Circuit Court for Baltimore City
Case No. 24-C-20-000676

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 440

September Term, 2020

ANDREA JO HANCOCK, *et al.*

v.

MAYOR AND CITY
COUNCIL OF BALTIMORE, *et al.*

Friedman,
**Gould,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: October 1, 2021

** Judge Steven B. Gould, now serving on the Court of Appeals, participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a specially assigned member of this Court.

The general rule is that the employer of an independent contractor is not liable for the acts and omissions of the contractor and its employees. This rule makes sense, as that's often the point of hiring an independent contractor, instead of giving the job to an employee. This case puts the general rule to the test. More precisely, this case puts the many exceptions of that rule to the test.

Tragically, it's the untimely and heartbreaking death of Kyle Hancock that puts these issues before this Court. Kyle, a 20-year-old young man, was buried alive while working at an excavation site. Kyle was the employee of the contractor hired by the city government to fix a clogged pipe buried deep in the ground. Kyle's employer was negligent for failing to ensure the excavation wall was properly supported. But recourse in a tort action against his employer is barred by Maryland's workers' compensation statute. Thus, one question here is whether under the facts alleged in the complaint, the city government can be held liable for failing to exercise reasonable care in hiring a contractor—Kyle's employer—who allegedly lacked the skill and qualifications to do the job safely. The other question is whether a subcontractor brought in by Kyle's employer to help with the job, who recognized the danger but failed to warn Kyle or take steps to mitigate it, can be held liable.

The circuit court answered both questions in the negative. After careful consideration of the factual allegations and governing principles of law, we are constrained by Maryland law to agree. We shall therefore affirm the judgment of the circuit court.

BACKGROUND FACTS AND PROCEEDINGS

THE INCIDENT[1]

In 2014, appellee the Mayor and City Council of Baltimore City (together, the "City") and R.F. Warder, Inc. ("Warder") entered into a contract for Warder to perform repairs and maintenance for the City's plumbing and heating systems (the "Contract"). Appellee Sutton Building Solutions, LLC ("SBS") was Warder's designated minority contractor under the Contract at all times relevant to this case.[2]

Pursuant to the Contract, on May 29, 2018, the City contacted Warder to unclog a pipe at the Clifton pool. The next day, Kyle Hancock[3] and Kenneth Walko, a journeyman plumber at Warder, went to the jobsite to assess the problem. Mr. Walko determined that the clog was likely caused by a collapsed pipe. As a result, the job was more complicated than originally anticipated, and Mr. Walko concluded that a rig would be necessary to excavate the area to reach the collapsed pipe. Warder assigned its Technical Services/Project Manager, Joseph Hren, to supervise the project. Mr. Walko told Mr. Hren that he anticipated that the excavation would need to be approximately 15 feet deep.

Later that same day (May 30), Mr. Walko spoke with Wallace Stephenson, the Facility Maintenance Coordinator for the Baltimore City Recreation and Parks, about the

[1] The facts set forth in this section are drawn from the allegations in the complaint.

[2] Appellee Keith Sutton is SBS's sole principal. (SBS and Mr. Sutton are together referred to as "Sutton").

[3] In this opinion, we refer to Kyle Hancock as "Kyle." We intend no disrespect from calling him by his first name. It is simply a way to differentiate him from the parties by the same last name that have sued on his behalf.

plan to excavate the site. Mr. Stephenson approved this course of action without first inquiring "about R.F. Warder's and/or SBS' experience digging excavations and never determined whether R.F. Warder and SBS had the requisite knowledge, education and experience to dig the required excavation."

The repair began on June 4, 2018. Kevin "Pat" Owens, a journeyman plumber at Warder, was assigned the task of operating the excavator. That afternoon, Mr. Owens used the excavator to dig while Mr. Walko used a bobcat to move the displaced dirt. By the end of the day, the excavation was eight feet deep, 20 feet long, and 15 feet wide.

Early the next morning, Mr. Stephenson toured the jobsite with Mr. Walko and Kyle. As they walked around the excavation site, Mr. Walko told Mr. Stephenson not to go "too close to a certain area" because the ground was very soft and had been breaking apart. Several hours later, Mr. Hren called Sutton to work on the jobsite, and informed him that "they had a big project going on involving an excavation."

Shortly thereafter, Mr. Owens moved the excavator away from the hole, and decided "that the crew would need to enter the hole to dig a better channel for water that was leaking from a pipe that was broken during the excavation process."

At approximately 1:15 p.m., Mr. Walko was the first person to enter the excavation. At that point, the excavation was at least 15 feet deep, and at ground level, it was approximately 40 feet long, and 24 feet wide. The west side of the excavation was sloped and the east side was nearly vertical. As a result, the bottom of the excavation was only ten to twelve feet long and six to eight feet wide.

Mr. Owens and Kyle joined Mr. Walko in the excavation and began digging around the pipe with hand shovels. Mr. Sutton arrived at approximately 1:45 p.m. and was updated on the job by Warder's crew. Mr. Sutton was instructed to "assist with the excavation, including clearing the dirt around the crushed pipe at the bottom of the excavation." Kyle was digging on the east side of the excavation—the side that wasn't sloped. Mr. Sutton "was to dig on the west end of the excavation," the sloped side. Mr. Sutton looked at the site and stated "out loud, but to no one in particular, that this was not safe." Nobody responded to his comment. Mr. Sutton proceeded to enter the excavation using the ramp on the west side. "Despite recognizing the dangerousness of the situation, including the unsafe nature in which the excavation had been dug and the significant risk that the east wall that was nearly vertical could collapse," Mr. Sutton took no action to stop the work "and/or advise Kyle to exit the excavation until all applicable laws, regulations, industry standards and the standard of care regarding excavations had been met and the danger had been eliminated." Instead of taking such action or speaking up, "Mr. Sutton consciously decided that he was going to stay a safe distance away from the vertical east wall so that if it collapsed, he would not be hurt."

At approximately 3:15 p.m., Mr. Sutton finished the work on his side and was looking at Kyle when he noticed the vertical east wall starting to give way. He yelled for Kyle to run. Kyle turned around, recognized the danger, and tried to run. Unable to escape, Kyle was buried alive under tons of dirt and debris from the collapse of the east wall. Mr. Sutton called 911, and others jumped into the excavation and attempted to dig by hand to rescue Kyle, but after the fire department arrived, they were instructed to stop their efforts

because the excavation was unsafe. Kyle was discovered approximately ten hours later, 18 feet into the excavation. He died of asphyxiation.

THE COMPLAINT

In February 2020, appellant Andrea Jo Hancock, Kyle's mother, individually and as personal representative of Kyle's estate, along with Kenneth Hancock, Kyle's father,[4] and through co-personal representatives, Jennifer Hancock and Courtney Hancock (collectively, the "Hancocks") filed suit against the City and Sutton, alleging four counts, each sounding in negligence.[5] As to the negligence count against the City, the complaint alleged that the City had a duty to Kyle to use reasonable care in hiring a qualified contractor to properly and safely perform the excavation work. The complaint alleged the "laws, regulations and [applicable] industry standards" for excavations of this kind required some combination of "sloping, shoring, benching and/or the use of trench boxes" to prevent a calamity of the sort that claimed Kyle's life. These standards, the complaint alleged, all of which were designed to protect "a specific class of persons which included Kyle," were all violated, and as a result the east wall caved in and killed Kyle.

The complaint alleged that Warder was not competent and qualified to perform the excavation work safely and properly, and that the City knew this. The complaint also alleged that, on a prior job for the City, the City's supervisor, John Habicht, noticed that

[4] Kenneth Hancock died after the litigation commenced.

[5] Count 1 was a survivor action against the City. Count 2 was a survivor action against Mr. Sutton. Count 3 was a survivor action against SBS under a theory of vicarious liability, and Count 4 was a wrongful death action against each defendant.

Warder had committed the same mistake at an excavation of seven feet. Mr. Habicht knew that the failure to use cave-in protection was a violation of "applicable safety rules and industry standards . . . but nonetheless hired [Warder] to perform the excavation at the Clifton Park pool which resulted in Kyle's death."

Thus, the complaint alleges, the City breached its duty to Kyle by failing to vet Warder to ensure it was qualified for the job and by failing to select and/or hire a competent and qualified contractor to properly and safely do the job. The complaint alleges that as a result of the City's negligent hiring of Warder and Warder's predictable negligence at the excavation site, Kyle suffered pre-impact flight, severe and conscious physical pain and suffering, severe mental anguish, injuries, and suffocation.

As to Sutton, the complaint alleged that Mr. Sutton failed to ensure and maintain safety at the jobsite, failed to make sure the work was performed in a safe and appropriate manner, and failed to make sure that Warder had the requisite knowledge, training, and experience to perform the work. The complaint alleged that Mr. Sutton was liable for his own negligence, for which SBS was vicariously liable.

THE CITY'S MOTION TO DISMISS

The City moved to dismiss, alleging that the complaint failed to state a claim upon which relief could be granted. The City's motion addressed the duty element of a negligence cause of action. The City acknowledged that it owes a duty to "employ competent and careful contractors," but contended that although such duty extended to "third parties," it did not extend to the employee of a contractor "who created the dangerous condition that resulted in the injury." For that proposition, the City relied primarily on

Rowley v. Mayor and City Council of Balt., 305 Md. 456, 461 (1986), as well as other authorities, including cases from other jurisdictions and certain sections of the RESTATEMENT (SECOND) OF TORTS, particularly section 411.

The Hancocks opposed the City's motion, arguing among other things that the Court in *Rowley*, 305 Md. at 470, limited its holding to the facts of the case and stated that "[a]n owner who employs an independent contractor is already liable to *all* third persons, including employees of the independent contractor, for his or her own negligence in the hiring of the independent contractor and for injuries resulting from any latent defect on the land." According to the Hancocks, this statement "compel[ed] the denial" of the City's motion.

The Hancocks also distinguished the authority relied upon by the City, arguing that that authority applied to claims in which the potential liability of the employer was based on vicarious liability of the contractor, not based on the employer's own negligence in selecting and hiring the employer.

In addition, the Hancocks relied on *Bagley v. Insight Commc'ns Co., L.P.*, 658 N.E.2d 584 (Ind. 1995), *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943 (Ind. 2005), *Sievers v. McClure*, 746 P.2d 885 (Ala. 1987), and *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1339 (D.C. 1997), cases from other jurisdictions, in which courts extended the owner's duty to employees of independent contractors..

SUTTON'S MOTION TO DISMISS

Sutton also moved to dismiss, arguing that the complaint failed to state a claim upon which relief could be granted because it failed to "properly allege" a duty owed by Sutton

to Kyle. In support of its motion, Sutton relied on *Parker v. Neighborhood Theatres, Inc.*, 76 Md. App. 590, 596 (1988), which it claimed, "articulated a 'created or controlled' standard for assessing the liability of one subcontractor to an employee of another subcontractor for an injury on a multi-contractor worksite." Sutton argued that because the complaint did not allege that Sutton either created or controlled the excavation site or the dangerous condition, Sutton owed no duty to Kyle.

In opposition to Sutton's motion, the Hancocks argued that Sutton's reliance on *Parker* was misplaced, because the Court in *Parker*, in framing the created or controlled standard, incorrectly interpreted the Court of Appeals' opinion in *Finkelstein v. Vulcan Rail & Constr. Co.*, 224 Md. 439 (1961). The Hancocks contended that the duty as articulated by *Finkelstein* did *not* include the elements of "create" or "control."

Relying on the principle that this Court's opinions must yield to conflicting opinions from the Court of Appeals, the Hancocks argued that *Finkelstein*'s articulation of the duty remained the law in Maryland, and, in support of that notion, the Hancocks pointed to *Maryland Sales & Service Corp. v. Howell*, 19 Md. App. 352, (1973) as an example where this Court correctly interpreted and applied *Finkelstein*. The Hancocks maintain that, properly construed, the duty articulated by *Finkelstein* does not include elements of "create" or "control."

Pointing to the allegations about Mr. Sutton's work at the job site, the Hancocks also argued that, even under the more stringent *Parker* standard, the complaint alleges that Sutton participated in creating the dangerous condition that claimed Kyle's life.

THE CIRCUIT COURT'S RULING

The Ruling on the City's Motion

The court delivered its ruling from the bench after hearing argument on the motion. The court focused on the relevant provisions from the Restatement, and whether Kyle was included within the class of people—"third persons"—to whom the City owed a duty of care in selecting and hiring contractors. The court's analysis was detailed and thoughtful, and in addition to the various Restatement provisions and Maryland caselaw, included a discussion of cases from our sister states. In granting the City's motion, the court concluded that "the law does not support a cause of action under Section 411 of the Second Restatement of Torts by an employee of an independent contractor against the employer in this case."

The court reduced its decision to a written order granting the City's motion.

The Ruling on Sutton's Motion

After hearing argument at a separate hearing, the circuit court provided another detailed and thoughtful basis for granting Sutton's motion. The court analyzed *Finkelstein*, *Parker*, and *Maryland Sales*, and, contrary to the Hancocks' argument, perceived no conflict between *Parker* and *Finkelstein*. The court noted that, at bottom, each case implicated the rule stated in *Finkelstein*, that "a subcontractor can owe a duty to the employees of another contractor, but that that duty is no greater than one owed by an employer to employee or an owner of real property to invitee."

According to the court, "[i]mplicit in an employee/employer relationship, and implicit in a real property owner and invitee relationship is ownership and control, just by

definition of employer and then property owner." The court further observed that the common denominator in each case "was that the defendant, or the particular contractor or subcontractor, created a hazard."

The court then determined that at best, the relationship between the parties was analogous to a co-worker because there was no allegation that Sutton "created, owned, or controlled the hazard in question." The court stated:

> This is not a special duty case, whereby just because the defendant in this case holds the title "contractor," there's automatically a duty imposed. None of the case law would direct us to that conclusion, so that it would just be illogical. Just because you are a contractor, if you're at a particular site, then you automatically owe a duty to any other contractor or employee that's at that [site]. That's just illogical. And it's just an unreasonable way to interpret the law.
>
> And so I think the way that this is pled, the plaintiffs have pled, you know, that because there exists in the realm of tort a co-contractor liability, then that they can just allege that there wasn't a – there was a duty, and the issue of whether or not they're correct about that duty would be otherwise proper for a jury or for summary judgment.
>
> But to the contrary – and I think that's a reasonable argument, but this Court is going to hold that the law is clear as to the type of relationship that must exist between the contractors and the co-contractors and not just that they hold the title "contractor." And here the complaint itself does not allege facts to support that relationship."
>
> And so for that reason, the Motion to Dismiss is granted.

The court subsequently entered a written order granting the motion.

The Hancocks timely appealed. On appeal, they present two questions:

1. Does an employee of an independent contractor have a cause of action against the contractor's employer for negligent hiring?

2. When a contractor recognizes [a] dangerous job site conditions, does the contractor owe a common law duty to employees of a co-contractor to identify, warn against, or mitigate the hazard?

STANDARD OF REVIEW

Maryland Rule 2-322(b)(2) provides that a motion to dismiss may be granted if a complaint fails "to state a claim upon which relief can be granted[.]" When reviewing the granting of a motion to dismiss,

> a court must assume the truth of, and view in a light most favorable to the non-moving party, all well-pleaded facts and allegations contained in the complaint, as well as all inferences that may be reasonably drawn from them, and order dismissal only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff, *i.e.*, the allegations do not state a cause of action for which relief may be granted.

Bacon v. Arey, 203 Md. App. 606, 651 (2012) (quoting *McHale v. DCW Dutchship Island*, LLC, 415 Md. 145, 155-56 (2010)).

We review a court's decision granting a motion to dismiss de novo. *Lamson v. Montgomery Cnty.*, 460 Md. 349, 360 (2018).

DISCUSSION

I.

THE ACTION AGAINST THE CITY

A.

THE HANCOCKS' CONTENTIONS

Framing the issue as one of first impression, the Hancocks ask us to "hold that an employer's duty to exercise reasonable care in hiring an independent contractor extends to the contractor's employees." The Hancocks assert that their suggested holding is a logical extension of "general tort duty principles" and is supported by decisions from a minority of our sister states.

The Hancocks acknowledge the general rule set forth in section 409 of the RESTATEMENT (SECOND) OF TORTS (1965) that "the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants." They explain that this general rule is swallowed up by the many exceptions: sections 410 through 415 sets forth the exceptions when the employer commits the negligence, and sections 416 through 429 lists the exceptions predicated on vicarious liability. Of the exceptions, the Hancocks embrace section 411, which provides, in relevant part, that "[a]n employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor . . . to do work which will involve a risk of physical harm unless it is skillfully and carefully done[.]" The Hancocks point out that this exception was recognized in *Perry v. Asphalt & Concrete Servs., Inc.*, 447 Md. 31, 51 (2016). But no Maryland case has, according to the Hancocks, determined "whether the negligently hired contractor's employees are 'third persons' to whom the employer of the contractor owes a duty of care in hiring." In this appeal, the Hancocks urge us to resolve that issue and determine that such a duty is owed.

B.

ANALYSIS

The Court of Appeals has defined duty as "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *Remsburg v. Montgomery*, 376 Md. 568, 582-83 (2003) (citations and quotations omitted). In determining the existence of a duty, the most significant factors are nature of

the foreseeable harm and the relationship between the parties. *Jacques v. First Nat'l Bank of Maryland*, 307 Md. 527, 534-35 (1986). Other factors include:

> the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Village of Cross Keys, Inc. v. U.S. Gypsum Co., 315 Md. 741, 752 (1989) (quoting *Tarasoff v. Regents of University of California*, 551 P.2d 334, 342 (1976)).

These considerations came into play in *Rowley v. Mayor and City Council of Balt.*, 305 Md. 456, 461 (1986), which both the City and the Hancocks discuss and, to varying degrees, rely upon in their briefs. At the outset, it is important to note that, as the Hancocks acknowledge, there does not appear to be a reported Maryland opinion that determined whether a hired contractor's employees are 'third persons' to whom the employer of the contractor owes a duty of care in hiring a contractor, and *Rowley* is no exception. *Rowley* does, however, address the duty of the employer of an independent contractor to the employees of an independent contractor under a set of facts analogous to the case at bar. Because the Court of Appeals provided a thorough analysis of the issue, *Rowley* provides a helpful analytical framework for addressing the specific question raised here.

Ms. Rowley was a security guard at the Baltimore Convention Center ("Center"), which was owned by the City. *Id.* at 460. Ms. Rowley was not, however, employed by the City; she was employed by a company referred to as "FMI," which, in turn, contracted with the City to provide management and operational services at the Center. *Id.* at 460-61.

Ms. Rowley was "beaten, raped and robbed by an unknown assailant at 2:20 a.m. . . ." *Id.* at 460. The assailant entered through one of four perimeter doors accessible by employees and delivery vehicles. *Id.* The assailant was able to make his way into the Center because one the doors—the one closest to the security office—had a defective locking device. *Id*. FMI had been aware of that defect for 11 months prior to Ms. Rowley's vicious attack. *Id.*

The City's contract with FMI required it to provide all routine maintenance and repairs, which would have included the defective locking device. *Id.* at 461. In her negligence action against the City, Ms. Rowley alleged that the City owed her a duty "to provide a safe and secure place for the general public and people working in the . . . Center." Ms. Rowley also alleged that the City knew that the building was unsafe and not secure but neglected to take remedial action. *Id*. The case made it to trial, but it never made it to the jury because the trial court granted the City's motion for judgment at the close of Ms. Rowley's case-in-chief. *Id.* This Court affirmed, and the Court of Appeals granted certiorari to determine "whether one who engages an independent contractor may be liable to an employee of that contractor for injuries causally related to the defective condition of the premises resulting from the negligent failure of the contractor to accomplish the repairs he was directed and empowered to make by the terms of the contract." *Id*. at 459.

The Court began its analysis by acknowledging the "general rule," drawn from RESTATEMENT (SECOND) OF TORTS section 409 (1965), "that the employer of an independent contractor is not liable for the negligence of the contractor or his employees." *Rowley*, 305 Md. at 461. The Court noted that the most common explanation for the

general rule "is that, since the employer 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 the risk." *Id*. at 462.

The Court then observed that many exceptions had been carved out of the general rule, so much so that the exceptions "have practically subsumed the rule." *Id*. The Court adopted the Restatement's approach which grouped the exceptions into three categories: "(1) Negligence of the employer in selecting, instructing, or supervising the contractor[,]" (2) Non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff[, and] (3) Work which is specially, peculiarly, or 'inherently' dangerous." *Id*. Each of these exceptions are addressed in sections 410 through 429 of the Restatement. *Id*.

Sections 410 through 415 address liability for an independent contractor's own negligence, one example of which would be the employer's negligent hiring or retention of the independent contractor. *Id*. at 462-63. Sections 416 through 429 address various forms of vicarious liability, that is, when the employer isn't negligent, but it is nevertheless held liable to the injured person for the independent contractor's negligence. *Id*. The Court found "instructive" the Restatement's explanation for the vicarious liability exceptions:

> The rules stated in . . . §§ 416–429, unlike those stated in . . . §§ 410–415, do not rest upon any personal negligence of the employer. They are rules of vicarious liability, making the employer liable for the negligence of the independent contractor, irrespective of whether the employer has himself been at fault. They arise in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of

> the work to the contractor. The liability imposed is closely analogous to that of a master for the negligence of his servant.
>
> The statement commonly made in such cases is that the employer is under a duty which he is not free to delegate to the contractor. Such a "non-delegable duty" requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted. Such duties have been recognized in a series of exceptions to the "general rule" of non-liability stated in § 409, which are stated in [§§ 416–429].

Id. at 462-63.

Ms. Rowley argued, and the Court agreed, that her claim was predicated on a form of vicarious liability and that the City "had a non-delegable duty to maintain the premises in a reasonably safe condition, and that the existence of that duty may be traced to several separate sources." *Id*. at 463. The issue, however, was whether that duty was owed to FMI's employees.

To answer that question, the Court first determined the status of the parties in relation to the property. As to the City, the "threshold question" was "whether the City was in possession and control of the building." *Id*. at 464. Section 328 of the Restatement recognizes three categories of possessors:

> (a) a person who is in occupation of the land with intent to control it or
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Id. at 464. The Court observed that the evidence showed that the City did not relinquish its possession of the Center to FMI, and therefore fell into the first category. *Id*.

As to Ms. Rowley, the issue was whether she was an invitee, licensee, or trespasser. "An invitee is a person invited or permitted to enter or remain on another's property for

purposes connected with or related to the owner's business[.]" *Id*. at 465. The Court determined Ms. Rowley was an invitee, which is generally the case with respect to employees of the contractor. *Id*. at 466. The Court noted that an owner has a duty to "exercise reasonable and ordinary care to keep his premises safe for the invitee and to protect him from injury caused by an unreasonable risk with the invitee, by exercising ordinary care for his own safety will not discover." *Id*. at 465. Such a duty is sometimes described as "non-delegable." *Id*. at 466. In this context, non-delegable doesn't mean that an owner is not permitted to delegate the *task* to a contractor; rather, it means that the owner cannot evade the *risk* associated with the task by allocating it to the contractor. *Id*.

The Court then turned to the specific situation—addressed in section 343 of the Restatement—where the invitee is the employee of an independent contractor hired by the owner. Sometimes called the "safe workplace" doctrine, the Court stated that "an employer has a duty to notify an employee of any latent or concealed dangers, provided he knows of the condition or with the exercise of ordinary care should have known of it." *Id*. at 465.

In *Rowley*, of course, the issue was not a latent or concealed danger at the workplace, but rather a safety hazard caused by the negligence of the independent contractor. The Court thus considered the liability imposed on the owner who delegates to an independent contractor the task of maintaining the safety of the premises. The Court identified three provisions of the Restatement that carved out exceptions to the general rule of the non-liability for the negligence of an independent contractor--sections 418, 422, and 425, which state:

§ 418 Maintenance of Public Highways and Other Public Places

> (1) One who is under a duty to construct or maintain a highway in reasonably safe condition for the use of the public, and who entrusts its construction, maintenance, or repair to an independent contractor, is subject to the same liability for physical harm to persons using the highway while it is held open for travel during such work, caused by the negligent failure of the contractor to make it reasonably safe for travel, as though the employer had retained the work in his own hands.
>
> (2) The statement in Subsection (1) applies to any place which is maintained by a government for the use of the public, if the government is under the same duty to maintain it in reasonably safe condition as it owes to the public in respect to the condition of its highways.
>
> § 422A Work Withdrawing Lateral Support
>
> One who employs an independent contractor to do work which the employer knows or should know to be likely to withdraw lateral support from the land of another is subject to the same liability for the contractor's withdrawal of such support as if the employer had retained the work in his own hands
>
> § 425 Repair of Chattel Supplied or Land Held Open to Public as Place of Business
>
> One who employs an independent contractor to maintain in safe condition land which he holds open to the entry of the public as his place of business, or a chattel which he supplies for others to use for his business purposes or which he leases for immediate use, is subject to the same liability for physical harm caused by the contractor's negligent failure to maintain the land or chattel in reasonably safe condition, as though he had retained its maintenance in his own hands.

Id. at 466-67.

The Court then explained that the policy animating these exceptions was the need to "protect innocent members of the public." *Id*. at 467. The Court then squarely addressed whether such exceptions should extend to the independent contractor's employees or subcontractors, noting that the majority of jurisdictions that addressed the issue had answered that question in the negative. *Id*. at 467-68. The Court focused on the rationale for the majority rule as described in opinions from two of our sister states: *King v. Shelby*

Rural Elec. Cooperative Corp., 502 S.W.2d 659 (Ky. 1973) and *Tauscher v. Puget Sound Power & Light Co.*, 635 P.2d 426 (Wash. 1981). The Court quoted both cases at length, which we need not do here, because the essence of both lengthy passages from those cases can be summarized as follows:

By statute, employees are already protected by the workers' compensation benefits for workplace injuries.[6] The injured worker's right to compensation for workplace injuries exists when the employer is *not* negligent, as well as when the employee *is* negligent. The cost for such benefits is factored into the price paid by the owner to the independent contractor. By statute, in return for such benefits, the employee cannot seek recovery from the employer in a separate tort action, even for the employer's own negligence. *Rowley*, 305 Md. at 469-70. Thus, if the employee had the right to impose tort liability on the party that hired the independent contractor, the resulting perverse effects would be two-fold. *First*, the employee would be placed in a better position than if he had been hired directly by the party who hired the independent contractor. *Second*, and relatedly, the owner would be subjected to greater liability for hiring the independent contractor than it would have been had it hired the employee directly. The unwelcome result is that owners would be less inclined to hire qualified and skilled independent contractors and instead more inclined to employ their own, and potentially less-skilled, workforce to perform the required task. *Id.* at 469-71.

[6] In Maryland, such benefits are required under Title 9 of the Labor and Employment Article of the Maryland Annotated Code.

After discussing and quoting from *King* and *Tauscher*, the Court turned to another instructive source that also concluded the exception did not apply to employees of the independent contractor—the Special Note in the Tentative Draft # 7 of the RESTATEMENT (SECOND) TORTS (1962). This Introductory Note stated:

> The other class of plaintiffs not included in this Chapter consists of the employees of the independent contractor. As the common law developed, the defendant who hired the contractor was under no obligation to the servants of the contractor, and it was the contractor who was responsible for their safety. The one exception which developed was that the servants of the contractor doing work upon the defendant's land were treated as invitees of the defendant, to whom he owed a duty of reasonable care to see that the premises were safe. This is still true. See § 343. In other respects, however, it is still largely true that the defendant has no responsibility to the contractor's servants. One reason why such responsibility has not developed has been that the workman's recovery is now with relatively few exceptions regulated by workmen's compensation acts, the theory of which is that the insurance out of which the compensation is to be paid is to carried by the workman's own employer, and of course premiums are to be calculated on that basis. While workmen's compensation acts not infrequently provide for third party liability, it has not been regarded as necessary to impose such liability upon one who hires the contractor, since it is to be expected that the cost of the workmen's compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.
>
> *Again, when the Sections in this Chapter speak of liability to 'another' or 'others,' or to 'third persons,' it is to be understood that the employees of the contractor, as well as those of the defendant himself, are not included. Id.* at 17–18 (emphasis added).

Rowley, 305 Md. at 471-72.

The Court in *Rowley* acknowledged that the Introductory Note was not authoritative, but nevertheless viewed it as "evidence . . . of the intent of the Restatement to limit and employer's liability under the exceptions." *Id*. at 472. The Court further stated that the final version of the Introductory Note "leaves the meaning of the words 'others,' 'another,'

and 'the public' undefined in order for each state to interpret the provisions according to their case law and workers' compensation statutes." *Id*. at 474.

And that—defining the meaning of 'others,' 'another,' and 'the public'—is what the Court in *Rowley* proceeded to do:

> We are not required to here determine whether the principles of §§ 416–429 should be interpreted so as to exclude, in every instance, the existence of a duty for the benefit of independent contractors and their employees. We hold that where, as here, the independent contractor has assumed responsibility for maintenance and repairs, and the harm has occurred to the contractor or his employee as a result of a defect arising from the failure of the contractor to make those repairs, nothing in §§ 416–429 operates to impose liability upon the person who hired the contractor. Moreover, comparing the duties contemplated by §§ 416–429 with those of a landowner (§ 343) or the closely related duty of an employer to furnish a safe workplace, we find no policy or other distinction that would justify a different result where the latter duties are involved. Thus, whether the duty to maintain premises in a reasonably safe condition arises [from] the status of landowner, or employer, or from the performance of a proprietary function by a governmental entity, the result is the same.

Id. The Court affirmed the judgment in favor of the City.

As the Hancocks point out, *Rowley* addressed the vicarious liability exceptions to the general rule of non-liability, not the direct negligence bucket of exceptions expressed in section 410 through 415 of the Restatement. Nevertheless, the facts in *Rowley* could be readily viewed through the lens of a negligent retention action akin to the claim brought by the Hancocks. Here, as in *Rowley*, the City owned the property and engaged an independent contractor to provide services thereon. Here, as in *Rowley*, the victim of the incident was the employee of the independent contractor. Here, as in *Rowley*, the underlying tragedy was allegedly caused by the independent contractor's negligence in its performance of a task it was hired to perform. Here, the City allegedly knew from prior

experience that the independent contractor does not properly support excavation walls at the job site; in *Rowley*, the City allegedly knew about the defective condition of the locking device for the 11 months leading up to the attack. Here, notwithstanding such knowledge, the City kept the independent contractor on the job even after the need for such an excavation became apparent, thereby exposing Kyle to an unreasonable risk of serious injury or death; in *Rowley*, notwithstanding its knowledge that the independent contractor had not fixed the defective door lock, the independent contractor remained employed under the contract, thereby exposing Ms. Rowley to an unreasonable risk of serious injury or death. Thus, when the titles of the causes of action are stripped away and this case is analyzed through the same prism through which the Court analyzed the facts in *Rowley*,[7] the same result obtains—that the City owed no duty to Kyle under the facts of this case as a matter of law.[8]

[7] *See* Md. Rule 2-303(3) ("All pleadings shall be so construed as to do substantial justice.").

[8] This would not be the first time in this context we cut through the label and analyzed the claim on its substance. In *Parker v. Neighborhood Theatres, Inc.*, 76 Md. App. 590, 593 (1988), discussed below, the plaintiff was employed as a laborer and injured when he fell through a hole. The plaintiff asserted multiple causes of action, including a direct negligence claim against the owner of the property. In assessing the owner's liability, we were not constrained by the plaintiff's characterization of the claim as one of direct negligence, and instead analyzed it as a disguised attempt to impose vicarious liability:

> Although [plaintiff] argues that [the owner's] retention of control creates direct liability by reason of the non-delegable duty imposed by section 414, it is, in reality, still a case of alleged vicarious liability, since the cause of appellant's injury was the failure of [the general contractor] to secure the opening until the smoke hole cover was installed.

We are not persuaded that section 411 of the Restatement staves off that result. Section 411 states:

> An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
>
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
>
> (b) to perform any duty which the employer owes to third persons.

The Hancocks contend that for purposes of section 411, the phrase "third persons" should include the employees of the independent contractor. At least with respect to the allegations made in their complaint, we disagree. Unlike several other exceptions to the general rule found in sections 410 through 429 in which the beneficiary of the exception is defined in broad and vague terms such as "another" or "others," section 411 limits its application to a more narrowly drawn circle defined as "third persons."[9] The phrase "third persons" describes one who is a stranger to the underlying relationship. Kyle was not a stranger to the relationship between the City and Warder.

Moreover, in *Rowley*, the Court favored the approach reflected in the draft Introductory Note that words like "others," "another," and "public" did not include the contractor's employee. Thus, it found nothing in sections 416 through 429 that "operate[d] to impose liability upon the person who hired the contractor." *Rowley*, 305 Md. at 474.

Id. at 600.

[9] *See, e.g.*, §§ 412 ("Failure to Inspect Work of Contractor after Completion"); 413 ("Duty to Provide for the Taking of Precautions against Dangerous Conditions Involved in Work Entrusted to Contractor"); 414 ("Negligence in Exercising Control Retained by Employer"); and 415 ("Duty to Supervise Equipment and Methods of Contractors or Concessionaire on Employer's Land Held Open to the Public").

Similarly, we have found nothing in section 411 that renders an employer liable to its independent contractor's employees.

Further, the policy considerations that animated the Court's analysis in *Rowley* apply with equal force to section 411. In *Rowley*, the Court stated that the policy supporting the vicarious liability sections was "to protect innocent members of the public." So too with section 411 and the other direct liability exceptions.

The same concerns discussed above pertaining to workers' compensation law would be implicated by the adoption of the Hancocks' proposed rule. As noted above, those concerns stem from the fact that the employer is shielded from direct claims from workers injured on the job, even when the injury is caused by the employer's negligence. Here, the Hancocks' cause of action is predicated on the City's alleged negligence. Thus, the workers compensation issues discussed in *Rowley* are implicated to the same extent here.

At bottom, we are persuaded that, from a factual standpoint, this case is sufficiently analogous to *Rowley* that, analytically, it makes no difference that *Rowley* invoked a vicarious liability exception and the Hancocks invoked a direct negligence exception. In addition, we have reviewed the authorities that adopted the minority view[10] advanced by the Hancocks and those that adopted the majority view[11] urged by the City. On balance,

[10] *See Sievers v. McClure*, 746 P.2d 885 (Ala. 1987), *Bagley v. Insight Communications Co., L.P.*, 658 N.E.2d 584 (Ind. 1995); *Fry v. Diamond Construction, Inc.*, 659 A.2d 241 (D.C. 1995), and *Tofoya v. Rael*, 193 P.3d 551 (N.M. 2008).

[11] *See Castro v. Serrata*, 145 F. Supp.2d 829 (S.D. Tex. 2000); *Matanuska Elec. Ass'n v. Johnson*, 386 P.2d 698 (Alaska 1963); *Cmty. Ass'n Underwriters of Am. v. Queensboro Flooring Corp.*, Civil Action No. 3:10-CV-01559, 2016 U.S. Dist. LEXIS 27648 (M.D. Pa. Mar. 4, 2016); *Camargo v. Tjaarda Dairy*, 25 P.3d 1096 (Cal. 2001);

the majority view of section 411 more closely aligns with the Court of Appeals' reasoning in *Rowley*. On the facts of this case, we therefore decline the Hancocks' invitation to extend the employer's duty to exercise reasonable care in hiring an independent contractor to the contractor's employees.

II.

THE ACTION AGAINST SUTTON

A.

THE PARTIES' CONTENTIONS

The Hancocks' claim against Sutton is predicated on the allegation that, as a subcontractor on this job, Sutton owed Kyle duties "similar to the duty owed by an employer to an employee or by the owner of real estate to an invitee on the premises," which "includes the duty to warn employees of any unreasonable risk which is either

Jones v. Schneider Nat'l, Inc., 797 N.W.2d 611 (Iowa Ct. App. 2011); *Payne v. Lee*, 686 F. Supp. 677 (E.D. Tenn. 1988); *Chapman v. Black*, 741 P.2d 998 (1987); *Lipka v. United States*, 369 F.2d 288 (2d Cir. 1966); *Carney v. Union Pac. R.R. Co.*, 77 N.E.3d 1 (Ill. 2016); *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258 (N.M. 1987); *Mentzer v. Ognibene*, 597 A.2d 604, 609 (Pa. Super. Ct. 1991); *Alvis v. City of Du Quoin*, 998 N.E.2d 722 (Ill. App. Ct. 2011); *Privette v. Superior Court*, 854 P.2d 721, 730-31 (Cal. 1993)(en banc); *Dillard v. Strecker*, 877 P.2d 371 (Kan. 1994); *Matteuzzi v. Columbus P'ship, L.P.*, 866 S.W.2d 128 (Mo. 1993) (en banc); *Sierra Pac. Power Co. v. Rinehart*, 665 P.2d 270 (Nev. 1983); *Tauscher*, 635 P.2d at 429-31; *Wagner v. Cont'l Cas. Co.*, 421 N.W.2d 835 (Wis. 1988); *Stockwell v. Parker Drilling Co.*, 733 P.2d 1029 (Wyo. 1987); *Vertentes v. Barletta Co.*, 466 N.E.2d 500 (Mass. 1984); *Conover v. N. States Power Co.*, 313 N.W.2d 397 (Minn. 1981); *Whitaker v. Norman*, 551 N.E.2d 579 (N.Y. 1989); *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445 (N.D. 1994); *Scofi v. McKeon Constr. Co.*, 666 F.2d 170 (5th Cir. 1982); *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936 (7th Cir. 1986); *Vagle v. Pickands Mather & Co.*, 611 F.2d 1212 (8th Cir. 1979), *cert. denied*, 444 U.S. 1033 (1980); *German v. Mountain States Tel. & Tel. Co.*, 462 P.2d 108 (Ariz. Ct. App. 1969); *Lopez v. Univ. Partners*, 63 Cal. Rptr. 2d 359 (Cal. Ct. App. 1997).

known to the subcontractor or that could have been discovered by reasonable inspection." For that proposition, they rely upon and quote from this Court's opinion in *Maryland Sales& Serv. Corp. v. Howell*, 19 Md. App. 352 (1973). The Hancocks claim that the rule articulated in *Maryland Sales* is grounded in the Court of Appeals' opinion in *Finkelstein v. Vulcan Rail & Constr. Co.*, 224 Md. 439 (1961). In particular, the Hancocks rely on this statement by the Court in *Finkelstein*:

> The duty owed by a subcontractor on a construction contract to the employees of other contractors on the job is similar to, and no greater than, that owed by an employer to an employee or the owner of real property to an invitee on the premises.

Id. at 441. The Hancocks also quote *Finkelstein* for the proposition that the "possessor of land is liable [for] harm to an invitee if the possessor only if he realizes that a potentially dangerous condition of which he is or should be aware constitutes an unreasonable risk to the invitee, has reason to believe the invitee will not discover or realize the risk and fails to warn the invitee." *Id*. at 442.

Sutton counters that the Hancocks have misinterpreted and/or misapplied *Maryland Sales* and *Finkelstein*. Sutton contends that the standard of liability applicable here was articulated in *Parker v. Neighborhood Theatres, Inc.*, 76 Md. App. 590 (1988). In *Parker*, this Court stated that "[t]he duty owed by a subcontractor, on a multiple-employer construction site, to employees of other contractors does not depend on knowledge of the danger, but on whether the subcontractor created or controlled the dangerous condition." *Id*. at 602. Sutton maintains that *Parker* neither contradicted *Finkelstein* nor misstated the law. Thus, Sutton argues, the trial court properly granted the motion to dismiss.

B.

ANALYSIS

The issue here is which standard is applicable: the "known or could have been discovered" standard urged by the Hancocks, or the "created or controlled" test promoted by Sutton. To answer that question, we will first summarize the salient facts and holdings from *Finkelstein*, *Maryland Sales*, and *Parker.*

Finkelstein involved the construction of the Baltimore Harbor Tunnel. 224 Md. at 440. The plaintiff was the employee of a subcontractor responsible for installing cables in the tunnel. *Id.* The plaintiff was walking on a catwalk when he tripped over a protruding bolt that had been installed by another subcontractor, Vulcan Rail and Construction Company ("Vulcan"). *Id*. at 440-41.

Vulcan was responsible for installing handrails, which it did by bolting them to the catwalk floor. *Id.* at 441. Vulcan first had to drill the holes that would receive the bolts. *Id*. The problem, however, was that the holes would get clogged with construction debris before the handrail could be installed. To prevent such clogging, Vulcan placed bolts in each hole. *Id*. The plaintiff tripped on one of the bolts installed for that purpose. *Id.*

The plaintiff sued Vulcan for negligence. Finding that the plaintiff failed to make a prima facie case, the trial judge directed a verdict in Vulcan's favor, and the plaintiff appealed. The Hancocks rely on the first sentence in the Court's explanation of its rationale for affirming the trial court:

> ***The duty owed by a subcontractor on a construction contract to the employees of other contractors on the job is similar to, and no greater than, that owed by an employer to an employee or the owner of real property to***

> ***an invitee on the premises.*** The rule that an employer must furnish his employee a reasonably safe place in which to work is qualified in application in situations where the place of work is a construction project, because of the common and necessary hazards there to be regularly encountered. The law holds no one to a higher responsibility than the fair and reasonable standard of his trade or undertaking. *Long Co. v. State Accident Fund*, 156 Md. 639, 652, 144 A. 775. The claimant offered no probative testimony that Vulcan's method of installation was not the ordinary method customarily employed or that it was not in accord with good practice in the trade, even after the trial judge allowed him to reopen his case in order to do so.

Id. at 441 (emphasis added).

The court further explained:

> The situation is analogous to that in *Morrison v. Suburban Trust Co*., 213 Md. 64, 66, 130 A.2d 915, 916, where the operator of a commercial garage was held not guilty of primary negligence because an invitee, fully familiar with the garage, fell over a jack handle lying on the floor of the garage. We said there: 'Ordinary care in the conduct of a garage does not require that the floor area used in the day by day operations be free of jack handles which, in the nature of the business, must constantly be used or, if it is not, that a warning of their presence must be given a visitor.' The opinion pointed out the possessor of land is liable to harm to an invitee only if he realizes that a potentially dangerous condition of which he is or should be aware constitutes an unreasonable risk to the invitee, has reason to believe the invitee will not discover or realize the risk and fails to warn the invitee. In considering whether the invitee will discover and realize the risk, the owner is entitled to assume that he will act as would a reasonable man.

Id. at 441-42. The Court held that "[t]here was no primary negligence and, if such negligence be assumed, the claimant assumed the risk." *Id.* at 442.

Maryland Sales involved the construction of a new roof on the Maryland Cup Corporation building in Baltimore County. 19 Md. App. at 353-54. The general contractor subcontracted with Maryland Sales & Service Corporation ("Maryland Sales") and Roofers, Inc. ("Roofers"). *Id*. Maryland Sales was hired to lay the metal roof deck, weld it into place, and cut holes in the roof deck to accommodate the skylights, ventilators, and

exhaust fans. *Id*. Roofers was hired to come in behind Maryland Sales to install insulation, and sequentially apply tar, felt, and a layer of slag. One of Roofers' employees, walking backwards as he was applying the felt with the spreading machine, fell through one of the holes cut by Maryland Sales and suffered serious injuries. *Id*.

The employee sued Maryland Sales for negligence.[12] *Id.* at 354. The jury found in the plaintiff's favor against Maryland Sales. *Id.* The issue on appeal was whether there was sufficient evidence to sustain the jury's verdict. *Id.*

The Court reviewed the competing evidence. The plaintiff's expert had testified that Maryland Sales should have informed the general contractor that the hole was being cut and should not have the left the hole open and unguarded. *Id.* at 356. Maryland Sales's expert, who happened to be an employee of Maryland Sales, testified that it was the general contractor's job, not the subcontractor's, to provide the safety precautions and to cover the holes. *Id*.

For the applicable legal standard, the Hancocks rely on the following italicized parts from the Court's discussion:

> *A subcontractor on a construction job owes a duty to the employees of other contractors similar to the duty owed by an employer to an employee or by the owner of real estate to an invitee on the premises. Although he is not an insurer of their safety, he must exercise due care to provide for the protection and safety of those employees. Finkelstein v. Vulcan Rail Co., 224 Md. 439, 168 A.2d 393. This includes the duty to warn employees of any unreasonable risk which is either known to the subcontractor or that could have been discovered by reasonable inspection.* There is no duty, however, to warn of dangers which are so apparent and obvious that an employee acting as a reasonable man could have discovered them. *Le Vonas v. Acme Paper Board Co.*, 184 Md. 16, 40 A.2d 43. The standard of due care is the standard of the

[12] So did the employee's wife, but her claim was not relevant to the Court's decision.

> reasonable prudent man. What constitutes due care depends on the circumstances of each case. Courts recognize that the hazards involved on a construction site, for instance, differ from those elsewhere. The subcontractor's duty, therefore, extends only to such conduct as is customary and usual in that trade of profession. *Long Co. v. State Accident Fund*, 156 Md. 639, 144 A. 775; *Joyce v. Flanigan*, 111 Md. 481, 74 A. 818. *See generally*, 57 C.J.S. Master and Servant s 610.

Id. at 357. The Court concluded that the jury's verdict was supported by the evidence. *Id*. at 357-59.

Parker involved the construction of two wings to a theatre complex. 76 Md. App. at 593. The property owner hired a general contractor for the task. *Id*. at 592. The plaintiff was employed by the general contractor as a laborer. The general contractor hired a subcontractor for the brick and masonry work. *Id.* Several days prior to the incident, an employee of the general contractor cut a 4' x 4' hole through the third floor roof to accommodate the installation of a smoke hatch. *Id.* at 592-93. The hole was covered by two unsecured sheets of plywood. *Id.* at 593. No other safeguards, such as guardrails, toe boards, or warning signs, were implemented. *Id*. at 593.

To complete its masonry work on the higher floors, the subcontractor placed 20 sheets of plywood, all belonging to the general contractor, on the roof to serve as a base for scaffolding. *Id.* at 593. After the masonry work was completed, the masonry subcontractor's employee stacked the 20 plywood sheets into three piles. *Id.* The general contractor's foreman instructed two of its employees, one of whom was the plaintiff, to clean the roof and remove the plywood. *Id.* The plaintiff and his co-worker brought the plywood sheets to the edge of the roof to be removed and lowered to the ground by a crane.

As he picked up the last sheet from one of the piles, the plaintiff took a step forward and fell 30 feet through the hole to the concrete floor below. *Id*.

Claiming he was not aware of the hole, the plaintiff sued the property owner and the general contractor, and the trial court directed a judgment in favor of both defendants. On appeal, the plaintiff argued that the trial court erred in preventing plaintiff from introducing into evidence the Prince George's County Code which, he argued, "impose[d] upon a property owner a non-delegable duty of maintaining the premises in a reasonably safe condition during construction." *Id*. at 593. This Court determined that *Rowley v. Mayor and City Council of Balt.*, 305 Md. 456, 461 (1986) applied, and held that the plaintiff's vicarious liability claim against the could not be "predicated upon a statutory non-delegable duty where the injuries to an employee of a contractor arise solely from the negligence of the contractor in failing to maintain a reasonably safe work place." *Id*. at 597.

The plaintiff also argued on appeal that the owner could be held liable for its own negligence, namely, its negligent "retention of control of the premises during construction." *Id*. at 598. The plaintiff relied on section 414 of the Restatement because, he alleged, the owner retained a certain degree of control over aspects of the job, and, therefore, owed a duty directly to the plaintiff.[13] The Court disagreed, finding that the

[13] The plaintiff relied upon section 414 of the RESTATEMENT (SECOND) OF TORTS, which provides that: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

evidence showed that the general contractor, not the owner, had total control over the details of its work implicated in the underlying incident. *Id*. at 601. The Court stated:

> The key element of control, or right to control, "must exist in respect to the very thing from which the injury arose." *Gallagher's Estate v. Battle,* 209 Md. 592, 122 A.2d 93 (1956); *Cutlip, supra.* While the contract is the operative source in seeking limitations of authority from the owner to the contractor, the relation may be changed by conduct of the parties outside the contract. Despite the lengthy cross-examination of Novak with respect to his construction experience and duties performed during this construction, no evidence of operative control emerged. The court's ruling that appellant failed to establish any retention of control by NTI was not error. The question of the existence of a duty is for the court. *Cutlip, supra.*
>
> Additionally, appellant has not provided the Court with any authority that an employee of an independent contractor injured by the negligence of his own master is a person intended to be included among the class of persons to whom the owner owes a non-delegable duty of reasonable care. As we have already indicated, the *Whiting–Turner* and *Gardenvillage* plaintiffs were members of the public, not employees on the job already covered for accidental injuries. No matter how appellant phrases it, what he is unsuccessfully attempting is an end run on the Worker's Compensation Law.

Id. at 601-02.

The Court in *Parker* then turned its attention to the trial court's entry of judgment in favor of the masonry subcontractor. The Court stated:

> Finally, we hold that the court did not err in granting Cowell's motion for judgment. Cowell had no physical or actual control over the work area where the hole in the roof was located. Nor did it have any contractual responsibility for cutting or covering the opening. Even were we to assume that Cowell was negligent in stacking plywood over the existing plywood, such negligence could not be a proximate cause of appellant's injuries. Keller Brothers had the responsibility of covering the opening in the roof. Its failure to secure the cover was the proximate cause of the injuries sustained by its own employee. If the covering had been nailed, obviously, appellant could not have picked it up.
>
> The duty owed by a subcontractor, on a multiple-employer construction site, to employees of other contractors does not depend on knowledge of danger, but on whether the subcontractor created or controlled the dangerous

> condition. *Finkelstein v. Vulcan Rail and Construction Co.*, 224 Md. 439, 168 A.2d 393 (1960).

Id. at 602-03.

Returning now to the case at hand, the Hancocks contend that the duty one subcontractor owes to an employee of another is similar to the duty a landowner owes to an invitee, namely, the duty to warn the other contractor's employees of any unreasonable risk that is either known to the subcontractor or could have been discovered through a reasonable inspection. The Hancocks contend that this standard is grounded firmly in the Court of Appeals' opinion in *Finkelstein* and this Court's opinion in *Maryland Sales*. They contend that *Parker* "went astray with its 'created or controlled' standard, which appears nowhere in *Finkelstein*." They argue that "*Parker*'s citation to *Finkelstein* does not include a pin citation, and neither the word 'create' nor the word 'control'—nor any variation of those words—is used anywhere in *Finkelstein*."

We disagree with the Hancocks' analysis. As discussed in Section I.B., the extent of a landowner's duty to others depends on its status in relation to its property. A possessor of the land—one who occupies with intent to control the land—owes an invitee the duty to "use reasonable and ordinary care to keep his premises safe for the invitee and to protect him from injury caused by an unreasonable risk with the invitee, by exercising ordinary care for his own safety will not discover." *Rowley*, 305 Md. at 465. In both *Finkelstein* and *Maryland Sales*, there was no issue that the defendants controlled or created the alleged hazardous condition. It was the defendants' control over the hazardous condition that

triggered the duty in the first place. Put simply, the issue in *Finkelstein* and *Maryland Sales* was whether the duty was breached, not whether it existed.

In contrast, in *Parker*, the decisive issue was whether the duty existed, not whether it was breached. That's what the Court was getting at when it stated that the duty "does not *depend* on knowledge of danger, but on whether the subcontractor created or controlled the dangerous condition." *Parker*, 76 Md. App. at 602 (emphasis added). The masonry subcontractor neither made nor controlled the dangerous condition that caused the injury. Thus, the duty wasn't triggered. Had there been such evidence, we can only presume that the Court would have taken the next step to evaluate whether the duty was breached. That it did not do so was not, a disavowal of *Finkelstein* and *Maryland Sales*.

The Hancocks contend that even if the "create" or "control" standard applies, the allegations in the complaint suffice to sustain a cause of action. We disagree. The complaint does not allege that Sutton controlled the job site or created the hazardous condition. In fact, the complaint alleges that the hazardous condition had already been created by the time Mr. Sutton descended into the ditch. Accordingly, the complaint fails to state a claim for which relief may be granted under the "create" or "control" standard.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.