COURT OF APPEALS
DECISION
DATED AND RELEASED

JULY 16, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 96-2751

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

RONALD WOLF,

PLAINTIFF-APPELLANT,

V.

PATRICIA SEKERES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM SEKERES, DECEASED, AND SUGAR CREEK MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

FROEDTERT MEMORIAL LUTHERAN HOSPITAL, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

ANDERSON, J. Ronald Wolf appeals the order for summary judgment dismissing his action for injuries sustained when his right hand slid into the unguarded snapping rollers of a 45- to 50-year-old corn picker. Ronald maintains that the trial court erred in concluding that, as a matter of law, his contributory negligence exceeded that of his employer. We reverse the trial court's holding because summary judgment is a poor substitute for a trial on questions of comparative negligence. Moreover, a reasonable view of the totality of the causal negligence leads to the conclusion that there are material issues as to the negligence of Ronald and the negligence of his employer.

On January 7, 1993, Ronald was injured while operating a tractor and Oliver corn picker on Whitewater Lake Farm owned by William Sekeres.[1] Ronald was a part-time employee for Whitewater Lake Farm. His father, Robert Wolf, had been operating the farm for more than 30 years under an employment agreement with Sekeres. As farm manager, Robert was responsible for the day-to-day farm operations, the maintenance and repair of all equipment, as well as the planting and harvesting of crops.

As owner, Sekeres was responsible for the purchase of farm equipment and employment policies. The Oliver corn picker was 40 to 50 years old and was purchased by Sekeres at an auction in 1988 for $210. The Oliver corn picker did not have many of the safety features present on newer models, such as reversing snap rollers and snapping roller guards. Sekeres expected Robert to perform all of the required maintenance on the farm equipment and would pay

[1] William Sekeres died during the pendency of this action and his wife Patricia Sekeres was substituted as personal representative of the estate.

Robert extra for the repair work. Several days before the accident the corn picker's gear box failed and Robert and Ronald made the necessary repairs.

Sekeres set overall employment policies for Whitewater Lake Farm. He maintained a Farm Employer's Liability Insurance policy issued by Sugar Creek Mutual Insurance Company. The policy provided coverage for one full-time employee and one part-time employee. Robert had Sekeres' permission to use Ronald as an employee and Sekeres would pay Ronald the going rate for part-time farm laborers. On the day of the accident, Robert asked Ronald if he could help harvest corn because the corn cob grinder was scheduled to be at the farm to make cattle feed.[2]

The accident happened after the noon meal. When cornstalks became jammed in the corn picker Ronald stopped the tractor, leaving the power takeoff (PTO) running, and mounted the drawbar between the tractor and the picker. After clearing the jam by tapping on the cornstalks, Robert attempted to locate the source of the "odd sound" he had been hearing all day. One of the reasons Ronald kept the PTO engaged was that the sound was only present when the picker was operating. He believed he located the source of the sound and he decided to go to the rear of the picker to check. He started to climb down off the drawbar when he slipped and his right hand was caught in the snapping rollers.

Ronald filed this action against Sekeres alleging that he was negligent in providing unsafe, obsolete and unmaintained farm equipment for his employees. Sekeres denied the allegations and after considerable discovery

[2] In the trial court and on appeal, Sekeres highlights that when the accident happened Ronald was serving a sentence in the Walworth County Jail for growing marijuana. Ronald's status as a Huber Law prisoner has absolutely no relevancy to the issues presented in this appeal.

moved for summary judgment. Sekeres argued in the trial court that he was entitled to summary judgment as a matter of law because Ronald's negligence in putting himself into a zone of danger exceeded Sekeres' negligence.

The trial court granted Sekeres' motion. Relying upon ***Frei v. Frei***, 263 Wis. 430, 57 N.W.2d 731 (1953), the court reasoned:

> Mr. Wolf's negligence has got to be greater than that of Mr. Sekeres, taking the evidence afforded most favorably, and that summary judgment is appropriate under the rationale of the Frei case, and I base that primarily on the fact that he was well aware of the dangers involved and the fact that the machine should not have been operated when it was clogged.

While acknowledging that the term "assuming the risk" is not used, the trial court continued:

> So I think the Frei case is clearly right on point. He was in the area of danger and he was there not for a justifiable reason. He was there for a negligent reason because–in other words, he was basically assuming the risk doing it quickly and more rapidly exposing himself to the danger.
>
> So I do find as a matter of law and fact that if he had operated it properly, but for his own, assuming the risk of doing it the risky way, he would not have been injured.

Ronald challenges the trial court's reasoning in this appeal. He contends that the trial court erred in the application of ***Frei*** and in making the decision that his negligence was greater than that of Sekeres. In support of the trial court's decision, Sekeres responds that he owed no duty to Ronald to provide safe farm equipment. Sekeres argues that the core proposition of ***Frei*** is that the contributory negligence of one who knowingly places himself or herself in a position of danger without being required to do so is, as a matter of law, greater than the negligence of anyone else.

We review a motion for summary judgment using the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.,*** 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* § 802.08(2), STATS. The converse is equally true—we will reverse a summary judgment if the record shows that material facts are in dispute or if the trial court incorrectly applied the law. *See* ***Garvey v. Buhler***, 146 Wis.2d 281, 288, 430 N.W.2d 616, 619 (Ct. App. 1988).

In beginning our analysis, we note that in negligence actions summary judgment is only to be granted to a defendant in those rare cases where it is clear and uncontroverted that the plaintiff's negligence is, as a matter of law, greater than that of the defendant. *See* ***Huss v. Yale Materials Handling Corp.,*** 196 Wis.2d 515, 535, 538 N.W.2d 630, 637 (Ct. App. 1995). The supreme court has observed:

> Summary judgment is a poor device for deciding questions of comparative negligence. What is contemplated by our comparative-negligence statute, sec. 895.045, is that the totality of the causal negligence present in the case will be examined to determine the contribution each party has made to that whole. It is the "respective contributions to the result" which determine who is most negligent, and by how much. A comparison, of course, assumes the things to be compared are known, and can be placed on the scales. If a defendant, on summary judgment, is to be permitted to set forth in his affidavits the conduct of the plaintiff, and seek summary judgment on the ground the plaintiff's negligence outweighs his own as a matter of law, the only recourse to the plaintiff is to set forth in his counteraffidavits all of the conduct of the defendant. The upshot is a trial on affidavits, with the trial court ultimately deciding what is peculiarly a jury question. Our summary-judgment statute

> does not authorize a trial by affidavits. The granting of summary judgment on this ground cannot be sustained.

Cirillo v. City of Milwaukee, 34 Wis.2d 705, 716-17, 150 N.W.2d 460, 466 (1967) (footnote omitted).

The starting point of our analysis is whether Ronald was an employee of Sekeres. It is well established that an employer has a duty to furnish his or her employee with reasonably safe means and equipment for doing the work which he or she is required to do. *See* ***Szep v. Robinson***, 20 Wis.2d 284, 293, 121 N.W.2d 753, 758 (1963). The trial court did not directly address this issue because it vaulted to what it believed was the dispositive issue and held that as a matter of law Ronald's contributory negligence was greater than Sekeres' negligence. In making this leap, the trial court implicitly held that Ronald was an employee of Whitewater Lake Farm. On appeal, Sekeres contends that he was not Ronald's employer because he never had control of the services Ronald performed on the farm.

> The right to control is the dominant test in determining whether an individual is a servant. However, other factors are considered, including the place of work, the time of the employment, the method of payment, the nature of the business or occupation, which party furnishes the instrumentalities or tools, the intent of the parties to the contract, and the right of summary discharge of employees.

Pamperin v. Trinity Mem'l Hosp., 144 Wis.2d 188, 199, 423 N.W.2d 848, 852 (1988) (footnote omitted).

In depositions, Sekeres testified that he was never consulted about Ronald working on the farm on the day of the accident and if he had been he would have told Robert that it was too cold to work. He testified that he always preapproved Robert's requests to hire Ronald to work on the farm. From this Sekeres argues that because he did not approve Ronald's work on the day of the

accident he did not have any control over Ronald and he was not an employee. Sekeres' postaccident denials that Ronald was not an employee on the day of the accident are not conclusive. *See* ***Drakenberg v. Knight***, 178 Wis. 386, 392, 190 N.W. 119, 121 (1922).

There are also numerous indicia of Ronald's employment status that can be found in Sekeres' deposition testimony. Sekeres was aware that Ronald worked on the farm and Robert had Sekeres' permission to hire Ronald as needed. In setting Ronald's wage rate, he consulted with the county extension agent on the going rate in Walworth County. Sekeres maintained a Farm Employer's Liability Insurance policy with coverage for one full-time and one part-time employee. On the day of the accident, Ronald was harvesting corn and control of the details of Ronald's work was relinquished by Sekeres because of his inexperience in farming and placed in Robert's hands.

The uncontradicted evidence that Ronald was an employee on the day of the accident is compelling. Where the evidence and inferences are clear that there is an employer-employee relationship, it can be decided by the court. *See* ***Thurn v. La Crosse Liquor Co.,*** 258 Wis. 448, 451, 46 N.W.2d 212, 214 (1951). We conclude that Ronald was Sekeres' employee; consequently, the question is whether Sekeres furnished Ronald with reasonably safe means and equipment for doing the work which he was required to do.

The trial court erred in holding that Ronald's contributory negligence exceeded Sekeres' as a matter of law. The flaw in the court's reasoning was its decision that in placing himself in the zone of danger, Ronald was "assuming the risk" after having stated that in Wisconsin "[w]e don't use the terms, assuming the risk, …." In this opening remark the court was correct. The

use of the doctrine of "assumption of risk" in farm labor accidents was abolished in ***Colson v. Rule***, 15 Wis.2d 387, 395, 113 N.W.2d 21, 25 (1962):

> [A]ny conduct of a farm laborer, which evinces want of ordinary care for his own safety, constitutes contributory negligence and is subject to comparison under the latter section. This will have the effect of largely, if not entirely, abrogating in farm-labor cases the defense of assumption of risk as an absolute bar to recovery where the conduct alleged falls short of express consent.

The supreme court gives several compelling policy reasons for its abrogation of the doctrine:

> In most situations, it seems highly unrealistic to hold that a farm laborer has assumed the risk of a dangerous situation arising from his use of a defective tool, device, or piece of machinery supplied by his employer.
>
> A further reason for abolishing assumption of risk as an absolute defense is that it tends to immunize those employers from liability who are the greatest transgressors in providing safe conditions of work for their employees.
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> ….
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> Another reason for changing the existing rule is the difficulty in drawing the dividing line between assumption of risk and contributory negligence.
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> ….
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> Furthermore, the most-potent argument in favor of treating employee conduct, which formerly fell within the definition of assumption of risk, as a phase of contributory negligence is that the disparity in result, as it affects the employee under the law as it has heretofore existed, cannot be justified. Under the doctrine that assumption of risk by a farm employee is an absolute bar to his recovery, such result is required where the employee merely passively accepts a defective or unsafe condition of work. On the other hand, because of our comparative-negligence statute a farm employee, who actively and knowingly does something unsafe which contributes to cause his injury, usually will be permitted to recover some damages against his negligent employer. Only in the case where the jury

> attributes 50 per cent or more of the combined negligence to the employee will he fail to recover.

Id. at 389-93, 113 N.W.2d at 22-24 (citations omitted) (footnote omitted).

It was in its following remarks explaining why summary judgment was appropriate that the trial court erred. Despite declaring that the assumption of risk doctrine is no longer viable, the court found that Ronald's contributory negligence was greater than Sekeres because in his actions Ronald was "assuming the risk." The court should have limited its summary judgment methodology to a consideration of whether under the totality of the causal negligence Ronald's contributory negligence exceeded Sekeres' negligence.

The court also erred in finding that ***Frei*** is controlling because of the similarity of the facts. In ***Frei,*** the farm laborer did not disengage the PTO when he stopped to unjam the cornstalks caught in the picker; he dismounted from the wagon and was walking back to the tractor when he noticed corn lying on the ground in front of the parallel gathering points of the picker. The picker was defective because the gathering chains were so worn that they could not be tightened and they ran loose and floppy. When the laborer bent over to pick up the corn, he placed himself in a zone of danger in front of the gathering points with the defective chains. The laborer was injured when the gathering chains flopped, caught his sleeve and pulled him into the snap rollers. *See* ***Frei,*** 263 Wis. at 431-33, 57 N.W.2d at 732-33.

It is uncontroverted that Ronald did not disengage the PTO when he unjammed the cornstalks without incident. What differentiates this case from ***Frei*** is that Ronald testified that he was injured as he was leaving the zone of danger; he slipped when dismounting from the drawbar and his right hand slid into the corn picker. Sekeres did not present any evidence in support of his motion for

summary judgment that Ronald, in dismounting from the drawbar, placed himself in harm's way, such as bending down in front of the picker's gathering points.

The significant difference between this case and ***Frei*** is that Ronald presented evidence that he had a reason to leave the PTO engaged when he cleared the picker. In ***Frei,*** the injured laborer did not have a reason for not disengaging the PTO, he kept it engaged for his own convenience. Here, Ronald testified that the picker had been making an "odd sound" on the day of the accident and the "odd sound" was only present when the picker was operating. There is evidence that several days before the accident Ronald and Robert repaired the picker's gear box. To troubleshoot the noise, Ronald testified that he kept the PTO engaged to be able to locate the noise. Ronald testified that he was curious about the noise because he believed it was some part wearing out. In attempting to identify the noise, its source and its cause, Ronald testified that he was carrying out a duty Sekeres expected his employees to perform, the repair of the machinery.

Contrary to Sekeres' contention, this difference—that Ronald had a reason to have the PTO engaged—is what distinguishes ***Frei*** from ***Haile v. Ellis***, 5 Wis.2d 221, 92 N.W.2d 863 (1958).[3] In ***Haile***, the injured laborer left the PTO engaged because it was not possible to clear the clogged picker with the power off. *See* ***id.*** at 228, 92 N.W.2d at 866.

[3] In his brief, Sekeres accedes to the proposition that the theme of ***Frei*** is that "one who knowingly places himself in a position of danger in operating a corn picker without being required to do so cannot, as a matter of law, recover from the defendant owner of the equipment." Despite acknowledging that a reason for having the PTO engaged is material to Ronald's contributory negligence, Sekeres presents no evidence to dispute Ronald's assertion that the only way to track down the source and cause of the "odd sound" was to have the PTO engaged.

The significance of a reason for having the PTO engaged was spelled out in the ***Colson*** decision when the supreme court explained that the "assumption of risk" doctrine had outlived its usefulness because it tended to immunize those employers who are the worst transgressors in failing to provide safe working equipment. In explaining the ***Haile*** decision, the supreme court reasoned that the employer

> would be more blameworthy if he supplied a defective corn picker that required the employee to continue to have the moving parts operate in order to remove clogging stalks, than he would if it were possible for the employee to remove such stalks while the power was off.

Colson, 15 Wis.2d at 390, 113 N.W.2d at 22.

We conclude that the trial court erred in granting summary judgment to Sekeres. This is not one of those unusual cases where the evidence is clear and uncontroverted that Ronald's contributory negligence was substantially more than the negligence of Sekeres. In opposition to Sekeres' motion for summary judgment, Ronald presented evidence that creates a dispute over material issues of fact. Was Ronald in a zone of danger as he dismounted the drawbar? If he was, it is one factor that can be used to assess his contributory negligence. Was it necessary to have the PTO engaged to troubleshoot the "odd sound"? If it was, it is a factor that can be used to assess Sekeres' negligence in providing his employees with farm equipment to complete their chores in a reasonably safe manner. *See* ***Haile***, 5 Wis.2d at 230, 92 N.W.2d at 867.

By the Court.—Judgment reversed and cause remanded.

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