COURT OF APPEALS
DECISION
DATED AND FILED

March 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

No. 97-1136

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

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY GROUP,

DEFENDANT-APPELLANT,

ROBERT ZUBOR,

DEFENDANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge.[1] *Reversed.*

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[1] Although the judgment was entered by Judge David M. Bastianelli, the substantive rulings which we review were made by Judge Michael S. Fisher, who was the trial judge and entered the findings of fact and conclusions of law.

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

NETTESHEIM, J. The issue in this case is whether William Sluppick, a general contractor, or Robert Zubor (Robert), an independent subcontractor, is responsible for fire damage which occurred to the owner's premises during a roof repair project. The actual litigants in this case are General Casualty Company of Wisconsin, Sluppick's insurer, and American Family Mutual Insurance Company Group, Robert's insurer. The trial court ruled that Robert was the responsible party even though Robert had hired his brother, Donald Zubor (Donald), to perform the work as an independent subcontractor.[2] Based on that ruling, the court ordered that Robert's insurer, American Family, must indemnify for the loss which General Casualty had previously paid.

On appeal, American Family first challenges the trial court's factual determination that Sluppick contracted with Robert, not Donald, to perform the repairs on the premises. Second, American Family challenges the trial court's legal conclusion that Robert was the responsible party. We uphold the trial court's factual determination that Sluppick contracted with Robert. However, we

[2] In making their arguments, the parties have not drawn any distinction between a "subcontractor" and an "independent contractor" when referring to Robert or Donald. Indeed, at certain times the parties have used the terms interchangeably as to each. A subcontractor is defined, in part, as "[o]ne who takes portion of a contract from principal contractor or another subcontractor." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990). An independent contractor is defined as "'[o]ne who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control to his employer, except as to the result of his work.'" ***Madix v. Hockgreve Brewing Co.***, 154 Wis. 448, 450-51, 143 N.W. 189, 190 (1913) (quoted source omitted).

For purposes of this opinion, we consider Robert as an independent subcontractor under his contract with Sluppick and Donald as an independent subcontractor under his contract with Robert. We do so not only because the parties, at times, portray them as such, but also because the evidence in this case does not establish that Robert was under the requisite degree of control by Sluppick or that Donald was under the requisite degree of control by Robert.

disagree with the court's legal determination that Robert, not Donald, was the responsible party. Therefore, we reverse the judgment.

BACKGROUND

Sluppick is a general contractor doing business as Building Associates. In December 1992, the Marchuk family, owners of the Marchuk Family Restaurant, approached Sluppick regarding a problem that they were having with the roof of their restaurant. Sluppick explained that he performed carpentry, not roofing, work. However, after additional discussion, Sluppick agreed with the Marchuks to act as their general contractor to arrange the roofing repairs. Sluppick then contacted Robert, who had done roofing work for him in the past. Robert expressed interest in the job. After Sluppick and Robert went to the Marchuks' restaurant to measure the upper roof area, Robert gave Sluppick an estimated cost for the repairs. Sluppick contacted the Marchuks who agreed to the estimate and inquired as to whether the lower roof of the restaurant could be similarly repaired.

Sluppick measured the lower roof area and then contacted Robert regarding these additional repairs. Robert agreed to do the entire job for $6200. Sluppick, as general contractor, quoted the Marchuks a price of $6800. The Marchuks agreed to the cost. Robert arranged with his brother Donald to have Donald perform the actual repairs. By stipulation, the parties in this case have agreed that Donald was not Robert's employee.

None of the agreements between the Marchuks and Sluppick, between Sluppick and Robert and between Robert and Donald was reduced to writing.

While Donald was performing the repairs, he accidentally started a fire which damaged the Marchuks' restaurant. The parties stipulated that Donald's negligence caused the fire and that the Marchuks and two of their insurers incurred losses in excess of $500,000 which General Casualty paid.

On March 15, 1995, General Casualty filed a complaint against Robert and his insurer, American Family. General Casualty alleged that Robert was acting as Sluppick's subcontractor when the fire occurred. General Casualty argued that it was entitled to indemnity or contribution from American Family if the damages resulted from the carelessness of Robert's employee, Donald. In defense, American Family contended that it did not owe coverage because neither Robert nor any of his employees had worked on the Marchuks' restaurant. Instead, American Family maintained that Sluppick had contracted with Donald, not Robert, and that Robert merely acted as a conduit to assist Sluppick in engaging Donald directly.

The matter was tried to the court without a jury. The parties submitted a stipulation which recited some agreed facts and also identified the issues for trial as follows: (1) "who hired who"—did Sluppick directly hire Donald to do the roofing work or did Robert hire Donald?; and (2) "[i]s the causal negligence of Don Zubor imputed to defendant Robert Zubor or is Robert Zubor vicariously responsible for the causal negligence of Don Zubor?" The stipulation additionally stated the parties' agreement that "[Donald] is not an insured under the American Family policy(ies) [and] that sufficient proof does not exist as to show an employer/employee relationship between Robert Zubor and Donald Zubor …."

In its written decision following trial, the trial court made the following findings:

> The Court has considered the evidence in this case and clearly the issue is who hired who to do what.
>
> William Sluppick was the general contractor on the Marchuk job. It is clear Sluppick contracted Robert Zubor. Without any discussion with Sluppick, Donald Zubor did the work. The question is was he an employee of Robert? The answer is yes.

Based on the above finding, the trial court determined that Robert was responsible for Donald's negligence. The court further ruled that Robert's duty to Sluppick was nondelegable, and therefore Robert's insurer, American Family, was obligated to indemnify General Casualty for the payments it had previously made.

On September 3, 1996, American Family filed a reconsideration motion based on the trial court's finding that Donald was Robert's employee. American Family noted that this finding was contrary to the parties' stipulation. After a hearing, the court amended its findings, stating instead that "Donald Zubor, after contracting with his brother, Robert Zubor, was the person who performed the said roofing installation work, which work Donald Zubor performed as a subcontractor to but not as an employee of his brother, Robert Zubor." However, the court confirmed its earlier ruling that Robert was responsible for Donald's causal negligence and the resulting damages.

The parties then filed a further stipulation entering judgment in favor of General Casualty but preserving American Family's right to appeal the trial court's ruling that Robert was "legally responsible for the causal negligence of Donald Zubor …."

DISCUSSION

THE FACTUAL ISSUE:

WITH WHOM DID SLUPPICK CONTRACT?

We begin by addressing American Family's challenge to the trial court's finding that Sluppick contracted with Robert, not Donald, to install the roofing. This presents an issue of fact. We will not set aside the trial court's finding of fact unless the finding is clearly erroneous. *See* § 805.17(2), STATS.

In support of its argument that Sluppick contracted directly with Donald, American Family points to the testimony given by Robert and Donald which disagrees with the trial court's finding. Robert testified that he never agreed with Sluppick to perform the roofing work on the Marchuk restaurant and that he was never hired to do that job. Robert testified that Sluppick contacted him to ascertain whether Donald was available to do a roofing job. Donald testified that he purchased the materials, supplied the tools and completed the work necessary for the roofing repairs.

However, other testimony supports the trial court's finding. Sluppick testified that he hired Robert to do the roofing work. Sluppick had used Robert in the past for such work. Sluppick expressly denied ever having hired Donald for the Marchuk job or having used Donald on any prior occasion for a roofing project. Sluppick testified that he negotiated the price of the roofing job with Robert and, once the Marchuks accepted Robert's estimate, told Robert that he could go ahead with the job. Sluppick testified that up until he encountered Donald at the job site, he did not know of Donald's involvement in the job. Sluppick testified that when he went to Robert's residence following the fire, he and Robert discussed whether Robert had insurance which would cover the damages. In addition, Robert's wife inquired whether Robert would still be paid for the job. According to Sluppick's testimony, Robert stated that Donald was a "subcontractor to him."

The testimony of the Zubor brothers and that of Sluppick is in direct conflict as to who Sluppick hired to perform the roofing work. It is for the trial court, not the appellate court, to resolve conflicts in the testimony. *See* ***Fuller v. Riedel***, 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990). It is evident from the trial court's decision that the court found Sluppick to be more credible. We conclude that the trial court's finding that Sluppick hired Robert to perform the roofing work and that Robert then further contracted with Donald is not clearly erroneous. We therefore uphold the trial court's factual finding.[3]

THE LEGAL ISSUE:
WHO IS RESPONSIBLE—ROBERT OR DONALD?

Next, American Family challenges the trial court's legal conclusion that under existing law, Robert was responsible for Donald's negligence. This issue presents a question of law which we review de novo. *See* ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993). Nonetheless, we value a trial court's decision on such a question. *See* ***id***.

The general rule is that the liability of an independent contractor may not be imputed to a general contractor. *See* ***Jacob v. West Bend Mut. Ins. Co.***, 203 Wis.2d 524, 543, 553 N.W.2d 800, 807 (Ct. App. 1996). However, an exception to this rule exists when a written construction contract with the owner obligates the general contractor to provide all labor and material necessary to complete the project. *See* ***id***. at 544, 553 N.W.2d at 808 (citing ***Brooks v. Hayes***, 133 Wis.2d 228, 231, 395 N.W.2d 167, 168 (1986)).

[3] We therefore need not address American Family's further arguments which are premised upon our acceptance of its argument that Robert did not contract to perform the roofing installation work. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

In ***Brooks***, the owners of a house sued their general contractor for fire damage caused by the negligence of a subcontractor who installed their fireplace. *See* ***Brooks***, 133 Wis.2d at 232-33, 395 N.W.2d at 168-69. The issue before the Brooks court was:

> [W]hether a general contractor who hires an independent contractor to perform services under the general contractor's agreement with a landowner to 'provide all necessary labor and materials and perform all work of every nature whatsoever to be done in erection of a residence' is liable to the landowners for damage to their property caused by the independent contractor's negligent construction.

Id. at 231, 395 N.W.2d at 168 (footnote omitted).

On appeal to the supreme court, the landowners argued that the general rule against a general contractor's vicarious liability for an independent contractor's tortious conduct should not apply when "there is a contractual relation between the plaintiff-owners and [the general contractor] and … the damage was to property of the plaintiff-owners, not a third party …." ***Id***. at 234, 395 N.W.2d at 169. Our supreme court agreed, concluding that "a general contractor is liable to the owner for breach of contractual duty of due care when an independent contractor negligently performs the general contractor's work under the contract …." ***Id***. at 236, 395 N.W.2d at 170.

The ***Brooks*** rule is designed to protect the landowner from a situation in which a general contractor attempts to discharge his liability to a third party when the landowners have not contractually agreed to such a discharge. *Cf.* ***Jacob***, 203 Wis.2d at 545, 553 N.W.2d at 808. However, in this case, the interests of the Marchuks, the owners, are not at issue or at risk. They have been fully compensated by General Casualty and they are not parties to this action. The

policy reasons which underpin the supreme court's decision in ***Brooks*** are not implicated in this case.[4]

Unlike the more conventional "two-tiered" case where the owner contracts with the general contractor and the general contractor then contracts with an independent subcontractor, here we have a "three-tiered" level of contractor participation: the Marchuks contracted with Sluppick; Sluppick subcontracted with Robert; and Robert subcontracted with Donald.[5] While Robert does not qualify as a general contractor in terms of his relationship to Sluppick or the Marchuks, he functionally stands as such as to Donald, whom he hired as his independent subcontractor. However, regardless of the label we put on Robert, we see no sound reason why the general rule against imputing an independent subcontractor's liability to a general contractor should not equally apply to the independent subcontractor who, in turn, further subcontracts with another.[6]

Brooks teaches that three conditions must exist before the exception permitting general contractor liability will apply: (1) the agreement must be in writing; (2) the agreement must be between the owner and the contractor; and (3) the contract must obligate the contractor to provide all of the materials and to do

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[4] Therefore we reject General Casualty's further argument that ***Brooks v. Hayes,*** 133 Wis.2d 228, 395 N.W.2d 167 (1986), is not limited to contracts between owners and general contractors.

[5] General Casualty describes this alignment as a "general contractor (Sluppick), a subcontractor (Robert Zubor) and a sub-subcontractor (Donald Zubor)."

[6] General Casualty urges us to adopt the Kansas law of ***Dondlinger & Sons', Const. Co. v. Emcco., Inc.,*** 606 P.2d 1026, 1029 (Kan. 1980), which holds that a subcontractor who subcontracts or assigns his duties to a third party remains liable to the prime contractor on his original contract. However, we deal here with the established Wisconsin law which holds, subject to the ***Brooks*** exception, that one who hires an independent contractor is generally not responsible for the wrongs committed by such contractor.

all of the work necessary to complete the project. *See* ***Brooks***, 133 Wis.2d at 231, 395 N.W.2d at 168. None of these requirements is established by the facts of this case. First, none of the agreements between the various participants is in writing. Second, Robert never contracted with the Marchuks, the owners. Third, Robert's agreements, whether with Sluppick or Donald, do not establish that he was obligated to provide all of the materials and do all of the work necessary to complete the project.[7] As such, this case does not fall under the exception set forth in ***Brooks***. As a result, Donald, who served Robert as an independent contractor, is the responsible party.

We conclude that the independent contractor rule applies to this case and that Donald's negligence cannot be imputed to Robert.

CONCLUSION

We uphold the trial court's factual finding that Sluppick contracted with Robert to perform the roofing installation. However, we conclude that the court erroneously applied the ***Brooks*** exception in this case. Instead, we hold that this case is governed by the general rule which precludes imputing Donald's negligence as an independent subcontractor to Robert. As such, American Family is not obligated to indemnify General Casualty. We reverse the judgment.[8]

By the Court.—Judgment reversed.

[7] The same failings could be said of Sluppick's oral agreement with the Murchuks.

[8] General Casualty also contends that American Family has raised certain issues which were not raised in the trial court and which go beyond the parties' stipulation as to the issues which were to be litigated in the trial court. However, we need not answer this argument because our decision is limited to the factual and legal issues which the stipulation clearly identified for trial and which the parties' trial court briefs addressed.

Not recommended for publication in the official reports.