Circuit Court for Montgomery County
Case No.: 421157V

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1204

September Term, 2017

CORY ALLEN JONES

v.

WASHINGTON SUBURBAN SANITARY COMMISSION

Graeff,
Shaw Geter,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: January 23, 2019

In Maryland, the general rule is that the employer of an independent contractor is not liable for physical injuries caused to another by the acts or omissions of an independent contractor. *Rowley v. Mayor and City Council of Baltimore*, 305 Md. 456, 461 (1986); *Marrick Homes v. Rutkowski*, 232 Md. App. 689, 698 (2017). There are some twenty exceptions to that rule. *See Marrick*, 232 Md. App. at 698, citing *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 36 (1976). Those exceptions are set forth in Restatement (Second) of Torts §§ 410-429. One of those exceptions is that an employer is liable for the acts of an independent contractor when the employer has a non-delegable duty that arises out of some relation of the defendant toward the public or the particular plaintiff. Another exception is when an employer contracts with an independent contractor to perform a job that is inherently dangerous.

The three questions presented in this appeal concern the applications, *vel non*, of one or more of the aforementioned exceptions. Those questions are:

> 1) Under the circumstances of this case, was a jury question presented as to whether a non-delegable duty was imposed on the appellee, the Washington Suburban Sanitary Commission ("WSSC")?
>
> 2) Were the acts being performed that caused plaintiff's injury "collateral negligence" for which WSSC cannot be held responsible?
>
> 3) Assuming that the WSSC has a non-delegable duty, is that duty broad enough to impose liability upon it for the tortious acts of employees of a subcontractor hired by one of the WSSC's independent contractors?

Those interesting questions arise out of a case filed by appellant, Cory Allen Jones, in the Circuit Court for Montgomery County against the WSSC. In his complaint, Mr. Jones sought recovery for damages he received in an accident that occurred when his

vehicle hit a WSSC manhole that was only partially covered. WSSC filed a motion for summary judgment arguing that it was not liable for Jones's injuries because those injuries were caused by the negligence of a subcontractor of an independent contractor it hired. WSSC claimed that because it had no control over the subcontractor, it was not vicariously liable for Jones's injuries. The circuit court granted WSSC's motion for summary judgment and dismissed Jones's case. This timely appeal followed.

I.

UNDISPUTED FACTS

On May 24, 2013, at approximately 12:15 p.m., Jones was driving on Cromwell Road in Montgomery County, Maryland when he saw two men in the middle of the roadway at the intersection of Cromwell Road and Massachusetts Avenue. He next saw the two men walk from the roadway onto the adjacent curb. As Jones's vehicle continued forward, his car drove over an improperly sealed manhole cover, which caused his vehicle's driveshaft to disengage and one of his rear tires to blow out. This damage to his car caused Jones to lose control of his vehicle, which, in turn, caused Jones to hit his head and face on the steering wheel.

The two men Jones saw in the roadway immediately before the accident were Joseph A. Harris and Harrison J. Ward, who were employees of Video Pipe Services. Video Pipe Services was a subcontractor of Inland Waters Pollution Control, Inc. ("Inland Waters"). Inland Waters was an independent contractor hired by WSSC to repair parts of WSSC's

sewer system. Video Pipe Services, the subcontractor, was hired by Inland Waters to take pictures of parts of the sewer system that needed repair.

WSSC admits that immediately before the accident, Harris and Ward "ran out onto Cromwell [Road] and lifted the manhole cover while the light governing the intersection was red. When the light turned green, they ran back to the safety of the sidewalk area, leaving the manhole cover improperly situated over the manhole."

At oral argument before this panel, counsel for WSSC explained that Harris and Ward were making a "pre-inspection" of access to a manhole in preparation for taking pictures of the status of the below street level sewer line.

In the circuit court, WSSC admitted, for the purposes of its summary judgment motion, that Harris's and Ward's actions in failing to properly place the cover over the manhole caused or contributed to Jones's accident and his injuries.

The circuit court's grounds for granting summary judgment were expressed by the court as follows:

> The facts in this case are really not in dispute. Really, the only question seems to be [] whether the extension of liability under the theories posed by [Jones] would hold WSSC liable for a subcontractor of an independent contractor who failed or I should say the subcontractor failed to seal the manhole cover after finishing some work that was done.
>
> And at least my interpretation of Maryland law at this time is that it does not. Therefore, I am going to grant the motion for summary judgment.

II.

STANDARD OF REVIEW

Md. Rule 2-501 provides, in pertinent part, that "[t]he court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). We apply the following standard for reviewing a circuit court's grant of summary judgment:

> Because the grant of summary judgment is a question of law, it is 'subject to a non-deferential review on appeal.' In conducting this *de novo* review, we evaluate the record in the light most favorable to the non-moving party and construe any reasonable inferences that may be drawn from the well-plead facts against the moving party.

Schneider Electric Buildings Critical Sys., Inc. v. Western Surety Co., 454 Md. 698, 705 (2017) (internal citations and some quotation marks omitted).

III.

DISCUSSION

A. Non-Delegable Duty

Many of the legal principles that govern this case were set forth by Judge McAuliffe, speaking for the Court of Appeals in *Rowley*, *supra*, where he wrote:

> The general rule is that the employer of an independent contractor is not liable for the negligence of the contractor or his employees. *Restatement (Second) of Torts* § 409 (1965).
>
> Various reasons have been advanced for it, but the one most commonly accepted 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 it.
>
> *Prosser and Keeton on The Law of Torts* § 71 at 509 (W. Keeton 5th ed. 1984) (footnotes omitted).

The general rule is riddled with a number of common-law exceptions that have practically subsumed the rule. As noted in comment *b* to § 409 of the Restatement, these exceptions fall into three broad 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.
> 3) Work which is specially, peculiarly, or "inherently" dangerous.

The generally recognized exceptions to the rule of non-liability are collected at §§ 410-429 of the Restatement. Sections 410-415 deal with liability imposed by reason of actual fault on the part of an employer of an independent contractor. Appellant does not suggest the City is liable upon any such theory. Rather, she relies upon a theory of vicarious liability pursuant to one or more of the principles collected in §§ 416-429. The introductory note to that portion of the Restatement is instructive:

> 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].

305 Md. at 461-63 (emphasis supplied) (footnotes omitted).

As mentioned, one of the main issues in this case is whether the type of work assigned to the independent contractor (repairs of underground sewer lines) imposed a non-delegable duty upon WSSC.

Jones relies on the second and third exception (discussed in *Rowley*) to the general rule of non-liability of an employer for acts of independent contractors. He contends that WSSC had a non-delegable duty to the members of the public to ensure the proper and safe replacement of manhole covers on public roads (second exception) and also contends that WSSC had a non-delegable duty because the work to be performed was "specially, peculiarly, or inherently dangerous" (third exception).

Restatement (Second) of Torts § 417, provides:

> One who employs an independent contractor to do work in a public place which unless carefully done involves a risk of making the physical condition of the place dangerous for the use of members of the public, is subject to liability for physical harm caused to members of the public by a negligent act or omission of the contractor which makes the physical condition of the place dangerous for their use.

In his brief, Jones argues that in order to do the work that the independent contractor agreed to perform, it was necessary to take off one or more manhole covers that were located in the public streets. Jones further maintains that if that job (removal and replacement of manhole covers) is not done carefully, by putting out warning signs or barriers when the covers are not in place, a clear danger to the motoring public is created.

WSSC responds that the replacement of the manhole cover did not give rise to a non-delegable duty. According to the WSSC, the job the subcontractor was performing was part of a "routine inspection," which did not pose a risk to public health and safety.

Moreover, WSSC asserts, the negligent acts of the subcontractor were collateral to the work of WSSC. Lastly, WSSC maintains that the liability of the subcontractors is too "attenuated" to justify the extension of WSSC's duty, if any, beyond the independent contractor.

The rationale for holding an enterprise liable due to one of the non-delegable duty exceptions is:

> "that some duties cannot be transferred or shifted to contractors because the enterprise that employs the independent contractor reaps the benefit of his work, and can select competent and financially sound contractors who could bear the costs of their own torts."

Dan B. Dobbs, et al., *The Law of Torts* § 432, 809-10 (2d ed. 2011) (footnotes omitted).[1]

The case of *Washington Suburban Sanitary Commission v. Grady Development Corp.*, 37 Md. App. 303 (1977) is, in many significant ways, here apposite. In *Grady*, a married couple suffered water damage when a sewer line under a street near their home backed-up causing sewage to flood into the basement of their home. The homeowners filed suit against the WSSC and Grady Development Corp. ("Grady"), the developer of the community in which plaintiffs' home was located. *Id.* at 304. Evidence at trial showed that several manhole structures near plaintiffs' home had been damaged and, as a result, rainwater was allowed to enter the sewage system causing the back-up. Evidence also demonstrated that the damage to the manhole structures likely was caused by the grading

[1] Dobb's treatise, *The Law of Torts*, published for the first time in 2001, is the successor to *Prosser and Keeton on the Law of Torts. Warr v. JMGM Grp., LLC.*, 433 Md. 170, 222 n.16 (2013).

or paving of the street near plaintiffs' home by contractors hired by Grady. *Id*. at 310. In a cross-claim, WSSC alleged that Grady had a duty to indemnify it for the negligence of its contractors because: 1) Grady's obligation was non-delegable inasmuch as the work was inherently dangerous; and 2) the acts of negligence in the performance of the work to be done did not constitute collateral negligence. *Id.* at 311-12. Grady, in turn, claimed, *inter alia*, that it was not liable for any damage to the manhole structures because it had delegated the grading and paving of the street to independent contractors and, after doing so, retained no control over the performance of the work. *Id.* at 308. The *Grady* Court held that a jury question was presented as to whether Grady had a non-delegable duty concerning the grading operations in the vicinity of manhole covers. *Id*. at 318.

In *Grady*, we recognized that Maryland's case law in regard to exceptions to the general rules concerning non-liability for acts of independent contractors is well developed, citing the decision in *P., B. & W. R. Co. v. Mitchell*, 107 Md. 600, 606 (1908), in which the Court of Appeals explained:

> The question of the extent to which the employment of an independent contractor to do work, placed entirely under his control, will relieve the employer from liability for injuries resulting to third persons has not only been much discussed by other tribunals but has been fully considered, in the light of the authorities applicable to it, and passed upon by this Court in a number of cases, among which are *Deford v. State, use of Keyser*, 30 Md. 179 [(1869)]; *City & Suburban R*[*y.*] *Co. v. Moores*, 80 Md. 348 [(1894)]; *Bonaparte v. Wiseman*, 89 Md. 12 [(1899)]; and *Samuel v. Novak*, 99 Md. 558 [(1904)]. As a result of these cases it may now be said to be settled in this State that although, when the work is being done by an independent contractor the employer will not be liable for an injury caused by negligence in a matter collateral to the contract, *he will be liable if the injury be caused by the thing contracted to be done, or if it be such as might have been anticipated by him, as a probable consequence of the work let out to the*

> *contractor, and he took no precaution to prevent it. The principle thus broadly stated embraces the subordinate proposition, separately discussed in many cases and especially appropriate to the one now before us, that the duty to refrain from interfering with the right of the public to the safe and unimpeded use of highways and streets is one of which an employer cannot divest himself by committing work to a contractor.* (Emphasis added.) 107 Md. at 606[.]

37 Md. App. at 315-16 (footnote omitted).

The *Grady* Court defined the term "inherently dangerous" activity so as to encompass work that, by its nature:

> . . . create[s] some peculiar risk of injury to others unless special precautions are taken – as, for example, excavations in or near a public highway, or construction or repair work on buildings adjoining it or likely to obstruct it, and similar activities, such as the clearing of land by fire, tearing down high walls or chimneys, the construction of a dam, and many other kinds of work.

Id. at 313-14 (citing Prosser, *Law of Torts*, Ch.12, § 71 (4th Ed., HB, 1971)). This category of work is limited to activity which involves "a high degree of risk in relation to the particular surroundings, or some rather specific risk or set of risks to those in the vicinity, recognizable in advance as calling for definite precautions." *Id*. at 314 (citing Prosser, *supra*.

In *Grady* (*id.* at 318-19) we said:

> We are persuaded that a synthesis of these cited Maryland cases demonstrates that the principles stated in *Prosser*, *supra*, long have been recognized as the law of this State. It is plain, in short, that Maryland Courts long have recognized that a searching examination of the facts and circumstances of the particular case must be made before non-liability of an employer for the negligence of his independent contractor will be declared as a matter of law.
>
> In the subject case there was evidence tending to show that the projecting sanitary sewer structures would be subject to damage if struck by

> heavy grading or paving equipment and that such damage likely would destroy the integrity of an essential requirement of the system, *i.e.*, that surface water be denied entry to it. Thus there was great risk of harm if the street paving work was negligently performed. *See Prosser*, *supra*, at 468, 473; *P., B. & W. R. Co. v. Mitchell*, *supra*; footnote 2, *supra*.
>
> There can be no doubt that the public health and safety is placed in jeopardy whenever a sanitary sewer system's imperviousness to surface water is destroyed. We hold that when an enterprise is undertaken the performance of which poses a high potential for harm to such a system, a duty to the public to guard against the danger arises. We think such duty "is one of which an employer cannot divest himself by committing work to a contractor." *P., B. & W. R. Co. v. Mitchell*, *supra*, at 604.
>
> Where, as here, the risk of such harm is involved in carrying out the work to be done under the contract, ensuing negligence cannot be deemed collateral to its performance. *Prosser*, *supra*, at 475. The employer "is bound to anticipate that such injuries may naturally result", *Surry Lumber Co. v. Zissett*, [150 Md. 494,] 507 [(1926)], particularly, "if he owes a duty to third persons or the public in the execution of the work." *City & S. Ry. Co. v. Moores*, *supra*, at 354. We think such a duty was owed.
>
> Grady's motion for a directed verdict should have been denied. Judgment N.O.V. in favor of Grady was erroneously entered.

(Emphasis added.)

We hold that in the subject case, as in *Grady*, a jury issue was presented as to whether the WSSC had a non-delegable duty. First, the work that WSSC contracted to be done, involved work on a public road, where the manhole covers were located. Second, it could be inferred, rationally, that WSSC knew that if its sewer lines were to be inspected, then manhole covers would have to be removed. Third, it could also be appropriately inferred that the WSSC knew, or reasonably should have known, that if the workers removed the manhole covers without putting up warning signs or barriers, a serious danger to the motorist who traveled on the public road would exist.

B. Collateral Negligence

We turn next to WSSC's contention that if a non-delegable duty exists, that duty did not extend to what the WSSC calls the collateral negligence of others. "Collateral negligence," we have explained, describes "the type of situation in which the special danger is not necessarily involved in the work to be done, and not contemplated in connection with the way it is expected to be done." *Grady*, 37 Md. App. at 314 (citing *Prosser*, Law of Torts, Ch. 12, § 71 (4th Ed., HB, 1971) at 474). An employer is not responsible for collateral negligence of an independent contractor because the risk of harm is not one that is contemplated or expected as part of performance of the contract. For example, an employer that contracts with an independent contractor to have windows painted in place, is not liable if the independent contractor decides to remove the windows prior to painting them, and, in doing so, drops a window five floors down. *Id*. at 315.

In the subject case, the work contracted to be done made it necessary for manhole covers that were located on a public street to be removed. In our view, a jury could decide that it was foreseeable that if the removal/replacement operation was done without adequate warning signs or barriers being put in place, motorists would be endangered if they struck one of the uncovered manholes. As we said in *Grady*, "Where . . . the risk of such harm is involved in carrying out the work to be done under the contract, ensuing negligence cannot be deemed collateral to its performance." *Id*. at 319 (citing *Prosser*, *supra*, at 475).

For the above reasons, we reject WSSC's argument that the negligent act of agents of the subcontractor was "collateral."

C. Liability for Acts of a Subcontractor

Lastly, WSSC contends that even if it had a non-delegable duty and even assuming that the work being done by the subcontractors cannot be characterized as "collateral," its duty did not extend to the negligence of the subcontractor (Video Pipe Services) hired by the independent contractor (Inland Waters). In support of its position, WSSC relies on *Rowley*, and asserts:

> First, the [*Rowley*] Court held that as the owner and possessor of the building in question, 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." [305 Md.] at 463. The Court went on to hold that this non-delegable duty, as a matter of policy, did not extend to an employee of the subcontractor. *Id.* at 473.

(Footnote omitted.)

WSSC misconstrues *Rowley*. For starters, *Rowley* did not involve an "employee of [a] subcontractor." And the *Rowley* Court never held that a non-delegable duty "did not extend to an employer of [a] subcontractor." Instead, the Rowley case involved a plaintiff, who was an employee of an independent contractor. *Rowley*, 305 Md. at 459. That employee was injured due to the failure of her employer (the independent contractor) to make the repairs the independent contractor was hired to perform. *Id*. at 463. The holding in *Rowley* was:

> 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 [of the Restatement (Second) of Torts (1965)] operates to impose liability upon the person who hired the contractor.

Id. at 474.

WSSC cites no authority to support the proposition it espouses, which is that a duty that is non-delegable if the work is performed by an independent contractor becomes delegable if performed by a subcontractor. Nor does the WSSC suggest any reason why such a legal proposition should be adopted. In any event, the case of *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25 undermines WSSC's position. In that case, the appellants were Gardenvillage Realty Corp. ("Garden") and the Arkwell Company, n/k/a The Thunderwood Company ("Thunderwood"). The appellants were sued by several plaintiffs who were injured when a concrete slab that constituted the base of a rear porch of a dwelling collapsed. *Id*. at 27. The accident occurred about six years after the concrete slab was installed in a newly constructed house. *Id.* at 28. The dwelling where the accident occurred was owned by Garden, who had hired Thunderwood, as its general contractor, to construct the dwelling. The slab that collapsed was manufactured and installed by Alex Luciano and/or his corporation, Alex Luciano Co., Inc., pursuant to a written order from Thunderwood. *Id.* at 27. The collapse occurred because the metal reinforcing rods within the concrete slab "ran the wrong way" inasmuch as the rods should have been placed lengthwise in order to properly support the weight of the slab but were not. *Id.* at 28. According to an expert witness called by the plaintiffs, the failure by the subcontractor, Luciano, to insert the metal reinforcing rods in the proper direction, constituted a violation

of the Baltimore City building code. *Id*. at 28. In *Russo*, we held that where there is a violation of a provision of a building code that was intended as a safety measure, and where that violation has produced death or personal injury, the duty imposed by the Code is non-delegable. *Id.* at 39. The *Russo* Court specifically held that the duty was non-delegable by the owner of the building (Garden) and by Thunderwood, the general contractor hired by Garden, who had obtained the permit to construct the dwelling. *Id*. In *Russo*, the owner of the building was held to have a non-delegable duty to have the concrete slab built in accordance with the Building Code even though the negligent party (Luciano) constructed and installed the defective concrete slab pursuant to an order from Thunderwood, the general contractor. *Id*. at 27. Our holding in *Russo* was cited with approval by the Court of Appeals in *Council of Code-Owners v. Whiting-Turner*, 308 Md. 18, 40 (1986).

If Garden, the owner of the building, could be said to have a non-delegable duty in regard to the action of Thunderwood's subcontractor, Luciano, we can see no reason why, in the subject case, the WSSC can escape responsibility for the breach of a non-delegable duty simply because the negligent act that caused appellant's injuries was performed by a subcontractor.

Taking the evidence as we must, in the light most favorable to the appellant, we hold that a jury question was presented as to whether the WSSC had a non-delegable duty to make sure that when the manhole covers were taken off, motorists traveling on the public road would be protected from striking a manhole structure that was not covered.

JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR MONTGOMERY COUNTY FOR TRIAL. COSTS TO BE PAID BY THE APPELLEE.