STATE OF MINNESOTA
IN COURT OF APPEALS
A10-115

Marcella Fliginger, trustee for the heirs and
next of kin of Arne Fliginger, Deceased,
Appellant,

vs.

Opus Northwest Construction, LLC, et al.,
Respondents,

Sowles Co., d/b/a Northwest Tower Cranes, et al.,
Defendants.

Filed November 2, 2010
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CV-09-11660

John T. Buchman, Adriel B. Villarreal, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for appellant)

Samuel L. Hanson, Charles B. Rogers, Jason R. Asmus, Briggs and Morgan, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Wright, Judge.

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

CONNOLLY, Judge

Appellant, the trustee for the heirs and next of kin of a subcontractor's employee killed on a construction job, brought this action against respondents, the owner and the general contractor. The district court granted summary judgment to respondents on the ground that they owed no duty to the decedent. Because we see no genuine issue of material fact and the district court did not err in applying the law, we affirm.

FACTS

In 2004, respondent Carlyle Condos, LLC (Carlyle) hired respondent Opus Northwest Construction, LLC (Opus) to construct a 39-story condominium development. They executed a Design-Build Contract. In 2005, Opus and Sowles Co., d/b/a Northwest Tower Cranes (Sowles), executed a crane rental agreement whereby Opus leased two cranes from Sowles. The agreement provided for a separate subcontract for erection and dismantling of the crane, and Opus and Sowles duly executed such a contract. In November 2006, Arne Fliginger (the decedent), a lead foreman on Sowles's crane dismantling crew, fell and was killed during the dismantling. The two witnesses to the accident testified that the decedent was not tied off.[1]

[1] A tie off is "[t]he act of an employee, wearing personal fall protection equipment, connecting directly [or] indirectly to an anchorage, or the condition of an employee being connected to an anchorage." Terms & Definitions for FrenchCreek Production's Fall Protection and Rescue / Recovery, http://www.frenchcreekproduction.com/terms-definitions.htm; *see also* OSHA Personal Fall and Arrest System, http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9730.

After a five-month investigation, Minnesota Occupational Safety and Health Act (MNOSHA) investigators issued two citations to Sowles, but none to respondents. In 2008, appellant Marcella Fliginger, trustee for the heirs and next of kin of the decedent, brought this action against Opus and Carlyle, alleging negligence.[2]

Respondents were granted summary judgment on the ground that they owed no duty of care to the decedent. Appellant challenges that judgment, arguing that there are six separate bases for concluding that respondents had and breached a duty of care, that genuine issues of material fact precluded summary judgment, and that the district court abused its discretion in excluding appellant's experts' affidavits.

D E C I S I O N

On an appeal from summary judgment, this court asks whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Both issues are reviewed de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002).

1. Duty of Care

The existence of a defendant's duty of care toward the plaintiff is an essential element of a negligence claim. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999); *see also ServiceMaster v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn.

[2] Specifically, appellant alleged negligence, breach of contract, and negligence per se against Opus, negligence against Carlyle, and negligence and failure to comply with statutory duties against Sowles. Sowles moved for and was granted summary judgment; appellant states that she "does not appeal the trial court's grant of summary judgment to Defendant Sowles."

1996) ("A defendant will not be bound to conform its conduct to a standard of care unless a legally recognized duty exists."). Whether such a duty exists depends on the relationship of the parties and the foreseeability of the risk. *Gilbertson*, 599 N.W.2d at 131. Appellant argues that a duty of care for the decedent was conferred on Opus by (a) the subcontract; (b) the Design-Build Contract; (c) Opus's safety policy; (d) the common law; (e) state and federal regulations, and (f) industry standards.

a. The Subcontract

The Subcontract Agreement between Opus (contractor) and Sowles (subcontractor) reads in relevant part:

> 9.1 To the fullest extent allowed by law, Subcontractor shall indemnify, defend, and hold harmless Owner [Carlyle], Architect/Engineer and Contractor . . . from and against all claims, damages, losses and expenses . . . . arising out of Subcontractor's performance or nonperformance of Subcontractor's Work.
>
> . . . .
>
> Subcontractor shall provide all labor, equipment, and materials necessary to complete the setup, erection, and dismantling of the tower cranes ("Work") for The Carlyle, including but not limited to, strict compliance with the following documents (the "Contract Documents") :

Description	**Number**	**Date**
This Subcontract Agreement		May 15, 2005
General Conditions of Subcontract	Articles 1-17	December 2004 Edition

> **This contract includes, but is not limited to the following items:**
>
> 1. Complete set-up, erection and dismantling of tower crane # 1 (east crane along 3rd Avenue) and tower crane # 2 (north crane along 1st Street).
>
> . . . .

4. All mobile cranes and rigging necessary to set-up, erect and dismantle the tower cranes.
5. Labor to tie-off and climb cranes as necessary.
6. Labor to perform all set-up, erection and dismantling.

. . . .

GENERAL CONDITIONS OF SUBCONTRACT

. . . .

4.3 Supervision and Construction Procedures

. . . .

4.3.1 Subcontractor shall supervise and direct the Work using its best skill and attention; provided, however if a higher standard is required to conform to requirements of good and generally accepted construction practice, the Work shall comply with such higher standard. *Subcontractor shall be solely responsible for constructions safety and for all constructions means, methods, techniques, sequences and procedures and for coordinating all portions of the Work.* Subcontractor shall comply with all reasonable requirements of Contractor as to means, methods, techniques, sequences and procedures, while conforming with and giving precedence at all times to all safety responsibilities under Article 10.

. . . .

4.10.1 Subcontractor shall be responsible to Contractor for the acts and omissions of all its employees, agents, vendors, and Sub-contractors, their agents and employees, and all other persons performing any of the work at the direction of or under a subcontract with Subcontractor.

. . . .

10.1.1 Subcontractor shall take all safety precautions with respect to the Work, shall comply with all safety measures initiated by Contractor and required by the Subcontract Documents including the Safety Policy for Subcontractors . . .

.

. . . .

10.2.1 Subcontractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:

1. All employees on the Work and all other persons who may be affected thereby;

. . . .

> 10.2.2 Subcontractor shall erect and maintain as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection . . . .

(Emphasis added.)

In a thoughtful and well-reasoned opinion, the district court concluded that Opus and Carlyle owed no duty of care to the decedent under this agreement, relying on *Sutherland v. Barton*, 570 N.W.2d 1 (Minn. 1997). *Sutherland* was brought by the trustee of the heirs of an electrical contractor's employee killed while doing electrical work. It held that Waldorf, the corporation that hired the electrical contractor, was not liable because it "did not retain detailed control over the work project as a whole or over the specific task on which the employee was working when injured." *Id.* at 2.

> Not just any amount of control by the hiring company is sufficient to impose direct liability. For liability to attach, the company must retain control over the operative detail of the work.
> . . . .
> It is not enough that [the company] 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.
> . . . .
> [It] is undisputed that [the contractor] determined how to perform the specific task to which [the decedent] was assigned the day of the accident [and] how to protect the work area. . . .
> . . . [The contractor] was the specialist in electrical work. . . . [It] chose to let its employees move forward with running conduit to the pull box without telling Waldorf that the power needed to be shut off. . . . Waldorf did not retain the necessary detailed control over the box board mill project or the specific

> task that [the decedent] was to perform to warrant the imposition of direct liability for [his] fatal injuries.

Id. at 5-6 (quotations and citations omitted).

Thus, the issue is whether Opus retained control over the dismantling project or the specific task that the decedent was performing when he fell. Nothing in the record indicates that Opus had such control, and, in addition to the subcontract itself, two items support the contrary position. First, Sowles's principal testified that Sowles "would allow only trained and experienced personnel to be up on the tower crane during dismantling." Thus, no one from Opus was present or involved in the dismantling.[3] Second, appellant's responses to respondents' requests for admissions show that no one from Opus directed or supervised the dismantling process and that only Sowles had provided the decedent with safety training for dismantling. The district court did not err when it concluded that Opus did not retain control.

Appellant argues that Carlyle, as the landowner, had a duty to warn the decedent about the dangers of dismantling. *Sutherland* also addressed this issue.

> [The decedent] was a licensed electrician with 30 years of experience. He had worked near live buss bars before and in fact had warned others of the danger inherent in such a task. . . . There is no dispute that the danger was known and obvious to [the decedent.] Indeed, the trustee's attorney specifically pointed out at oral argument that this is not a duty to warn case because the danger was known and obvious.

[3] Appellant speculates that, if Opus had asked to inspect the dismantling equipment, Sowles would have complied, and that Opus therefore had control over the dismantling. But the record clearly shows that dismantling is a highly specialized task and that no one at Opus was qualified to perform or evaluate it. Moreover, speculation is not enough to defeat summary judgment. *See Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

Id. at 7. Like the decedent in *Sutherland*, the decedent here was experienced in the work he was doing; as a lead foreman, he was responsible for checking others' compliance with safety precautions. Carlyle, the landowner, had no duty to warn him of the dangers of his work.

> Landowners are not . . . liable for harm caused by known or obvious dangers unless the landowner should anticipate the harm despite its obvious nature.
> . . . .
> . . . [The decedent] had expertise as an electrician. This expertise was the exact reason Waldorf hired [the contractor] to perform the . . . project. [The decedent] was trained to work near energized electrical wires. It was entirely reasonable for Waldorf to expect that . . . a company specializing in electrical work . . . would take the necessary safety precautions and would require its employees to follow proper safety guidelines. Accordingly, Waldorf had no reason to anticipate that . . . its independent contractor and . . . its contractor's employee . . . would proceed to encounter the danger of the live buss bars without taking the necessary safety precautions. Waldorf did not owe [the decedent] a duty to protect him from harm by this known and obvious danger.

Id. Carlyle, like Waldorf, had an "entirely reasonable" expectation that Sowles and the decedent would not "encounter the danger" of dismantling the crane "without taking the necessary safety precautions."[4]

[4] Appellant relies on *Lemmer v. IDS Properties, Inc*., 304 N.W.2d 864, 867 (Minn. 1980) (concerning subcontractor's employee injured when equipment belonging to another subcontractor fell on him) and *Thill v. Modern Erecting Co.*, 272 Minn. 217, 136 N.W.2d 677 (1965) (concerning subcontractor's employee injured when a crane operated by employee of another subcontractor tipped over). Both are distinguishable. *Lemmer* addressed issues not present here: whether evidence supported the jury's finding as to the general contractor's 80% liability, 304 N.W.2d at 867, whether defendants seeking contribution must be jointly liable with those from whom they seek contribution, *id.* at

Particularly in light of the factual similarities between the electrical contractor and Sowles and between the decedent in *Sutherland* and the decedent here, the district court did not err in relying on *Sutherland* to conclude that, under the Subcontractor agreement, neither Carlyle nor Opus owed a duty of care to the decedent.

b. The Design-Build Contract

Appellant argues that the decedent was owed a duty of care as a third-party beneficiary of the Design-Build Contract between Carlyle and Opus, providing that Opus was "solely responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under this Contract and for compliance with laws, ordinances, and regulations as specifically set forth herein. . . ." The district court concluded that neither Sowles nor the decedent could "be considered intended beneficiaries in the contract between Carlyle and Opus, because the contract was signed months before they were involved in the project, and without any discussion or consideration of their existence or their role. They were, at best, as a matter of law, considered to be incidental rather than intentional beneficiaries[.]"

An incidental beneficiary has no right to sue for breach of the contract. *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). An intended beneficiary exists if

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868, and whether the subcontractor that owned the equipment could have recovered from the general contractor if there had been common liability, *id.* at 869. In *Thill*, the general contractor "had been around the area while the crane was being set up, inspected it and said 'It looks good' or words to that effect. At the trial he admitted that he knew the purpose of the outriggers, blocking and pins, but he did not inspect the machine carefully[.]" 272 Minn. at 223, 136 N.W.2d at 681. Here, Opus had no knowledge of or experience in dismantling.

> (1) . . . [R]ecognition of a right of performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary [the duty owed test]; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance [the intent to benefit test].

Restatement (Second) of Contracts § 302 (1979). None of these criteria is met here: recognizing a right to Opus's performance in Sowles would not effectuate any stated intention of either Carlyle or Opus, and neither the "duty owed test" nor the "intent to benefit test" is fulfilled.

i. Duty owed test

Appellant relies on Article 9(w) of the Design-Build Contract, providing that "Contractor shall erect and properly maintain, at all times, as required by the conditions and progress of the Work, reasonable safeguards for the protection of workmen and the public." Appellant argues that "workmen" means "subcontractors" and that Sowles was therefore a "duty owed" intended beneficiary. But the Design-Build Contract also uses the term "subcontractors"; *see, e.g.*, 9(c) (requiring contractor to enforce strict discipline and good order "among its employees and subcontractors.") If Opus and Carlyle had intended their contract to impose on Opus the duty of protecting subcontractors and their employees, the contract would have said so. Neither Sowles nor the decedent was a "duty owed" third party beneficiary.

ii. Intent to benefit test

Nor were Sowles and the decedent "intent to benefit" beneficiaries. The inquiry under this test is to whom performance is to be rendered. *Buchman Plumbing Co. v. Regents of the Univ. of Minn*., 298 Minn. 328, 335, 215 N.W.2d 479, 484 (1974). *Buchman* concerned a plumbing contractor who attempted to recover as a third-party beneficiary under a contract between the university and a general contractor.

> If, by the terms of the contract, performance is directly rendered to a third party, he is intended by the promise to be benefitted. Otherwise, if the performance is directly rendered to the promisee, the third party who also may be benefitted is an incidental beneficiary with no right of action.
>
> . . . .
>
> Applying the above tests, we hold that there was no "intent to benefit" [the plumbing contractor. The general contractor's] performance was to be rendered directly to the [u]niversity. . . . [The plumbing contractor] was at most an incidental beneficiary. In addition, [the general contractor's] performance of its contract with the [u]niversity would not discharge the duty owed by the [u]niversity to [the plumbing contractor]. . .

Id. at 335-36; 215 N.W.2d at 484-85. The Design-Build Contract clearly envisions that Opus's performance will be rendered to Carlyle, not to Sowles or the decedent; nor did Opus's performance discharge any duty Carlyle owed Sowles.

The district court did not err in concluding that Sowles and the decedent were not intended beneficiaries of the Design-Build Contract between Carlyle and Opus.

c. The Opus Safety Policy

Appellant argues by implication that a general contractor's safety policy supersedes a subcontractor's policy even when the subcontract agreement between the

general contractor and the subcontractor clearly states the contrary. Appellant cites no legal authority for this argument.

The Subcontractor policy signed by Opus and Sowles makes it clear that safety was the responsibility of Sowles, not of Opus.

> These minimum guidelines are intended to assist contractors in reducing the possibility of loss by bringing to their attention the hazards and possible abatements. Compliance with any of these guidelines in no way guarantees the fulfillment of the subcontractors' obligations as may be required by local, state, or federal laws. Opus Northwest assumes no liability for such obligations.
>
> SUBCONTRACTOR RESPONSIBILITIES
>
> Subcontractors will be held accountable for their safety performance.
>
> Opus Northwest requires each subcontractor to fully implement a comprehensive safety program. . . .
>
> Safety responsibilities are to be assigned to key individuals at different levels of each subcontractor's personnel structure.

Thus, Sowles's safety policy, not Opus's safety policy, governed Sowles's activities and employees. Opus's safety policy did not impose a duty of care for the decedent on Opus.

d. Common Law

Appellant argues that, if a general contractor retains control but does not exercise it, the general contractor is liable for injuries to a subcontractor's employees, and that "the District Court ignores several Minnesota Supreme Court cases wherein general contractors were found negligent for failing to exercise its [sic] supervisory authority as required by contractual terms." But appellant cites only one case, *Foster v. Herbison, Construction Co.*, 263 Minn. 653, 115 N.W.2d 915 (1962) for the proposition that "contractual obligations are valid evidence of the duty of a general contractor to others."

Foster concerned a driver injured when his truck tipped over because the contractor employed to maintain the highway had left it full of holes. "When a contract for the construction or repair of a highway contains provisions requiring the contractor to perform specific acts intended to protect the travelling public using the highway, such contract provisions are admissible on the issue of negligence." *Id*. at 63, 115 N.W. 2d at 915. *Foster's* holding is irrelevant here. In any event, *Sutherland* has established that an entity that hires a subcontractor is not liable for injuries to the subcontractor's employees if the entity "did not retain detailed control over the work project as a whole or over the specific task on which the employee was working when injured." *Sutherland*, 570 N.W.2d at 2.[5]

e. State and Federal Law

Appellant argues that OSHA regulations establish Opus's duty of care to the decedent. But the OSHA investigation resulted in Sowles receiving two citations and notifications of penalty: one for having an employee exposed to fall hazards without adequate protection, which carried a penalty of $25,000; the other for a guardrail that did not meet the standards, which carried a penalty of $2,100. The investigation also resulted in the Safety Director of Opus receiving a letter from OSHA stating that "MNOSHA conducted an inspection of your facility on November 6, 2006, and . . . the inspection resulted in no proposed citations." Sowles's principal testified that he recalled OSHA's

[5] Appellant attempts to distinguish *Sutherland*, arguing that it "more aptly applies to . . . relationships involving a landowner and a subcontractor instead of a general contractor/subcontractor relationship," but acknowledges that *Sutherland*, "is frequently cited to evaluate a construction site injury."

conclusion was "Fatality not related to general contractor [Opus], no citations." Thus, nothing in the record indicates that, if Opus had a duty imposed by OSHA regulations, it breached that duty.

f. Industry Standards

Appellant argues that "Opus owed duties of care stemming from well accepted industry customs and practices." For this argument, appellant relies not on legal authority but on publications of the Associated General Contractors of America, ACG, specifically its "Accident Prevention and Loss Control" manual, and on a "risk control" document put out by Opus's prior insurance company. Appellant offers no support for the view that these documents supersede the language in the Opus-Sowles subcontract and impose a legal duty on Opus.

None of the six grounds appellant cites refutes the district court's conclusion that Opus and Carlyle had no duty of care to the decedent.

2. Disputed Material Facts

Appellant claims the district court erroneously relied on four disputed material facts when making its decision.

The first concerned the district court's finding that "Sowles' fall protection guidelines required employees to always tie off whenever they were more than six feet off the ground, regardless of the presence of guardrails" and its observation that whether Sowles or Opus had the more stringent safety policy was "not material so as to preclude summary judgment as [the decedent] was generally required to tie-off under either Sowles' policy or Opus' policy even with the presence of guardrails."

A memo from the Sowles's safety director to all Sowles employees on fall protection standards and enforcement methods states that "Anyone working over 6 feet from the ground must tie off 100% of the time." In his deposition, Sowles's principal answered "yes" when asked "[W]as it a requirement of Sowles . . . that anyone working over six feet from the ground should tie off one hundred percent of the time?" Thus, evidence supports the district court's finding. But Sowles also had a Job Safety Analysis Plan that listed as a loss prevention measure "100% tie off required at all times when outside hand rails and ladder cages." Appellant argues that this creates a genuine issue of material fact as to whether Sowles's policy was less stringent than Opus's policy. We disagree, but, in any event, whether Opus or Sowles had the more stringent policy is not material to the determination that Opus had no duty of care to the decedent.

The other three alleged genuine issues of material fact pertain to the deposition testimony of an Opus employee who was operating a crane at the time of the accident. Because of this employee, appellant challenges the conclusion that Opus was not involved in the dismantling. But, when the employee was asked "What role, if any, did you think you had with respect to safety during the dismantling of a tower crane?", he answered, "Well, with safety, I take orders from the guys that are running the [dismantling] crew and that [is] my safety aspect of it. I don't move that crane unless I hear from them guys." He also testified that he had never reported that Sowles's employees were not tied off because, when he saw them, they were tied off. The conclusion that "there is nothing in the record to show or suggest that [the Opus crane

operator] was involved in the erection or dismantling of cranes" did not require the district court to impermissibly find facts.

The district court also concluded that "[t]ower crane erection and dismantling is highly specialized" and "assume[d] for the sake of the [summary judgment] motion that [appellant] correctly asserts that all subcontractor work may be 'specialized.'" The degree to which the dismantling of a tower crane is or is not specialized is not material to whether Opus had a duty of care to the decedent.

Finally, the crane operator testified that he did not believe the decedent's fall was accidental and that he had not said this at the time to representatives of Opus and OSHA because he wanted to spare the decedent's family. Again, whether the decedent's fall was accidental is not a fact material to the summary judgment decision that Opus owed no duty of care to him in the circumstances of this accident.

3. Exclusion of Evidence

A district court's decision to exclude expert testimony will not be reversed absent an abuse of discretion or an erroneous application of the law. *Hempel v. Fairview Hosps. and Healthcare Servs., Inc.*, 504 N.W.2d 487, 490 (Minn. App. 1993). Appellant submitted affidavits from two OSHA experts. The district court

> reviewed [the affidavits] and conclude[d] that they are not competent expert opinions sufficient to create a genuine issue of material fact. They essentially set forth an opinion on the existence of a legal duty. It is the sole province of the Court to determine a legal duty[.] *See Zimmer v. Carlton County Co-op Power Ass'n*, 483 N.W.2d 511, 513 (Minn. App. 1992) ("Whether one owes a legal duty to another is a question of law to be determined by the court.") [*review denied* (Minn. June 10, 1992)] . . . [The experts are] not qualified to interpret

> legal contracts . . . [or] to instruct the Court on legal duties imposed by OSHA regulations. Thus, the Court disregards the conclusion of [one expert]. . . . [and] cannot defer to the legal opinions and conclusions of [the other expert]. *See Safeco Ins. Co. v. Dain Bosworth Inc*., 531 N.W.2d 867, 873 (Minn. App. 1995) ("An affidavit from an expert cannot create a duty where none exists.")[*review denied* (Minn. July 20, 1995)]; *In re Trusts A & B*, 672 N.W.2d 912, 918 (Minn. App. 2001) ("[Expert testimony] does not by itself establish a legal duty to exercise that care.").

Appellant argues that the "retention of [the first expert] was not to interpret whether any legal duties existed but to discuss the standard of care owed by a general contractor within the industry." But the issue on which summary judgment was granted was not the standard of care but whether a duty existed. Thus, a discussion of standard of care was not relevant. The other expert's affidavit concerned, inter alia, the cause of the decedent's death; causation also was not relevant to the existence or nonexistence of a duty of care. The district court did not err in excluding the experts' affidavits.

The conclusion that neither Carlyle nor Opus owed a duty of care to the decedent in the circumstances of this accident was not based on disputed material facts and did not involve an erroneous interpretation of the law.

Affirmed.