ROBERT EDWARD SUTKOWSKI, Plaintiff-Appellant,

v.

BAZYLI TYMCZYNA and OLGA TYMCZYNA, Defendants-Respondents.

No. A-0841-09T2.

Superior Court of New Jersey, Appellate Division.

Argued: March 24, 2010.
Decided: November 23, 2010.

Thomas S. Howard argued the cause for appellant (Kirsch Gartenberg Howard, LLP, attorneys; Mr. Howard and Jesse C. Klaproth, on the brief).

John R. Knodel argued the cause for respondents (**Methfessel** & **Werbel**, attorneys; Mr. Knodel, on the brief).

Before Judges Cuff and C.L. Miniman.

PER CURIAM.

Plaintiff Robert Edward Sutkowski appeals from a July 31, 2009, order granting summary judgment to defendants Bazyli Tymczyna and Olga Tymczyna, because defendants owed no duty of care to plaintiff under the facts and circumstances of the case. Plaintiff also appeals from an October 8, 2009, order denying reconsideration of the summary judgment because the standard for reconsideration had not been met.[1] We now reverse and remand.

The following material facts were submitted on defendant's motion for summary judgment and plaintiff's opposition to that motion. Defendant is a widow residing in Newark. Defendant called plaintiff's mother and asked her to request that her son help her in cleaning her gutters and hanging Christmas decorations. She offered to pay $100 for his assistance.

On December 10, 2006, plaintiff went to defendant's home, and defendant told him to clean out the gutters, hammer down any nails that were protruding from the gutters, and hand her Christmas lights. As they walked to the rear of the house, defendant explained how she wanted the work to be performed. She told him that he would be cleaning the upper and lower gutters by removing leaves and acorns. She pointed out nails that needed to be hammered back into place. She specifically told him that the upper gutter needed the nails hammered.

Defendant provided plaintiff with a hammer, short ladder, plastic bags for the leaves, a garden hose, and a plastic container for trash. Further, she showed him how to access her roof through an open window in the front of the house. She led him through her house to the window and showed him how to get onto the roof. Plaintiff asked defendant for a long ladder that he could use to access the roof, but she informed him that she did not have access to a long ladder. She assured him that previous workmen who cleaned the gutters went in and out of her house through the window and onto the roof.

As plaintiff was performing the work, defendant assisted him by handing him the short ladder through the window so he could access the upper gutter. As he worked, she provided him with empty plastic bags to fill with waste from the gutters. She handed him the hose to spray out the gutters and turned on the water for him. Plaintiff handed her the full plastic bags, and she disposed of them.

Once the gutters at the front of the house were clean, plaintiff walked across the roof to the rear of the home to clean the rear gutters. Defendant showed plaintiff the nails that needed to be hammered back into place. She showed him how to enter her home and climb out another window to go from the upper roof to the lower roof. When the rear gutters were clean, defendant reminded plaintiff to hammer the gutter nails. She watched him perform this work to ensure that the nails were properly hammered down. In all, defendant instructed plaintiff in the specific techniques he was to use in performing the work.

While plaintiff stood on the lower roof to nail the gutters, he accidentally stepped off the roof and fell to the ground. Plaintiff was severely injured as a proximate result of his fall. Plaintiff admitted that he most likely was not looking down at the roof when he fell.

In support of summary judgment, defendant argued that she "owed no duty to plaintiff, an independent contractor, to protect him from a risk inherent in the job he agreed to perform." In support of this proposition, defendant relied on Muhammad v. New Jersey Transit, 176 N.J. 185 (2003); Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993); Moore v. Schering Plough, Inc., 328 N.J. Super. 300 (App. Div. 2000); Rigatti v. Reddy, 318 N.J. Super. 537 (App. Div. 1999); Wolczak v. National Electric Products Corp., 66 N.J. Super. 64 (App. Div. 1961); and four unreported Appellate Division opinions.

Plaintiff urged that there were material disputes of fact precluding summary judgment, that defendant controlled the means and method of performing the work, and that defendant had a nondelegable duty of care. Plaintiff relied on Rigatti, supra, 318 N.J. Super. 537; Majestic Realty Associates, Inc. v. Toti Contracting Co., 30 N.J. 425, 431 (1959); Basil v. Wolf, 193 N.J. 38, 63-64 (2007); and Pfenninger v. Hunterdon Central Regional High School, 167 N.J. 230, 252 (2001). Plaintiff also distinguished the cases on which defendant relied.

The motion judge correctly stated the legal standard governing determination of a motion for summary judgment and then found that "there is no genuine dispute as to any material fact." After discussing case law respecting duty of care, including that of landowners to independent contractors, the judge found that defendant did not owe a duty of care to plaintiff:

> Clearly, from my review of the facts, the cause of the plaintiff's fall, admittedly, was his failure to make proper observations as to his footing resulting in his falling from the roof. Certainly, falling from a roof is a hazard incidental to repairing a roof. Certainly, the plaintiff understood the hazards of the job which he agreed to accept.
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> I find that the defendant in this case did not exercise the requisite amount of control to substantiate any duty of care and/or any liability on her part, specifically, the undisputed facts are as follows, as I find them to be in the record provided.
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> Plaintiff was hired to clean the gutters, to repair a gutter and/or to install Christmas lighting. The defendant provided the plaintiff with a hammer, I believe nails, plastic bags in which to place the refuge or the substance removed from the gutters and indicated to him that she did not have a ladder, for purposes of accessing the roof or the areas to be repaired. Also, [she] indicated to him that in the past other workers or independent contractors she hired accessed the roof through a window and, thereafter, showed the individual — provided to the individual access to the subject window.
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> The plaintiff argues that the defendant had a duty not to tell plaintiff that you could access the roof through a window and if, in fact, the plaintiff was injured while accessing the roof through the window, perhaps that argument might have some substance or some persuasion, however, accessing the roof through the window had absolutely no connection to or relation to or did in any way proximately cause the plaintiff's fall. The plaintiff's fall, again, admittedly, was caused by his own lack of making — his failure, I should say, to make proper observations as he was stepping from one roof onto the other.
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> The acts and/or assistance provided by the defendant to the plaintiff pursuant to the [Muhammad] case is tantamount to nothing other than or no more than supervision to insure [sic] that the work contracted for was, in fact, performed.
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> I find unpersuasive plaintiff's arguments that her providing a ladder, a hammer, nails and plastic bags, as well as aiding plaintiff or assisting the plaintiff in removing the filled plastic bags from the roof would, again, tantamount to the requisite control and supervision required under all of the aforementioned cases to infer any liability on the defendant.
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> I find otherwise with tantamount to a ruling which is a direct contradiction to all of the aforementioned authorities cited. For those reasons, the application will be granted.

Plaintiff subsequently filed a notice of motion for reconsideration, which the judge considered on October 8, 2009. Plaintiff called the judge's attention to Sanna v. National Sponge Co., 209 N.J. Super. 60 (App. Div. 1986), and Izhaky v. Jamesway Corp., 195 N.J. Super. 103 (App. Div. 1984), as requiring denial of summary judgment. The judge found that neither case had any significance or application to the matter. He noted that both cases arose in commercial situations and that the hazardous condition in each case was created by the defendant. He concluded that plaintiff had failed to meet the standard for reconsideration and denied the motion. This appeal followed.

Plaintiff contends that the judge erred in failing to apply the Wolczak[2] analysis to the facts of the case and improperly made fact-findings and weighed the evidence. He asserts that by participating in the work, defendant assumed responsibility to provide plaintiff with a safe place in which to do the work, requiring a trial on the merits.

Defendant responds that she was a residential property owner who owed no duty to plaintiff, an independent contractor, beyond the duty a property owner would owe a business invitee. Because the risk was inherent in the work plaintiff agreed to perform, she urges that the judge was required to grant summary judgment to her.

In reviewing a ruling on a summary-judgment motion, we apply the same standard as that governing the trial court. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 402 (App. Div. 1988), certif. denied, 115 N.J. 59 (1989).

Summary judgment "is designed to provide a prompt, businesslike and inexpensive method of [resolving cases]." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Summary judgment is appropriate if "there is no genuine issue as to any material fact" in the record. R. 4:46-2(c).

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.
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> [Ibid.]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), outlined the standard for deciding a summary-judgment motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Where there is a dispute in the evidence, the court must assume that the non-moving parties' assertions of fact are true and "must grant all the favorable inferences to the non-movant." Id. at 536. The determination then is whether the evidence "`is so one-sided that one party must prevail as a matter of law.'" Ibid. (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

"[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts § 282 (1965). When a person fails to take reasonable precautions to prevent causing harm to another, that person acts negligently. Id. § 284.

> To determine whether a defendant's conduct is negligent, we consider what a "prudent man" would have done in the defendant's circumstances. Weinberg v. Dinger, 106 N.J. 469, 484 (1987). In addition to showing that a defendant failed to act with reasonable care, a plaintiff must show that a defendant owed the injured party a duty of care. Kelly v. Gwinnell, 96 N.J. 538, 548 (1984). Traditionally, courts have determined the circumstances under which a defendant owes a legal duty to another. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996). Similarly, the scope of the duty owed is a matter of law. Kelly, supra, 96 N.J. at 552.
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> [Pfenninger, supra, 167 N.J. at 240.]

The formulation of a duty of care and its imposition derive from considerations of public policy and fairness to the litigants. Hopkins, supra, 132 N.J. at 439.

> Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. [Goldberg v. Hous. Auth. of Newark, 38 N.J. 578, 583 (1962)]. That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. Ibid. The analysis is both very

> fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.
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> [Ibid.]

In determining whether a duty of care is owed to an injured person, a judge must consider "the relationship of the parties, the nature of the risk—that is, its foreseeability and severity—and the impact the imposition of a duty would have on public policy." Dunphy v. Gregor, 136 N.J. 99, 108 (1994) (citing Goldberg, supra, 38 N.J. at 583).

Here, the risk of falling off the roof was clearly foreseeable and was likely to have severe consequences. Indeed, defendant urges that the risk was inherent in the nature of the work. The foreseeability of this risk "is the indispensable cornerstone of any formulation of a duty of care, [although] not all foreseeable risks give rise to duties." Ibid. Further, the imposition of a duty here will have no adverse impact on any public policy; defendant has not urged otherwise. Both of these factors support imposing a duty of care on defendant. Ibid. Thus, the relationship of the parties requires careful consideration.

Defendant contends that plaintiff was an independent contractor to whom she owed no duty of care beyond that owed by a property owner to a business invitee. Plaintiff urges, on the other hand, that he was a casual employee to whom defendant owed a duty to provide a safe means and method for performing the work.

> The important difference between an employee and an independent contractor is that one who hires an independent contractor has no right of control over the manner in which the work is to be done, it is to be regarded as the contractor's own enterprise, and he, rather than the employer is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing it.
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> [W. Page Keeton et al., Prosser and Keeton on the Law of Torts[] § 71 (5th [ed. 1984).]
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> The status of independent contractor is "characterized by the attributes of self-employment and self-determination in the economic and professional sense." Rokos v. State, Dep't of Treasury, 236 N.J. Super. 174, 181 (App. Div. 1989).
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> [Baldasarre v. Butler, 132 N.J. 278, 291 (1993).]

Our Supreme Court in Bahrle v. Exxon Corp., 145 N.J. 144, 156-57 (1996), again addressed this distinction.

> An independent contractor is a person "who, in carrying on an independent business, contracts to do a piece of work according to his own methods without being subject to the control of the employer as to the means by which the result is to be accomplished but only as to the result of the work." Wilson v. Kelleher Motor Freight Lines, Inc., 12 N.J. 261, 264 (1953); see also AT&T v. Winback [&] Conserve Program, Inc., 42 F.3d 1421, 1435 (3d Cir. 1994) (defining independent contractor), cert. denied, [514 U.S. 1103], 115 S. Ct. 1838, 131 L. Ed. 2d 757 (1995).; [sic] Restatement (Second) of Agency § 2(3) (1958) (same); 41 Am. Jur. 2d Independent Contractors § 1 (same). The employer-independent contractor relation-ship, then, differs from the employer-employee relationship, in which the employer controls not only the result, but also the means of achieving it. Wilson, supra, 12 N.J. at 264; AT&T, supra, 42 F.3d at 1435; Restatement (Second) of Agency[, supra,] § 2(2).
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> [Id. at 157; see also Muhammad, supra, 176 N.J. at 196 (recognizing that independent contractors work according to their own methods without being controlled by the employer as to the means of doing the work); Rigatti, supra, 318 N.J. Super. at 542.]

For an independent contractor, the landowner owes a "`duty to conduct a reasonable inspection to discover latent dangerous conditions' as well as `to guard against any dangerous conditions . . . that the owner either knows about or should have discovered.'" Parks v. Rogers, 176 N.J. 491, 497-98 n.3 (2003) (quoting Hopkins, supra, 132 N.J. at 434); see also Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 121 (2005).

"As a general rule, a landowner has `a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.'" Rigatti, supra, 318 N.J. Super. at 541 (quoting Kane v. Hartz Mountain Indus., 278 N.J. Super. 129, 140 (App. Div. 1994), aff'd o.b., 143 N.J. 141 (1996)). "This general rule operates to protect individuals performing

work on the premises of the landowner, most commonly independent contractors and their employees." Ibid. (citations omitted); see also Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 462 (App. Div.), certif. denied, 158 N.J. 685 (1999). However, "`[t]he landowner is under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work.'" Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 318 (App. Div.) (alteration in original) (citation omitted) (quoting Sanna, supra, 209 N.J. Super. at 67), certif. denied, 146 N.J. 569 (1996); see also Rigatti, supra, 318 N.J. Super. at 541-42.

If plaintiff were an independent contractor, we would have little doubt that the motion judge would have been correct in granting summary judgment as falling off a roof is an inherent risk of climbing upon one to perform work. However, drawing all inferences in favor of plaintiff, it is not entirely clear that he was an independent contractor as a matter of law. This is so because there is no evidence that plaintiff was "`carrying on an independent business,'" or that he "`contract[ed] to do a piece of work according to his own methods without being subject to the control of the employer as to the means by which the result is to be accomplished but only as to the result of the work.'" Bahrle, supra, 145 N.J. at 157 (quoting Wilson, supra, 12 N.J. at 264).

A reasonable jury could well conclude from the facts before us that plaintiff was no more than a "casual employee." If work is not being performed in connection with any business of the employer, as was the case here, then work is "casual" and outside the scope of the Workers' Compensation Act if it is "not regular, periodic or recurring." N.J.S.A. 34:15-36; see also Thompson v. G. Correale & Sons, Inc., 130 N.J.L. 431, 433 (Sup. Ct. 1943); Gray v. Greenwood, 129 N.J.L. 596, 597-98 (Sup. Ct.), aff'd o.b., 130 N.J.L. 558 (E. & A. 1943). There is no evidence before us suggesting that this work, arranged through plaintiff's mother, was "regular, periodic or recurring."

In such a case, the employer's duty to the employee is not determined by the employee's status vis-á-vis the land. Rather, the employer owes his or her employee a general duty of care under all of the circumstances of the case. See, e.g., Cicalese v. Lehigh Valley R.R. Co., 75 N.J.L. 897, 902 (E. & A. 1908) (noting the duty of a master-employer "to take care that the place in which his servant is to work shall be reasonably safe"); Snyer v. N.Y. & N.J. Tel. Co., 73 N.J.L. 535, 536-37 (E. & A. 1906) (finding that an employer owed its employee "a duty to take reasonable care that the places in which it employed him to work were safe for the work which he was to do"); Burns v. Del. & Atl. Tel. & Tel. Co., 70 N.J.L. 745, 749 (E. & A. 1904) (recognizing that an employer's duty to exercise reasonable care extends to making "the system or method adopted by the employer for the doing of the work" reasonably safe for the employee); Conrad v. Robbi, 341 N.J. Super. 424, 438-39 (App. Div.) (recognizing right of minor to elect common-law right of action under N.J.S.A. 34:15-10), certif. denied, 170 N.J. 210 (2001); Thompson v. Family Godfather, Inc., 212 N.J. Super. 270, 276 (Law Div. 1986) (noting right of minor under N.J.S.A. 34:15-10 to sue employer in tort for injuries suffered at work); Cernadas v. Supermarkets Gen., 192 N.J. Super. 500, 503-04 (Law Div. 1983) (same); Harrison v. Cent. R.R. Co., 31 N.J.L. 293, 300 (Sup. Ct. 1865) (concluding that "an employer contracts with his employee to use reasonable diligence to protect him from unnecessary risks, and . . . for the omission of such diligence, which is equivalent to negligence or want of care, he will be answerable to the action of such employee for all the damages which may ensue").

Negligence is simply conduct that falls below the standard of care "established by law for the protection of others [from unreasonable risk of harm]." Harpell v. Pub. Serv. Coordinated Transp., 20 N.J. 309, 316 (1956) (citation and internal quotation marks omitted); see also Restatement (Second) of Torts, supra, § 282. The defendant's conduct is compared with that which a hypothetical person of reasonable vigilance would do under the same or similar circumstances. McKinley v. Slenderella Sys. of Camden, N.J., Inc., 63 N.J. Super. 571, 579 (App. Div. 1960); Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953), aff'd o.b., 14 N.J. 526 (1954). "The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account; negligence is a failure to do what the reasonable person would do `under the same or similar circumstances.'" Keeton et al., supra, § 32 (footnote omitted).

We cannot say as a matter of law that the method and means specified by defendant were free of all negligence in the circumstances. A reasonable jury could readily conclude that plaintiff was indeed a casual employee of defendant and that defendant was negligent in failing to provide plaintiff with a long ladder from which to perform the assigned tasks. As a consequence, the grant of summary judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

[1] Defendant Bazyli Tymczyna died prior to entry of the summary judgment order, and on September 21, 2009, plaintiff agreed to dismiss him from this action. We shall hence refer to his wife, Olga Tymczyna, as defendant.

[2] Wolczak, supra, 66 N.J. Super. 64.