IN THE UTAH COURT OF APPEALS

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| Celso Magana and Yolanda Magana,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>Dave Roth Construction, ABM Crane Rental, and John Does I-V,<br><br>Defendants and Appellee. | MEMORANDUM DECISION<br>(Not For Official Publication)<br><br>Case No. 20070548-CA<br><br>F I L E D<br>(June 26, 2008)<br><br>2008 UT App 240 |

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Third District, Salt Lake Department, 050914998
The Honorable Kate A. Toomey

Attorneys: Daniel F. Bertch and Kevin K. Robson, Salt Lake City, for Appellants
Peter H. Barlow and Ryan P. Atkinson, Salt Lake City, for Appellee

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Before Judges Greenwood, Billings, and Davis.

GREENWOOD, Presiding Judge:

Celso and Yolanda Magana argue that summary judgment was improper because material issues of fact exist regarding whether Dave Roth Construction (DRC) actively participated in rigging the joists or in the overall construction of the project to the extent that DRC may be liable under the retained control doctrine. "Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Thompson v. Jess, 1999 UT 22, ¶ 12, 979 P.2d 322 (internal quotation marks omitted). We review the trial court's decision on "summary judgment for correctness, according no deference to [its] legal conclusions." Id. "We view [the] facts and all reasonable inferences in the light most favorable to the nonmoving party." Smith v. Hales & Warner Constr., Inc., 2005 UT App 38, ¶ 6, 107 P.3d 701.

"Utah adheres to the general common law rule 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.'" Thompson, 1999 UT 22, ¶ 13 (quoting Restatement (Second) of Torts § 409 (1965)). There is, however, an exception to this rule, commonly referred to as the retained control doctrine. See id. ¶ 14. Under this doctrine, "a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work." Id. ¶ 19 (emphasis added). The retained control doctrine "provides a 'narrow theory of liability applicable in the unique circumstance where an employer of an independent contractor exercises enough control over the contracted work to give rise to a limited duty of care.'" Begaye v. Big D. Constr. Corp., 2008 UT 4, ¶ 8, 178 P.3d 343 (quoting Thompson, 1999 UT 22, ¶ 15).

The Maganas first argue that Mr. Magana's conflicting testimony about Brett Campbell taking part in rigging the joists creates a genuine issue of material fact regarding whether DRC actively exercised control over offloading the roof trusses. We are not, however, persuaded by this argument because mere participation does not expose DRC to liability. In Begaye v. Big D. Construction Corp., 2008 UT 4, 178 P.3d 343, the supreme court explained that liability under the "active participation" standard of the retained control doctrine is appropriate only "'when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished.'" Id. ¶ 9 (quoting Thompson, 1999 UT 22, ¶ 19). In other words, DRC must have "exercis[ed] 'such control over the means utilized that the contractor [could not] carry out the injury-causing aspect of the work in his or her own way.'" Id. ¶ 10 (quoting Thompson, 1999 UT 22, ¶ 21). Viewing the facts in the light most favorable to the Maganas, at best, they indicate that Campbell may have been on the semi-truck, assisting Ted Alexander with rigging the second load of roof trusses. There is, however, no evidence to indicate that Campbell exerted control over Alexander, or Circle T, or any part of the offloading that was taking place. Thus, DRC cannot be liable under the active participation standard of the retained control doctrine.

Woven into their active participation argument, the Maganas briefly assert that DRC is liable because it allegedly provided the crane used to offload the trusses. While the supreme court, in Thompson v. Jess, 1999 UT 22, 979 P.2d 322, stated that

"'[t]he degree of control necessary for the creation of a legal duty must involve either the direct management of the means and methods of the independent contractor's activities or the provision of the specific equipment that caused the injury,'" id. ¶ 20 (emphasis added) (quoting Grahn v. Tosco Corp., 68 Cal. Rptr. 2d 806, 820 (Cal. Ct. App. 1997), overruled in part by Hooker v. Department of Transp., 38 P.3d 1081, 1091 (Cal. 2002); Camargo v. Tjaarda Dairy, 25 P.3d 1096, 1102 (Cal. 2001)), this statement derives from a California decision explaining that liability may be imposed under the retained control doctrine "where the [employer] furnished the equipment or was obligated by contract to do so, and the equipment proved to be defective, causing injury to the employee of the independent contractor." McDonald v. Shell Oil Co., 285 P.2d 902, 905 (Cal. 1955). Because the Maganas have not alleged that DRC provided defective equipment that caused Mr. Magana's injury, the Maganas' theory under this aspect of the retained control doctrine also fails.

The Maganas next argue that DRC is liable under the retained control doctrine because Campbell was responsible, in part, for the overall safety of the project. However, our supreme court has expressly cautioned against imposing liability under these circumstances. In Begaye, the court noted that

> there are serious public policy concerns in holding a general contractor liable for injuries of a subcontractor simply because it has a supervisory role and has closely monitored safety on the job site as a responsible general contractor should. "Penalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety."

2008 UT 4, ¶ 11 n.4 (quoting Martens v. MCL Constr. Corp., 807 N.E.2d 480, 490 (Ill. App. Ct. 2004)); see also McDonald, 285 P.2d at 904. Therefore, liability may not be asserted on the basis that DRC may have maintained a general responsibility over project safety.

We reach the same conclusion with regard to the Maganas' argument that DRC is liable under the retained control doctrine because it directed, to some extent, the construction of the walls. In Thompson, the supreme court explained that there is a distinction between control over how the work is done and

"control over the desired result." 1999 UT 22, ¶ 24; see also Smith v. Hales & Warner Constr., Inc., 2005 UT App 38, ¶ 13, 107 P.3d 701. Specifically, the Thompson court declined to impose liability under the retained control doctrine even though the homeowner directed where the injury causing activity would take place because the homeowner was merely exerting control over the desired result, not the manner in which the work was done. See 1999 UT 22, ¶¶ 3-4, 26. Like the homeowner in Thompson, when Campbell "snapped the lines for the walls," he was merely exercising some control over the desired result, i.e., where the walls were to be constructed in accordance with the plans for the project. This action does not amount to control over the manner in which the work was done, and thus, liability under this theory cannot result.

In their last effort to create liability under the retained control doctrine, the Maganas rely on this court's decision in Local Government Trust v. Wheeler Machinery Co., 2006 UT App 513, 154 P.3d 175. Briefly addressing the retained control doctrine, the Wheeler court reversed summary judgment, concluding that "there is sufficient evidence to create a question as to the applicability of the retained control doctrine" because "an invoice suggests that Wheeler's agents gave verbal approval for [the subcontractor's] work," and there was some evidence that the direction to adjust the injury-causing equipment came from Wheeler, "strongly suggest[ing] that Wheeler was directing [the subcontractor's] actions." Id. ¶ 10. There is, however, no similar evidence advanced in this case suggesting that DRC controlled, or even influenced, the manner in which the work was done. Mr. Magana's inconsistent testimony suggests that Campbell may have assisted Alexander, who was in charge of offloading the trusses; but there is no testimony suggesting that Campbell ordered Alexander to offload the trusses in a certain way. Thus, the Wheeler decision does not require us to reverse the trial court's summary judgment ruling.

Finally, the Maganas argue that DRC is liable under sections 413, 416, and 427 of the Restatement (Second) of Torts. Yet, the Utah Supreme Court unequivocally rejected this same argument in Thompson, stating, "Whether based on direct negligence under section 413 or vicarious liability under sections 416 and 427, these provisions have no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work." Id. ¶ 30 (emphasis added). It is undisputed that Mr. Magana was employed by Circle T, the company responsible for the framing and the roof trusses. Mr. Magana was

not employed by DRC. Consequently, these Restatement sections do not apply here.[1]

Based on the foregoing, we affirm.

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Pamela T. Greenwood,
Presiding Judge

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WE CONCUR:

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Judith M. Billings, Judge

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James Z. Davis, Judge

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1. We decline to rule on the Maganas' remaining arguments--that DRC is liable under Restatement sections 323, 324, and 424, or under a theory of agency--because these arguments are not adequately briefed and the trial court did not address them. In their appellate brief, the Maganas cite to the Restatement provisions and make a general, unsupported assertion that agency law applies. They do not, however, provide any additional legal argument or authority. Thus, their arguments have not been properly presented to this court. See Utah R. App. P. 24(a); State v. Gomez, 2002 UT 120, ¶ 20, 63 P.3d 72 ("[A] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." (internal quotation marks omitted)).