COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 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. 98-1065-FT

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

ROBERT LARSON AND TRACY LARSON,

PLAINTIFFS-APPELLANTS,

V.

BAYSIDE TIMBER,

DEFENDANT-RESPONDENT,

THEODORE BRESETTE, WEBER BROTHERS TRANSIT, OPERATING ENGINEERS LOCAL 139 HEALTH BENEFIT FUND AND FARMERS INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Iron County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Robert and Tracy Larson appeal a summary judgment that dismissed their tort lawsuit against Bayside Timber Corporation. Robert suffered injuries when his snowmobile collided with Weber Brothers Transit Company's log-hauling truck.[1] Weber Brothers was hauling logs for Bayside Timber. The trial court ruled that Weber Brothers was an independent contractor and that Bayside Timber thus had no vicarious liability for Weber Brothers' torts. The Larsons make three basic arguments: (1) Weber Brothers was not an independent contractor; (2) Bayside Timber had vicarious liability for Weber Brothers' torts even if Weber Brothers was an independent contractor; and (3) Bayside Timber was guilty of its own negligence, independent of any vicarious liability. The trial court correctly granted summary judgment if there was no dispute of material fact and Bayside Timber had a right to judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We reject the Larsons' arguments and affirm the summary judgment.

The Larsons did not show any grounds for Bayside Timber's vicarious liability. By and large, third parties have no vicarious liability for the torts of independent contractors. *See* ***Wagner v. Continental Cas. Co.***, 143 Wis.2d 379, 388, 421 N.W.2d 835, 838 (1988). Courts judge whether a tortfeasor was an independent contractor by how much control the third party had. *See* ***Arsand v. City of Franklin***, 83 Wis.2d 40, 43-44, 264 N.W.2d 579, 581 (1978). The Larsons did not show the needed control by Bayside Timber. Weber Brothers used its own trucks and had control over the operational details of the log hauling. Weber Brothers chose the drivers and the routes they would take, and the Larsons

[1] This is an expedited appeal under RULE 809.17, STATS.

have not alleged that Bayside Timber employees rode along on the log-hauling trucks. Bayside Timber had control only in the limited sense that it paid Weber Brothers for a service and had a right to demand performance of that service. Bayside Timber set the ends, not the means, with Weber Brothers left to its own means to reach those ends.

The Larsons also did not meet exceptions to the rule against vicarious liability for the torts of independent contractors, such as the exception for principals who entrust inherently dangerous or ultrahazardous activities to independent contractors. *See* ***Wagner***, 143 Wis.2d at 388, 421 N.W.2d at 838 (entrusters have vicarious liability for those torts). The Larsons put forth no facts showing that log hauling was more hazardous than hauling other materials or inherently dangerous in terms of raising the risk of a collision. For example, they gave no facts showing that log hauling needed extra precautions on the part of drivers. On the contrary, all facts tended to show that log haulers, like other drivers, needed to use the degree of care called for by the load and the terrain: reasonable care under the circumstances. Without proof that log haulers needed to take greater precautions, the trial court had no reason to conclude that drivers of log-hauling trucks had any less control over the truck than drivers of other trucks. In short, the Larsons did not show that log-hauling trucks posed a greater danger to road users than other vehicles.

The Larsons' complaint contains no separate negligence claim against Bayside Timber. Their complaint must give fair notice of the claims they advance. *See* ***Hertlein v. Huchthausen***, 133 Wis.2d 67, 72, 393 N.W.2d 299, 301 (Ct. App. 1986). The Larsons' allegations as to Bayside Timber sound in the law of vicarious liability. For example, the complaint states that the driver was hauling logs on behalf of Bayside Timber. This allegation resembles vicarious

liability. The complaint alleges that the Weber Brothers' driver operated the log-hauling truck in a negligent manner. It alleges that Robert was operating the snowmobile in a prudent manner. The complaint makes a direct claim of negligence against Weber Brothers; it alleges that Weber Brothers negligently entrusted its truck to the driver. On the other hand, the complaint makes no comparable claim against Bayside Timber. It nowhere alleges that Bayside Timber wrongly entrusted log hauling to an independent contractor or that Bayside Timber itself acted in any way guilty of negligence. The trial court correctly judged the merits of the Larsons' complaint.

The trial court also had no duty to let the Larsons amend their complaint after it had rendered judgment. The trial court made a discretionary decision. *See* ***Leciejewski v. Sedlak***, 110 Wis.2d 337, 350, 329 N.W.2d 233, 239 (Ct. App. 1982). The trial court could reasonably rule that the motion to amend was too late by the postjudgment stage. The Larsons could have sought to amend earlier, and amendment at the postjudgment stage would have worked unfairness against Bayside Timber. As a result, we need not address the Larsons' claim in the amended complaint that Bayside Timber was itself negligent in failing to post warning signs on the road. While the Larsons also made this claim in their summary judgment brief, the trial court had no duty to address it; the claim was in variance with the complaint's failure to allege negligence, and the Larsons must abide by their failure to cite Bayside Timber with anything but imputed fault. In sum, the Larsons have shown no error of law or dispute of material fact that would bar summary judgment.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.