash Hazard Assessment may take literally thousands of hours to develop and prepare in addition to the mandated cost of training for co-workers.

6. Both Defendants (Marion T and Mr. Lester Lee) had a duty to make the work environment safe for Mr. Tinsley.

Marion T and Mr. Lee failed to make the work site reasonably safe for Mr. Tinsley by negligently maintaining and negligently controlling [] the facility that contained this dangerous instrument.

(Appellant’s App. pp. 128-29) (emphasis in original). In order to be used in a summary judgment proceeding, an affidavit must set forth such facts as would be admissible in evidence. Ind. Trial Rule 56(E), *Merrill*, 771 N.E.2d at 1263. The trial court struck these statements because it found that they advanced legal conclusions and are inadmissible under

Indiana Evidence Rule 704(b), which states that “Witnesses may not testify to...legal conclusions.”

Whether the defendant owed the plaintiff a duty is a pure question of law for the court to decide. *Pope v. Hancock Cty Rural Elec. Membership Corp.*, 937 N.E.2d 1242, 1246 (Ind. Ct. App. 2010). As such, we have held that an expert witness was not permitted to testify that the defendant was responsible for a defective condition and owed the plaintiffs a duty. *Merrill*, 771 N.E.2d at 1263.

It is clear that in each paragraph, Hayslip asserts that Marion T was negligent by showing that it (1) owed Marvin a duty, (2) breached that duty, and (3) was the proximate cause of the damages. By the Estate’s own admission, Hayslip’s statements were legal conclusions regarding negligence and proximate cause, and, thus, properly stricken. Any decision by the trial court to strike the entire paragraph as opposed to specific sentences was well within its discretion.

#### CONCLUSION

Based on the foregoing, we conclude that the trial court did not err when it granted summary judgment in favor of Marion T and struck portions of Hayslip’s affidavit.

Affirmed.

ROBB, C.J., and BROWN, J., concur.