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ATTORNEY FOR APPELLANT:
RITA BEATTY:

SCOTT P. SULLIVAN
Noel Sullivan
Kokomo, Indiana

ATTORNEY FOR NOTIFICATION
PARTY, RODGER BEATTY:

DANIEL HARRIGAN
Bayliff, Harrigan, Cord and Maugans, P.C.
Kokomo, Indiana

ATTORNEYS FOR APPELLEES:

SCOTT L. STARR
JON M. MYERS
MATTHEW D. BARRETT
Starr Austin Myers & Miller LLP
Logansport, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RITA BEATTY, custodial parent of)
NORA K. BEATTY,)
)
Appellant-Plaintiff,)

vs.)

JAMES THAD MARTIN, Individually, and)
d/b/a JTM EXPRESS and G.R. WOOD, INC.,)
a/k/a AMERICAN TIMBEX, INC., and)
WESLEY LA FOUNTAINE d/b/a)
LA FOUNTAINE LOGGING a/k/a)
LA FOUNTAIN TRUCKING,)
)
Appellees-Defendants,)

RODGER BEATTY,)
)
Notification Party, and)

No. 34A05-0608-CV-454

independent contractor lacks sufficient financial resources to perform the contract “in a way that would not be detrimental to other persons lawfully upon the highway.” Appellants’ App. p. 30. Concluding that summary judgment was properly entered for Wood, we affirm the judgment of the trial court.

FACTS

The facts, as reported in our unpublished memorandum decision of Walker v. Martin, No. 34A05-0608-CV-424 (Ind. Ct. App. Feb. 27, 2007), are as follows:

Wood is a veneer wood company in Mooresville that sells its products to furniture manufacturers and other businesses. Wood purchases its logs from sawmills, loggers, and landowners, and saws the logs into veneer wood. Nearly 2600 loads of logs are delivered to the facility each year. Since approximately 1983, Wood has owned no log trucks, and instead has contracted with either the sellers or truck owners to have the wood delivered to its mill.

Timothy LaFontaine is a logger in the business of purchasing, cutting, and reselling timber logs. He did not own a truck for the purpose of transporting the logs, and he would occasionally sell timber to Wood. On September 16, 2003, Wood entered into an agreement with LaFontaine, wherein Wood agreed to purchase forty-eight walnut logs and eight oak logs from LaFontaine. These fifty-six logs grew on land that was owned by a third party and felled by LaFontaine near Silver Lake.

Martin was the primary log hauler for LaFontaine in 2003, and he was retained to haul fifty-six logs from Silver Lake to Wood’s veneer mill. However, the parties dispute who actually hired Martin to haul the logs from Silver Lake. Specifically, Wood maintained that it was LaFontaine’s responsibility to contract for the log hauling, while LaFontaine alleged that it was Wood’s responsibility to do so. Although Martin did not know who was responsible for paying him for hauling these logs, he had hauled so many loads for LaFontaine in 2003 that he had painted the company’s logo on his truck.

Martin drove his truck under the business name of JTM Express and acted as his “own boss.” Appellants’ App. p. 45. Although Martin obtained a commercial driver’s license in 1987, he suffered a severe head injury in 1991. As a result, Martin had to learn to speak and walk again, but he was subsequently able to resume his truck-driving career. At some point, Martin

procured a “farm-log” exemption license plate in Michigan for his truck.² As a result, Martin’s plates did not require that he purchase the \$750,000 minimum interstate trucking insurance that the federal government requires.

In addition to hauling for LaFontaine, Martin would occasionally drive loads for other companies. Martin set his own rate, and he alone was responsible for determining the route that he was to drive. Martin also paid for his own fuel, and he owned the tools that he kept in the truck. Martin also charged by the load rather than by the hour, and he paid for his own insurance and mechanical maintenance. Sometimes Martin would charge \$.01 per board foot of timber that was hauled, and other times he would charge a typical load fee of \$2.00 per mile. When delivering the logs to Wood’s mill, either Wood or LaFontaine would pay him.

On December 9, 2003, twenty-four-year-old Christopher was killed on U.S. 31 in Howard County when the vehicle he was riding in collided with a truck owned and operated by Martin while en route with a load of logs that he was delivering to Wood. Martin apparently ran a stoplight at an intersection and collided with the vehicle that [Nora] Kathy Beatty was driving. Beatty also died in the collision.

When the accident occurred, Martin was operating his 1988 Freightliner tractor-trailer that bore LaFontaine’s logging logo. Martin had loaded the trailer that morning with the logs from Silver Lake in order to haul them to Wood’s mill. Although LaFontaine was present when Martin was loading the logs onto the trailer, no one directed Martin regarding the arrangement of the load.

As a result of the accident, the Moores commenced a wrongful death suit against Martin, La Fontaine, and Wood on September 9, 2004.³ Thereafter, on December 12, 2005, Wood moved for summary judgment, claiming that it was neither an employer nor a joint venturer with Martin. Wood further contended that Martin was an independent contractor and that Wood could not be held liable for Martin’s acts.

Following a hearing on the motion, the trial court granted Wood’s motion on July 10, 2006, determining that Martin was an independent contractor and not an employee, agent, or servant of Wood at the time of the collision.⁴ The Moores now appeal.

² 49 CFR section 390.5 provides that a driver is eligible for a farm-log exemption by virtue of being an owner or employee of a log farm and transporting logs within 150 miles of that farm. Martin was not a log farm owner or operator, and he regularly operated more than 150 miles from his home. [footnote in original].

³ The Moores filed an amended complaint for damages on June 16, 2005.

⁴ While the trial court granted summary judgment with respect to Wood, it was made clear that “[p]roceedings on the Plaintiffs’ action against the remaining Defendants James Thad Martin individually and d/b/a JTM

Slip op. at 2-5.

On appeal, we affirmed the trial court’s grant of summary judgment for Wood. Specifically, we determined that “the dominant factor of control establishe[d] Martin’s status as an independent contractor while he was working for Wood.” Id. at 12. Moreover, we observed that the Moores had failed to establish any of the exceptions to the general rule of non-liability of a general contractor for the torts of independent contractors. Finally, we determined that Wood was not liable as a matter of law under a joint venture theory. Id. at 17-18.

In this case, Beatty filed a complaint for wrongful death against Wood and others on September 9, 2004, alleging that Martin was negligent for running the red light and causing the collision that resulted in Nora’s death.⁵ Beatty alleged—among other things—that, at the time of the accident, Martin was acting as Wood’s agent and that Wood was vicariously liable for Martin’s negligence under the doctrine of respondeat superior. Beatty also contended that even if Martin was not an employee or agent of Wood, Wood was liable for Martin’s negligence under an exception to the general rule that a principal is not liable for the negligence of an independent contractor.

Thereafter, Wood filed a motion for summary judgment, claiming that

Express and Timothy LaFontaine individually and d/b/a La Fontaine Logging shall continue in accordance with further orders.” Appellants’ App. p. 25.

⁵ Rita filed an amended complaint for wrongful death on August 26, 2005, for the purpose of naming Tim LaFontaine d/b/a LaFontaine Logging, and Rodger Beatty as parties to the action. Rodger was added as a party defendant “for purposes of answering as to any interest that he may have” in the action. Appellants’ App. p. 53.

[It] did not have any employment or other agency relationship with Defendant, James Thad Martin; that there was not a joint venture between Wood, Martin and Tim LaFontaine d/b/a La Fontaine Logging; that Wood is not vicariously liable for Martin's alleged negligence since the exceptions to the general rule of contractee non-liability for the negligent acts of independent contractors do not apply; and Wood cannot be held liable for allegedly hiring James Thad Martin as an independent contractor since Indiana law does not recognize such a claim.

Appellants' App. p. 54-55. Beatty filed a brief in opposition to the motion for summary judgment and submitted her designation of evidence. On March 10, 2006, Wood filed a motion to strike certain portions of Beatty's response brief in opposition to the motion for summary judgment that pertained to a state police officer's affidavit regarding Martin's prior traffic record. Specifically, Wood argued that the averments set forth in the affidavit constituted inadmissible evidence and drew "impermissible legal conclusions." *Id.* at 828.

Following a hearing on the pending motions, the trial court granted Wood's motion to strike portions of the police officer's affidavit regarding Martin's driving record. The trial court also granted Wood's motion for summary judgment, concluding that Martin was an independent contractor and not an employee, agent, or servant of Wood at the time of the accident. The trial court specifically agreed with the analysis set forth in Walker, which discussed the theories of agency and independent contractors. The Beattys now appeal. ⁶

DISCUSSION AND DECISION

I. Standard of Review

When reviewing a trial court's grant of summary judgment, we apply the same

standard as that of the trial court. Summary judgment is appropriate if the pleadings and evidence submitted demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. We construe the pleadings, affidavits, and designated evidence in the light most favorable to the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of material fact. Wilson v. Royal Motor Sales, Inc., 812 N.E.2d 133, 135 (Ind. Ct. App. 2004). Because a trial court's grant of summary judgment comes to us clothed with a presumption of validity, the appellant must persuade us that error occurred. Id. Nevertheless, we carefully scrutinize motions for summary judgment to ensure that the non-moving party was not improperly denied his or her day in court. Id. If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Irwin Mortgage Corp. v. Marion County Treasurer, 816 N.E.2d 439, 442 (Ind. Ct. App. 2004). Finally, we note that mere speculation cannot create questions of fact. Briggs v. Finley, 631 N.E.2d 959, 964-65 (Ind. Ct. App. 1994). Moreover, opinions expressing a mere possibility with regard to a hypothetical situation are insufficient to establish a genuine issue of material fact. Id. Put another way, "guesses, supposition and conjecture are not sufficient to create a genuine issue of material fact to defeat summary judgment." Midwestern Indem. Co. v. Sys. Builders, Inc., 801 N.E.2d 661, 666 (Ind. Ct. App. 2004).

⁶ Rodger has also filed an appellate brief in the matter.

II. The Beattys' Claims

A. Independent Contractor

When considering the Beattys' attacks on the summary judgment ruling, we note that Martin's employment status is the focal point of our analysis in light of Indiana's "long-standing general rule . . . that a principal is not liable for the negligence of an independent contractor." Bagley v. Insight Commc'ns Co., 658 N.E.2d 584, 586 (Ind. 1995). Whether one acts as an employee or an independent contractor is generally a question for the finder of fact. Mortgage Consultants, Inc. v. Mahaney, 655 N.E.2d 493, 496 (Ind. 1995). However, if the significant underlying facts are undisputed, the court may properly determine a worker's classification as a matter of law. Moberly v. Day, 757 N.E.2d 1007, 1009 (Ind. 2001).

In general, an employer-employee relationship exists when the principal has the right to control the manner and methods in which the agent performs his work and the agent has the ability to subject the principal to personal liability. Ind. Ins. Co. v. Am. Comm. Serv., Inc., 768 N.E.2d 929, 936 (Ind. Ct. App. 2002). On the other hand, an independent contractor undertakes to produce a certain result but is not controlled as to the method in which he or she uses to obtain that result. Id. As there are no rigid rules for determining whether a person is an employee or an independent contractor, we turn to our Supreme Court's opinion in Moberly, where the court applied a ten-factor analysis described in the Restatement to distinguish employees from independent contractors:

“(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.”

Moberly, 757 N.E.2d at 1010 (quoting Restatement (Second) of Agency § 220(2) (1958)).

We consider all of the circumstances set forth above, and no single factor is dispositive.

Moberly, 757 N.E.2d at 1010. However, “extent of control” is the single most important factor in determining the existence of an employer-employee relationship. Wishard Mem. Hosp. v. Kerr, 846 N.E.2d 1083, 1090 (Ind. Ct. App. 2006).

1. Extent of Control Over Details of the Work

Martin alone controlled the loading and driving of his semi truck and trailer. Appellants' App. p. 76, 80. Although Wood owned the logs, Martin acted as his own boss. Id. at 76. Martin testified in his deposition that he was in charge of loading logs on the semi and that it was his decision alone as to what route to take when delivering his loads. Id. at 80. In essence, the designated evidence establishes that but for being told where to pick up and deliver the logs, all of the details as to how the task was to be performed were left to Martin's discretion. As a result, the control factor favors a conclusion that Martin and Wood did not have an employer-employee relationship.

2. Occupation or Business of Employee

The designated evidence established that the "LaFontaine Logging" logo was on the side of Martin's semi-truck and trailer. Id. at 79. Martin testified that he placed the logo on the truck because:

I thought the guy I was hauling for, Tim LaFontaine would enjoy his logo on my door, for one. Kind of maybe a little P.R. thing going. And it just made more sense having a logging logo on my door than a J.T.M. logo, so I just thought, well, I'll put it on.

Id. at 75. Martin also acknowledged that he hauled logs for a number of other companies besides LaFontaine. Id. at 79. Thus, Martin did not work exclusively for Wood. In other words, Martin operated his own business and hauled logs for companies or individuals of his own choosing. Id. at 80. Hence, this factor also weighs in favor of Martin as an independent contractor.

3. Kind of Occupation

As noted above, Martin was the “boss” of his company and could work whenever and for whomever he wanted. Id. at 76. No one supervised or instructed Martin regarding how he was to perform his duties. Id. at 80, 86, 404. Martin specifically acknowledged that the company did not “have the right to dictate anything involving the transportation of [the] logs from Silver Lake to Mooresville.” Id. at 404. This factor suggests that Martin was an independent contractor and not one of Wood’s employees.

4. Skill Required

We note that while unskilled labor is typically performed by employees, independent contractors often performed skilled labor. Howard v. U.S. Signcrafters, 811 N.E.2d 479, 483 (Ind. Ct. App. 2004). Here, it was established that Martin held a commercial driver’s license and had made a living driving trucks since 1987. Appellants’ App. p. 74. Martin’s actions as an interstate truck driver were regulated by the Federal Motor Carrier Safety Regulations (FMCSR), and the purpose of that legislation is to create uniform standards of travel in order to promote safety and prevent truck collisions. See 49 C.F.R. §§ 382.102, 383.1(a), and 387.1. Moreover, all motor carriers and drivers are to be knowledgeable of, and comply with, the FMCSR. 49 C.F.R. § 390.3(e). At the time of the accident, it is undisputed that Martin specialized in the loading and hauling of logs. Therefore, we conclude that this factor weighs in favor of Martin’s status as an independent contractor.

5. Supplier of Equipment, Tools, and Work Location

As our Supreme Court observed in Moberly, “it is particularly significant if an employer provides tools or instrumentalities of substantial value, and the same would

presumably be true if the workman is the provider.” 757 N.E.2d at 1012. Here, it was undisputed that Martin owned both the semi-truck and trailer that hauled the logs. Appellant’s App. p. 79. If the vehicle was in need of maintenance, it was Martin’s responsibility to pay for those repairs. Id. Moreover, Martin paid for the fuel and insurance on the truck, and all of the equipment therein, including the tools and straps, belonged to him. Id. at 79-81. Thus, this factor supports the conclusion that Martin was an independent contractor at the time of the accident.

6. Length of Employment

The Moberly court observed that “employment over a considerable period of time with regular hours indicates employee status.” 757 N.E.2d at 1012 (emphasis in original). Moreover, an employee is “one who performs continuous service for another.” Id.

As noted above, the designated evidence established that Martin hauled logs for a number of entities and individuals in 2003. He occasionally hauled logs to Wood’s facility, but there was no evidence indicating that Martin was on Wood’s payroll. Martin could accept or reject a particular job at his discretion, his hours were not regular, and his service was not continuous. Hence, the evidence is indicative of Martin’s status as an independent contractor with regard to this factor.

7. Method of Payment

As noted in Moberly, sporadic payments in lump sum amounts for each job performed, instead of payments by the hour or on a weekly basis, are more typical of an independent contractor than an employee. 757 N.E.2d at 1012; see also Restatement

(Second) of Agency § 220(2) cmt. h (suggesting that payment by the hour or month indicates an employer-employee relationship).

The Beattys assert that the method of payment factor establishes an employer-employee relationship because Wood paid Martin directly or gave a check to LaFontaine to give to Martin. However, Martin was not paid on an hourly basis. Rather, he was paid by the load based on the number of miles traveled. Appellants' App. p. 80. Moreover, Martin did not recall whether he was ever paid for the load of logs that were involved in the accident, and Wood had paid Martin on only three occasions during 2003. Id. at 849-57. In this instance, we conclude that the method of payment is indicative of Martin's status as an independent contractor.

8. Regular Business of Employer

Wood sold its venire wood to various furniture manufacturers. Although the delivery of logs to Wood's facility was an intricate part of its business operations, Wood owned no delivery trucks. Martin made his living hauling logs and did not perform deliveries for Wood on a regularly scheduled basis. Again, this factor weighs in favor of Martin's status as an independent contractor.

9. Belief of the Parties

Martin unequivocally stated that his relationship with Wood was that of an independent contractor. Id. 76, 82. And a representative of Wood executed an affidavit

stating that “at all relevant times, it was Wood’s belief that . . . Martin was either an employee or independent contractor of . . . LaFontaine.” Id. at 196. Although the Beattys maintain that the trial court erred because Martin testified that he considered himself to have been working for Wood, Martin never testified that he believed that he was Wood’s employee. We infer from Martin’s testimony that he believed that he was working for Wood as an independent contractor.

10. Whether the Principal is in Business

Finally, we note that Wood operated as a business. Therefore, this factor alone arguably favors employee status for Martin.

Although the majority of the factors discussed above indicate that Martin was not Wood’s employee at the time of the accident, Beatty relies on this court’s opinion in Detrick v. Midwest Pipe and Steel, Inc., 598 N.E.2d 1074 (Ind. Ct. App. 1992), for the proposition that an employer-employee relationship existed. Detrick involved a company that hired numerous truckers to drive its rigs. One of the drivers was in an accident, and the injured party sued both the trucking company and the shipper. The trial court granted the shipper’s motion for summary judgment and the motorist appealed, arguing that material facts existed as to whether the driver was an employee. We reversed, finding that a question of fact existed as to whether the driver was the shipper’s employee.

Unlike the circumstances here, however, there were numerous facts presented in Detrick supporting the proposition that the driver could be the shipper’s employee. For instance, the shipper in Detrick had authority to discharge drivers hired by the trucking

company, supplied trucks, equipment and work apparel, and controlled the manner in which the driver's duties were performed. Id. at 1077-78. Moreover, there was evidence that the driver used the shipper's tools, operated the shipper's equipment, was issued keys to the shipper's facility, assisted in the loading of the shipper's trucks, and performed maintenance on the shipper's equipment. Id. Additionally, the evidence showed that the shipper and trucking company colluded to name their companies in a similar way to create an illusion that the trucks labeled "Midwest" signified their relationship not to Midwest Trucking, but to the shipper, Midwest Piping. Id. Finally, there was evidence that the shipper issued paperwork indicating that shipments would arrive by "our truck," and the trucking company drivers purchased and sold surplus steel in the name of the shipper and signed for incoming loads as agents of the shipper, Midwest Piping. Id.

In essence, none of these circumstances exist in this case and, when considering all of the factors set forth in Moberly, the dominant factor of control establishes Martin's status as an independent contractor while he was working for Wood. Hence, we find that Detrick does not control the outcome here. Indeed, nine of the ten factors weigh in favor of Martin's status as an independent contractor. That said, taken as a whole, the undisputed facts set forth in the designated evidence support the trial court's conclusion that Martin was an independent contractor at the time of the accident.

B. Exceptions to the Rule

Notwithstanding our conclusion that Martin was an independent contractor, Beatty argues that an exception to the rule regarding nonliability of the principal exists in this case

because “Wood was charged under the Wood-La Fontaine contract with hiring all employees necessary for the transportation of the logs and for exercising control over them.”

Brief of Appellant Rita Beatty at 25. As a result, Rita points to the rule announced in Bagley that a principal is liable for the acts of an independent contractor when the “principal is by law or contract charged with performing the specific duty.” 658 N.E.2d at 586. However, for liability to attach under this exception, the contract must provide for a specific duty of care, evidence that the specific duty was breached, and evidence that the breach was a proximate cause of the injury. Id.

In this case, Rita asserts that Wood bore the responsibility for controlling the transport of the logs and summarily concludes that “there is competent evidence that Wood undertook a duty of transportation of the logs.” Appellants’ App. p. 25. However, in determining whether a party is charged with a specific duty of care under a contract, the court examines all of the provisions set forth in the agreement. Merrill v. Knauf Fiber Glass, 771 N.E.2d 1258, 1268 (Ind. Ct. App. 2002). Moreover, the assumption of duty by contract exception to the general rule of nonliability is not triggered merely because a contractor may have a right to inspect and test the work, approve of the work and/or supervise employees of the independent contractor, or even by requiring the contractor to follow company safety rules. Armstrong v. Cerestar USA, Inc., 775 N.E.2d 360, 371 (Ind. Ct. App. 2002).

In Armstrong, the plaintiff truck driver brought a personal injury action against the defendant-milling plant after the driver was injured while removing sludge from the plant pursuant to a written contract between the plant owner and the driver’s employer. The driver

argued that the plant owner assumed a duty to insure the safety of all persons working pursuant to the purchase order between it and the driver's employer. Specifically, the driver relied on this language in the purchase order: "Seller will obtain advice from Buyer's Safety Director as to Buyer's safety regulations agrees to conform thereto." Id. at 371. The truck driver argued that, under this provision, the plant owner assumed control of supervision of safety at the site where the sludge material was being loaded into the tankers. The plant owner filed a motion for summary judgment, arguing that it did not assume a specific duty to protect the plaintiff and the trial court granted the motion. We affirmed the grant of summary judgment and held that the plant owner did not assume a duty to insure the truck driver's safety when contracting with the driver's employer. Id. at 371-22. More specifically, we determined that the language in question did nothing more than require the driver's employer to observe the plant owner's safety rules and require the employer to obtain the rules. Id. In conclusion, we determined that "[w]ithout more, there is no assumption of duty pursuant to this purchase order." Id. at 372.

In Merrill, a roofing company's employee filed a negligence action against a building owner for injuries he sustained after he fell through a skylight while on the roof making repairs. The employee argued that the owner contractually bound itself to place covers or guards over the skylights of the building. Although the employee conceded that no provision in the contract expressly required the owner to cover or guard the skylights, he argued that a specific duty for his protection was created by the following language in the purchase order:

3. Technical cognizance hereof shall be the responsibility of the Owner's Lew Craig or his designee. Said technical representative will be responsible for

assuring Contractor[’s] strict compliance with Owner’s Safety Rules and Procedures for Outside Contractors.

. . .

6. Such work shall be in accordance with oral directions of Owner’s technical representative named herein. Contractor understands and agrees to follow [the building owner’s] Safety Rules and Procedures for Outside contractors

Merrill, 771 N.E.2d at 1269. The employee argued that because OSHA regulations required the skylights to be covered, the regulations should have been included in the safety procedures. The building owner filed a motion for summary judgment and argued that it did not assume a duty to cover skylights. The trial court granted the motion and the employee appealed. We affirmed, holding that the building owner was not contractually bound to place covers or guards over the skylights. Id. at 1270. We determined that the language of the agreement did not mention “skylights, and we observed that the agreement did not show an intent for the building owner to know applicable OSHA safety regulations and to assure that the roofing company comply with each of them.” Id. at 1269-70. We further noted that paragraph three of the purchase order actually spoke in terms of the building owner’s safety rules, and not OSHA-promulgated regulations. Id. at 1269. Therefore, we concluded that the entry of summary judgment was proper. Id. at 1270.

Finally, the Beattys direct us to Hale v. R.R. Donnelley and Sons, 729 N.E.2d 1025 (Ind. Ct. App. 2000), where a construction worker who was employed by a subcontractor brought an action against the owner of the worksite, general contractor, and subcontractor for damages as a result of injuries he sustained when he fell while descending a storage system. The plaintiff alleged that the general contractor and subcontractor owed him a duty under the

second Bagley exception to the general non-liability rule based on language contained in a written contract between the general contractor and subcontractor. The relevant portion of the contract indicated that the general contractor agreed to require all personnel to work in a manner that complied with OSHA regulations and that the general contractor agreed to a project-wide duty of providing a safe work environment. The trial court entered summary judgment in favor of the general contractor and the plaintiff appealed. We affirmed, observing that

A plain reading of the contract language indicates that [the general contractor] did not intend to assume a duty of care for the entire project work site, including [the plaintiff]. The contract affirmatively reflects an intent for [the general contractor] to assume a duty of care for its own employees and its own personnel, and not the employees or personnel of any subcontractors at the worksite. Further, the contract is an equipment purchase agreement between [the general contractor] and [the owner of the worksite], for [the general contractor] to design, manufacture, sell and warrant the “High Bay Storage Racks” to [the owner of the worksite], and does not contain an affirmative duty to [the general contractor] to assume a project wide duty while [the subcontractor] assembled the racks at the . . . the worksite.

Id. at 1029.

As in Merrill and Hale, the one-page contract relied upon by the Beattys does not evince an intent on the part of Wood to assume a specific duty of care with regard to Nora, who was a traveler on a public roadway, or even a general duty of care regarding log hauling.

Indeed, the agreement between Wood and LaFontaine neither defines a duty of care nor mentions the assumption of such a duty by Wood. The cited portion of the contract does not provide for Wood to observe applicable federal and state trucking regulations, or to make sure the hauler has all appropriate licenses and obeys all traffic signals. Even though the

Beattys point to the “furnish the equipment” and the “sole exclusive control” language in the contract in concluding that the specific contract duty exception applies, they do not designate any evidence that Wood’s contract with LaFontaine imposed a specific duty of safe driving that would have protected Nora. As a result, the trial court did not err in holding that the “specific duty” exception did not apply in these circumstances.

C. Additional Exception

Finally, Rita Beatty argues that “sound public policy supports the creation of an additional exception.” Brief of Appellant Rita Beatty at 30. Specifically, Beatty contends that a new exception should be created

where the facts give rise to a reasonable inference that a principal knows or should know in the exercise of due diligence that a potential independent contractor with whom he is contracting lacks the financial resources to conduct the purpose of the contract in a way that would not be detrimental to other persons lawfully upon the highway.

Id.

This court previously rejected a similar argument in Kahrs v. Conley, 729 N.E.2d 191 (Ind. Ct. App. 2000). In Kahrs, the plaintiffs were rear-ended by a vehicle that had been escorting the transport of a modular home by a semi-tractor. The plaintiffs sued the owner of the semi-tractor who had hired a contractor to transport the home. The plaintiffs argued that an employer-employee relationship existed between the owner and contractor and that the owner was negligent in hiring the contractor as a result of not verifying his past driving record or requiring the contractor to carry adequate financial protection for the benefit of any third party who is injured in an accident. We disagreed with the plaintiffs and held that the driver was an independent contractor, not an employee of the owner of the semi-tractor. Id.

at 194-95. In rejecting the argument that an additional exception to the non-liability rule should be adopted, we observed that

Plaintiffs' complaint alleges that Transit was negligent in the employment of Conley for both failing to determine his safety record and failing to contractually require him to provide adequate financial protection for injuries to third parties. Because Transit is not Conley's employer, the negligence, if any, must arise from the negligent hiring of an independent contractor. Our supreme court recently declined to recognize the negligent hiring of an independent contractor as an independent tort. Bagley, 658 N.E.2d at 586-87; Red Roof Inns, Inc. v. Purvis, 691 N.E.2d 1341, 1344 (Ind. Ct. App.1998). Instead, the court reiterated the general rule that a principal is not liable for the negligence of an independent contractor and decided that the basic concept of negligent hiring was "subsumed" in the five existing exceptions to the general rule of non-liability. Bagley, 658 N.E.2d at 587; Red Roof Inns, 691 N.E.2d at 1343-44. "Thus, one who hires an independent contractor may be liable for the failure to exercise reasonable care to employ a competent and careful contractor only when there is a non-delegable duty based upon at least one of the five exceptions." Red Roof Inns, 691 N.E.2d at 1344.

Id. at 195. In light of this pronouncement, we reject Beatty's invitation for this court to adopt an additional exception to the rule.

The judgment of the trial court is affirmed.⁷

FRIEDLANDER, J., and CRONE, J., concur.

⁷ As an aside, we note that Beatty asserts that the trial court erred in granting Wood's motion to strike argument and evidence with regard to its refusal to admit Martin's past driving record and the conclusion that the driver's tractor-trailer was in violation of various state and federal motor carrier safety regulations as designated evidence. Indiana Evidence Rules 404(b) and 609(a), which address the admissibility of prior criminal convictions and other "bad acts" might have precluded the admission of Martin's driving record. However, even assuming solely for argument's sake that the trial court may have erred in striking this exhibit,

such error was harmless in light of our conclusion that Martin was an independent contractor rather than an employee or agent of Wood.