

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEREK LEE SCHREYER,

Case No. 05-CV-1235 (PJS/JJG)

Plaintiff,

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY,

Intervenor Plaintiff,

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

v.

BANDAG, INC.,

Defendant.

BANDAG, INC.,

Third-Party Plaintiff,

v.

TIRE ASSOCIATES WAREHOUSE, INC.,
a/k/a Tire Associates,

Third-Party Defendant.

Harry A. Sieben, Jr., SIEBEN GROSE VON HOLTUM & CAREY, LTD., for
plaintiff.

Lawrence M. Baill and Steven Theesfeld, YOST & BAILL, LLP, for intervenor
plaintiff.

Hal A. Shillingstad and Andrea Kiehl, FLYNN GASKINS & BENNETT, LLP,
for defendant/third-party plaintiff.

Jo Ann Strauss and Michael D. Barrett, COUSINEAU MCGUIRE
CHARTERED, for third-party defendant.

Defendant Bandag, Inc. (“Bandag”) is the holder of a patent on a method for retreading tires. Through franchise agreements, Bandag licenses others to use its patented method. Third-party defendant Tire Associates Warehouse, Inc. (“Tire Associates”) is one of those Bandag franchisees.

On April 22, 2004, while working for Tire Associates, plaintiff Derek Schreyer was injured when a tire being retreaded exploded. Schreyer cannot sue Tire Associates because of the exclusive-remedy feature of the worker’s compensation law, Minn. Stat. § 176.031, so Schreyer instead brings a claim of negligence against Bandag. Intervenor plaintiff Universal Underwriters Insurance Company, which paid Schreyer’s worker’s compensation claim, brings a subrogation claim against Bandag. Bandag, in turn, brings a third-party complaint for contribution or indemnity against Tire Associates.¹

This matter is before the Court on Bandag’s motion for summary judgment on Schreyer’s and Universal’s claims. For the reasons set forth below, the motion is granted. In light of the Court’s disposition of Bandag’s motion, the Court will dismiss without prejudice Bandag’s claim against Tire Associates.

I. BACKGROUND

A. *Retreading*

The franchise agreement between Bandag and Tire Associates gives Tire Associates the right to use Bandag’s patented method to retread tires. Retreading a tire is a multi-step process that involves inspecting the tire, removing the old tread, making necessary repairs, and affixing

¹Bandag labeled its claim against Tire Associates a “cross-claim.” As Tire Associates is not Bandag’s codefendant, Bandag’s pleading is actually a third-party complaint. *Compare* Fed. R. Civ. P. 13(g) *with* Fed. R. Civ. P. 14.

new tread. After new tread is affixed, the tire must be heat cured. If the tire is a bias-ply tire, it is sent to a curing-rim station, at which special curing rims and flanges are placed on the tire and the tire is inflated using compressed air. According to Bandag's safety guidelines, the air line used to inflate tires during the curing-rim process is supposed to be regulated for pressure at no higher than 10 psi. Shillingstad Aff. Ex. L at 1; *id.* Ex. I; Ortiz Dep. 13.

Some, but not all, of the equipment that Bandag franchisees use to retread tires is supplied by Bandag. The compressed-air system used by Tire Associates during the curing-rim operation — including the air-pressure regulator and gauge — is not made or sold by Bandag. Warrant Dep. 110.

B. The Accident

On the day Schreyer was injured, his supervisor was absent and Schreyer was the “head of the shop.” Schreyer Dep. 31. Toward the end of the day, Schreyer went to the curing-rim station to help another employee finish work on some tires. Schreyer was walking up to the station to remove the compressed-air line from a tire when the tire exploded, injuring him. Schreyer does not know how long the tire had been attached to the hose when he approached it. After the accident, an independent measurement found that the air line was dispensing at 110 psi — eleven times the 10 psi recommended by Bandag. Tire Associates later determined that the pressure regulator had failed.

C. The Relationship Between Bandag and Tire Associates

Tire Associates has been a Bandag franchisee for over thirty years. Warrant Dep. 15.

The franchise agreement that was in force at the time of the accident states:

The relationship of the parties is that of franchisor and franchisee, and seller and buyer only, and [Tire Associates] acknowledges that

this Agreement does not create a fiduciary relationship between [Tire Associates] and BANDAG. The parties are independent contractors, and exercise sole control over their businesses at their own risk.

Shillingstad Aff. Ex. A § V. Consistent with the parties' status as two independent contractors, Tire Associates hires, assigns work to, supervises, disciplines, and fires its own employees; in short, it decides who will do what work and under what circumstances. Willaert Dep. 64-65.

Tire Associates also has its own written safety program in place, which includes safety guidelines for compressed air systems. Warrant Dep. 30, 32-33. These guidelines provide that safety devices on compressed-air systems must be checked frequently and that air compressors must be equipped with pressure-relief valves and gauges. Shillingstad Aff. Ex. G. Tire Associates also instructs its employees to check pressure gauges from time to time to ensure that air pressure is properly regulated. Willaert Dep. 67.

Although Tire Associates maintains control over its day-to-day operations, the franchise agreement gives Bandag certain rights to monitor what its franchisees are doing with its patented process and to maintain quality control across franchisees. The agreement requires Tire Associates to maintain Bandag-supplied equipment in proper working order. Shillingstad Aff. Ex. A § III(d). Moreover, the agreement (at least as plaintiff reads it²) requires Tire Associates to replace or repair any equipment — whether or not supplied by Bandag — that Bandag determines is unsafe. *Id.* § III(e); Warrant Dep. 71. The agreement also gives Bandag the right to inspect Tire Associates' business records and premises and samples of retreaded tires. *Id.*

²The parties dispute whether the franchise agreement gives Bandag the right to require Tire Associates to repair or replace non-Bandag equipment. For the purposes of Bandag's motion, the Court assumes that Bandag had the right to insist that Tire Associates repair or replace all defective equipment, whether or not the equipment was manufactured by Bandag.

§ IV. Finally, Bandag provides its franchisees training at its facility in Muscatine, Iowa, as well as instruction manuals and other written materials. Bertotti Dep. 104. As part of the training, Bandag teaches its franchisees that the compressed-air line used during the curing-rim operation should be regulated at no more than 10 psi. Ortiz Dep. 13. Bandag does not provide any other advice or instruction on the setup of its franchisees' compressed-air systems. Ortiz Dep. 13.

Once a year, Bandag conducts a day-long inspection known as a Manufacturing Excellence Program ("MEP") audit.³ Bertotti Dep. 34. The purpose of this audit is to ensure consistent quality among Bandag franchisees as well as to check safety practices. Bertotti Dep. 152. As part of the audit, Bandag inspectors use a preprinted safety checklist. At the top of the list, the form states, "Do not operate specified equipment when any of the following conditions are present." Shillingstad Aff. Ex. I. Following that statement is a list of twenty or so items; after each item, the inspector can check "OK" or "Not OK." *Id.* Included on the list is the following item: "Airline used to inflate curing rim is not regulated to 10 psi. Set and lock regulator at 10 psi maximum." *Id.*

John Bertotti is a Bandag employee who conducts MEP audits. In checking the curing-rim station during an MEP audit, Bertotti's practice is to check the *reading* on the gauge on the compressed-air line to make certain that it is set at 10 psi. Bertotti Dep. 50. Bertotti does not undertake the more arduous task of ensuring that the gauge is *accurate*. Instead, he verbally reminds the manager to check the accuracy of the gauge with a master gauge. Bertotti Dep. 50-51.

³Schreyer correctly notes that Bandag *visits* franchisees up to four times per year; the MEP audit is done only once per year, however. Bertotti Dep. 34.

In August 2003 — eight months before the accident that injured Schreyer — Bertotti conducted the annual MEP audit at Tire Associates. Warrant Dep. 38. Bertotti filled out the safety checklist, but did not check either “OK” or “Not OK” after the item referring to the curing-rim air line. Anderson Dep. 102-03. Schreyer now contends that Bertotti failed properly to inspect the curing-rim air line and that, had he done so, he would have discovered that the regulator was defective, he would have warned Tire Associates of the defect, Tire Associates would have repaired the regulator, and Schreyer would not have been injured.

II. ANALYSIS

A. *Standard of Review*

Summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).⁴ A dispute over a fact is “material” only if its resolution might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a fact is genuine only if the evidence is such that a reasonable jury could return a verdict for either party. *Ohio Cas. Ins. Co. v. Union Pac. R.R.*, 469 F.3d 1158, 1162 (8th Cir. 2006). In considering a motion for summary judgment, a court must assume that the nonmoving party’s evidence is true. *Taylor v. White*, 321 F.3d 710, 715 (8th Cir. 2003).

⁴The Federal Rules of Civil Procedure were amended effective December 1, 2007. The amendments are stylistic only, however, and the Court therefore quotes from the amended Rules. See Fed. R. Civ. P. 56 advisory committee’s note on 2007 amendments.

B. Bandag's Motion

To prevail on his negligence claim, Schreyer must establish that Bandag owed him a legal duty of care, that Bandag breached that duty, and that the breach proximately caused harm to him. *Nickelson v. Mall of Am. Co.*, 593 N.W.2d 723, 725 (Minn. Ct. App. 1999). Bandag moves for summary judgment on the sole ground that it did not owe a duty of care to Schreyer.

Before addressing Bandag's motion, the Court notes that it is curious that Bandag did not also move for summary judgment on the issue of causation, for there is no evidence in the record that would permit a jury to find that any breach of any duty by Bandag caused harm to Schreyer. Recall that Bertotti's annual inspection occurred *eight months* before Schreyer was injured. There is no evidence that the regulator was malfunctioning at that time, and thus no evidence that, even if Bertotti had examined the regulator as closely as possible, he would have found something wrong with it. It appears, from the evidence submitted to the Court, that the parties simply do not know when the regulator began malfunctioning. Schreyer, of course, has the burden of proof on causation, and thus this absence of evidence would appear to be fatal to his case.

As noted, though, Bandag has moved for summary judgment only on the ground that Bandag did not owe Schreyer a duty in the first place. Bandag's confidence in this argument is understandable. After all, Schreyer worked for Tire Associates, not Bandag. Bandag did not hire Schreyer, did not assign tasks to Schreyer, did not supervise Schreyer, and had no right to discipline or fire Schreyer. Moreover, the equipment that injured Schreyer was not made by Bandag or sold by Bandag. On first glance, it is difficult to understand how Bandag could be

liable for an injury caused to someone who was not its employee by a faulty air-pressure regulator that was not its product.

Schreyer nevertheless argues that Bandag owed him a duty of care with respect to this regulator and that Bandag breached its duty when Bertotti failed to discover or warn of a defect in the regulator during his August 2003 inspection. The parties' arguments focus on two possible sources of a duty of care: first, that Bandag retained sufficient control of Tire Associates' overall operations so as to give rise to a "general" duty of care; and second, that Bandag voluntarily assumed a "particular" duty of care by inspecting the air-line regulator that malfunctioned. The Court examines each of these theories in turn.

1. Retained Control

Although Tire Associates is a franchisee of Bandag, the parties' contract defines Tire Associates as an independent contractor, and both Schreyer and Bandag analyze Bandag's potential liability under case law that defines when someone who retains an independent contractor can be held liable for injuries suffered by the employees of that independent contractor. These arguments are rather ill-suited to the circumstances of this case. Unlike, say, a general contractor who hires a subcontractor to wire a new home for electricity, or the owner of an office building who hires an independent contractor to keep the building clean, Bandag did not really employ Tire Associates to do anything for Bandag. Instead, it sold Tire Associates a license to use a particular method for retreading tires.

In any event, even if Bandag could be deemed to have retained or employed Tire Associates, Bandag does not owe a general duty of care to all Tire Associates employees. As a general matter, Minnesota courts do not impose liability on the employer of an independent

contractor for injuries suffered by the independent contractor's employees. *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997). Minnesota courts recognize an exception when the employer of an independent contractor "retains detailed control over a project and then fails to exercise reasonably careful supervision over that project."⁵ *Id.* Of course, just about everyone who employs an independent contractor retains *some* control over the work to be done by that contractor. Thus, to ensure that the exception does not swallow the rule, Minnesota courts have made clear that, "[f]or liability to attach, the [employer of an independent contractor] must retain control over the 'operative detail' of the work." *Id.* (quoting Restatement (Second) of Torts § 414 cmt. a (1965)).

Bandag had nothing resembling "detailed control" over the "operative detail" of the work done by employees of Tire Associates. Bandag did not interview, screen, hire, schedule, assign work to, supervise, pay, discipline, or fire any of those employees. Bandag did not instruct Tire Associates whether to hire one employee or one hundred; whether to retread one tire per day or one thousand; whether to stay open only an hour each day or instead to provide twenty-four hour service. Bandag simply sold Tire Associates a license to use a patented process, and Bandag maintained limited inspection and quality-control rights to ensure that neither Tire Associates nor any other franchisee damaged the value of its patent.

Schreyer argues that because Bandag had the right to inspect Tire Associates for safety violations, and to insist that Tire Associates correct them, it retained control of Tire Associates'

⁵Schreyer argues that Bandag retained control over Tire Associate's operations and is therefore subject to vicarious liability. In *Sutherland*, the Minnesota Supreme Court applied the same retention-of-control analysis to both the issue of direct liability and the issue of vicarious liability. Regardless of whether the nature of Bandag's liability is direct or vicarious, therefore, Schreyer must establish that Bandag retained sufficient control to subject it to liability.

work. But the right to conduct periodic inspections and require the replacement of defective equipment is not the same as having “detailed control” over the “operative detail” of day-to-day work. *See Sutherland*, 570 N.W.2d at 6 (independent contractor, not employer, determined how to perform the specific task that caused the injury, thus the employer was not liable under the retained-control theory); *Lee v. N. States Power Co.*, No. C8-90-636, 1991 WL 15395, at * 1 (Minn. Ct. App. Feb. 12, 1991) (employer’s right to require compliance with safety codes, and employer’s actions enforcing safety, did not subject employer to liability under retained-control theory because the employer had no right to exercise control over day-to-day manner in which work was performed or the way in which safety requirements were implemented). Instead, for an employer to have a duty of care under the retained-control theory, the employer must retain enough control to be able to prevent the risks created by the contractor’s work. *Lee*, 1991 WL 15395, at *1.

In this case, Bandag clearly did not have that kind of control over Tire Associates. It was Tire Associates, and not Bandag, that purchased the compressed-air system, that set up the compressed-air system, and that worked with the compressed-air system on a daily basis. Tire Associates fully understood the need to inspect the system regularly and to immediately repair any malfunctioning equipment. Indeed, Tire Associates developed and imposed its own safety standards with respect to the use of compressed air. By contrast, Bandag audited Tire Associates once per year and made less formal visits up to three times per year. Given that Bandag was not even *present* at Tire Associates 361 out of 365 days each year, and given that Bandag inspected the equipment at Tire Associates only once per year, Bandag was plainly in no position to prevent risks to the employees of Tire Associates created by malfunctioning equipment. The

bottom line is that Bandag did not exercise “detailed control” over the “operative detail” of the day-to-day work being done at Tire Associates, and thus Bandag did not owe a general duty of care to Schreyer or the other employees of Tire Associates.

2. Voluntary Assumption of Duty

Schreyer next argues that, even if Bandag did not retain a sufficient degree of control over Tire Associates to give rise to a *general* duty of care to Tires Associates’ employees, Bandag voluntarily assumed a *specific* duty of care to those employees by conducting annual safety inspections. In *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979), the Minnesota Supreme Court identified several factors relevant to the question of whether an inspection creates a voluntarily assumed duty of care, including: (1) whether the inspector had actual knowledge of the dangerous condition, (2) whether the inspector’s actions increased the risk of harm, and (3) whether other persons reasonably relied on the inspector’s representations and conduct.

Of course, reliance on the inspection in general is not sufficient. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves.

Id. at 807; *see also Williams v. Harris*, 518 N.W.2d 864, 868 (Minn. Ct. App. 1994) (liability for voluntarily assuming a duty arises only if the defendant’s conduct leads others to rely on such assumption of duty and to refrain from taking more direct action to protect themselves).

Although *Cracraft* involved the specific question of a municipality’s liability for fire-code inspections, the Minnesota Court of Appeals has applied *Cracraft* to the issue of whether a private inspector has voluntarily assumed a duty. *See In re Norwest Bank Fire Cases*, 410

N.W.2d 875, 878 (Minn. Ct. App. 1987) (citing *Cracraft* as creating a general rule limiting the liability of inspectors).

In this case, all three *Cracraft* factors demonstrate that Bandag did not voluntarily assume a duty to Tire Associates or its employees:

First, there is no evidence that Bertotti actually knew of any malfunction or other dangerous condition affecting the air-pressure regulator used during the curing-rim operation. Indeed, as described above, there is no evidence that the regulator *was* defective when Bertotti looked at it (eight months before Schreyer was injured).

Second, even assuming that Bertotti failed to detect a malfunction, this failure did not, by itself, *increase* the risk of harm that existed before Bertotti looked at the gauge on the regulator. An inspector who simply fails to detect a preexisting danger does not increase the risk of harm. *See Norwest*, 410 N.W.2d at 879.

Third, there is no evidence that Tire Associates, or any of its employees, reasonably relied on specific actions or representations of Bandag. Although it is true that several Tire Associates employees testified that they relied on Bertotti's inspections in a general way, *Cracraft* requires more. Under *Cracraft*, Bandag must have taken specific actions or made specific representations which caused Tire Associates not to take its own measures to ensure that its compressed-air system was working properly.

There is no such evidence in this case. To the contrary, Bertotti testified that, to check air pressure at the curing-rim station, he simply looked at the gauge, and he did not independently test whether the gauge was accurate. Bertotti Dep. 50-51. The safety checklist corroborates Bertotti's testimony. Had Bertotti found a problem, he would have checked a space

advising Tire Associates to “[s]et and lock regulator at 10 psi maximum.” This is a reference to the *setting* of the regulator (which can be assessed by a quick look at the gauge), and not to the *functioning* of the regulator (which can be assessed only by checking the regulator with a master gauge). Moreover, after his August 2003 audit, Bertotti checked *neither* “OK” nor “Not OK” on the line referring to the setting of the curing-rim air-pressure regulator. Clearly, then, nothing Bertotti said or did could have induced Tire Associates to fail to check its own air-compression system from time to time.⁶

It is likewise clear that nothing that Bertotti said or did in fact caused Tire Associates to fail to monitor its own equipment. To the contrary, Tire Associates developed its own safety standards with respect to the use of compressed air. These standards mandated that safety devices on compressed-air systems be checked frequently and that air compressors be equipped with pressure-relief valves and gauges. Shillingstad Aff. Ex. G; Warrant Dep. 32-33. Tire Associates employees were also informed of the danger of using compressed air. Willaert Dep. 67. The safety standards implemented by Tire Associates conclusively rebut any suggestion that Tire Associates believed that, because Bandag looked at its air-pressure gauges once per year, Tire Associates did not need to worry about those gauges or other safety devices.

For these reasons, the Court concludes that, by conducting an annual audit of the equipment at Tire Associates, Bandag did not voluntarily assume a duty to ensure that the air-

⁶Although David Willaert, a shareholder and then-general manager of Tire Associates, testified that Tire Associates relied on Bandag to check the functioning of the regulator, Willaert merely said that he “believe[d]” Bertotti checked the regulator with an independent gauge. Willaert Dep. 71. Willaert admitted that he had never seen Bertotti perform such a test, *id.*, and he did not testify that Bertotti ever told him that he would or had checked the functioning of the regulator.

pressure regulator at the curing-rim station functioned correctly. Bandag therefore cannot be held liable to Schreyer.⁷

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Defendant Bandag, Inc.'s motion for summary judgment [Docket No. 141] is GRANTED.
2. Plaintiff Derek Schreyer's second amended complaint [Docket No. 68] is DISMISSED WITH PREJUDICE AND ON THE MERITS.
3. Intervenor Plaintiff Universal Underwriter Insurance Company's second amended complaint in intervention [Docket No. 76] is DISMISSED WITH PREJUDICE AND ON THE MERITS.
4. Third-party plaintiff Bandag, Inc.'s complaint against third-party defendant Tire Associates Warehouse, Inc. [Docket Nos. 89, 90] is DISMISSED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 5, 2007

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

⁷At times, Schreyer suggests that Bandag could be liable for failing to advise Tire Associates about design defects in the regulator. This contention is completely without merit; there is absolutely no evidence that Bandag undertook any duty to advise Tire Associates with respect to the selection of non-Bandag equipment.