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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1540**

Peter Haldeman,
Appellant,

vs.

Zacher Excavating, Inc., et al.,
Defendants,

Scenic Lodging Corporation,
Respondent.

**Filed July 21, 2009
Affirmed
Shumaker, Judge**

Cass County District Court
File No. 11-CV-06-2632

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Considered and decided by Shumaker, Presiding Judge; Lansing, Judge; and
Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant, an injured construction worker, claims that the district court erred in granting summary judgment to respondent contractor upon ruling that the contractor owed no duty of care to appellant. We affirm.

FACTS

Appellant Peter Haldeman was injured when he fell into a hole dug for the installation of a rainwater catch-basin system at a construction site where he was working. Among others, he sued respondent Scenic Lodging Corporation, alleging that it was negligent in the selection and supervision of the designer of the system and in its failure to supervise the construction site so as to eliminate dangerous conditions there. The district court granted Scenic Lodging's motion for summary judgment. Haldeman contends that the court erred in doing so.

The project in question was the construction of a large commercial building on land owned by Shorequest LLC. Scenic Lodging installed the rainwater catch-basin system to keep water from flowing onto a parking lot. Originally, each catch basin was covered by a plastic cover attached with screws. After Next Innovations, Inc., a tenant of the building, moved in, it was decided that the catch-basin covers would be replaced with metal grates to be fabricated by Next Innovations.

A welder employed by Next Innovations removed some of the covers so that he could obtain measurements for the grates. One of the covers he removed was on the

catch basin that Haldeman fell into. The welder had not replaced that cover after he removed it.

In granting summary judgment, the district court ruled that Scenic Lodging owed no duty of care to Haldeman and, therefore, could not be liable for his damages.

DECISION

When reviewing an appeal from summary judgment, this court determines whether any genuine issues of material fact exist and whether the district court erred in applying the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue for trial exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *Id.* at 71 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as “incorrect legal standard” and clarifying that “summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions”). On appeal, the evidence is examined in the light most favorable to the party against whom summary judgment has been granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

The district court determined that, on the record before it, there was neither a genuine fact issue nor an applicable legal theory to support the proposition that Scenic Lodging owed Haldeman a duty of care that would make it liable for Haldeman's injury. We agree.

On appeal, Haldeman offers two arguments for the imposition of a duty of care on Scenic Lodging. First, he contends that Scenic Lodging was the general contractor or a subcontractor on the project and that either status placed the company in the position of a possessor of land with concomitant duties of care. Secondly, he argues that there exists a genuine fact issue as to whether Scenic Lodging ever covered the catch basin that he fell into, thus creating the possibility that the company's negligent omission caused his injury.

Possessor of Land

It is undisputed that Shorequest owned the land on which Haldeman's injury occurred. There is no evidence in the record to show that Scenic Lodging had any legal possessory interest in the land. Thus, if Scenic Lodging is to be charged with the duty of care required of a possessor of land, its relationship to the land must be found in some other capacity. Haldeman claims that it can be found in Scenic Lodging's capacity as the project's general contractor. A general contractor who retains detailed authoritative control and supervision over a construction project can be charged with the duty of care required of a possessor of land. *Thill v. Modern Erecting Co.*, 272 Minn. 217, 226-27, 136 N.W.2d 677, 684 (1965).

Although a general contractor, under some circumstances, can be liable for injuries on land, the record here does not show or support a reasonable inference that Scenic Lodging was the general contractor on this project. In fact, the evidence is entirely to the contrary. John Zacher, a holder of ownership interests in Shorequest, Scenic Lodging, and Next Innovations, testified at deposition that there was no general contractor for this project. Rather, he and his employees coordinated the work. Ronald Anderson, a person paid by Scenic Lodging, testified at deposition that he monitored the work of subcontractors but that there was no formal site manager for the project. Nothing in this record shows that Scenic Lodging assumed or asserted any particular control over the project, engaged in supervisory conduct, or held itself out or acted as if it had authority to direct or manage the project. Other than serving as a pay conduit for certain employees, its only active role was that of the installer of the rainwater catch-basin system. Furthermore, Shorequest admitted in its answer that, at the time of Haldeman's accident, Shorequest "maintained control and possession of the premises" Absent evidence that Scenic Lodging served as an official or de facto general contractor, it cannot be charged with possessory liability related to that status. Haldeman has failed to point to evidence that would allow a jury to do anything but speculate on this issue.

Haldeman also seeks to affix a possessory duty of care to Scenic Lodging in its status as a subcontractor, citing *Dishington v. A. W. Kuettel & Sons, Inc.*, 255 Minn. 325, 329, 96 N.W.2d 684, 687-88 (1959), and section 384 of the Restatement of Torts adopted therein, for the proposition that one who creates a dangerous condition on land is subject

to the same liability as a possessor of land. We can address Haldeman's subcontractor-liability and negligent-omission arguments in the context of this rule.

Scenic Lodging clearly was the contractor for the installation of the catch-basin system. The record shows that it installed the system and attached covers to the catch basins so that there would be no openings into which someone could step or fall. The record shows that Next Innovations removed and failed to replace the cover on the basin that Haldeman fell into.

Haldeman points to no facts to show that Scenic Lodging was negligent in installing the system or covering the catch basins, or that the company had any supervisory responsibilities after Next Innovations altered the original coverings. Thus, there is no evidence in this record that Scenic Lodging did anything or failed to do something that would bring it within the ambit of the liability rule reflected in the Restatement of Torts.

Genuine Issue of Fact

Haldeman suggests that Scenic Lodging possibly never covered the basin that he fell into, citing the deposition testimony of a worker that "he had never seen a cover on it before the grate was installed." But Haldeman neglects to provide the context of the testimony:

- Q. Had it been uncovered for some time, to your knowledge?
- A. Yeah. I have no idea if it ever was covered or not.
- Q. Did you ever—on the one that [Haldeman]fell in, did you ever see a cover on it before the grate was put on it?

A. I didn't, personally, no.

The critical statement is: "I have no idea if it was ever covered or not." It would be speculative to infer from that statement that the catch basin had never been covered. Furthermore, the welder who worked on the grates for Next Innovations specifically recalled removing the cover over the basin that Haldeman fell into. He could not have removed the cover unless it had been in place before its removal.

On this record, a jury would be left to speculate as to duty and breach. Thus, the district court properly granted Scenic Lodging's motion for summary judgment.

Affirmed.