COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP997-FT **Cir. Ct. No. 2007CV404**

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

ROBERT ROHDE,

PLAINTIFF-APPELLANT,

V.

ACUITY, A MUTUAL INSURANCE COMPANY AND THE SELMER COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.[1] Robert Rohde appeals a judgment and an order dismissing his safe place and negligence claims against The Selmer Company and its insurer. The circuit court concluded that Selmer, the general contractor, was not liable to Rohde, an employee of a subcontractor, because Selmer neither retained the requisite control under the safe place statute nor committed an affirmative act of negligence. We agree with the circuit court and affirm.[2]

Background

¶2 Selmer was the general contractor for a construction site in Fond du Lac. Selmer subcontracted with M.V. Klinger, which employed Rohde, for application of water sealant to the building. When Rohde arrived at the construction site, he surveyed the work area. Noticing cars in his path, Rohde contacted a Selmer employee and asked that the vehicles be moved so Rohde would not get sealant on them. Selmer agreed to ensure the vehicles were relocated. Rohde did not re-examine the area after the cars were moved.

¶3 Selmer provided a scissors lift for Rohde to use, and an employee demonstrated its controls for Rohde. Rohde asked a few questions about maneuvering around dirt, wet cement, and some stairs, then began his work. Rohde applied sealant in an orderly pattern, spraying up the building for the width of the lift, moving the lift to the next section, then spraying down the building. After completing a pass up the building, while moving the lift to the next section,

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[2] An order denied the motion for summary judgment. A subsequent judgment confirmed the order and taxed costs against Rohde.

the lift tipped over. Rohde was thrown to the ground and severely fractured his right wrist and ankle. The lift had tipped because of an incline for a loading dock in Rohde's path. Rohde conceded that had he looked over the edge of the lift before moving it, he would have seen the incline and avoided it.

¶4 Rohde brought this action against Selmer, alleging negligence and a violation of the safe place statute, WIS. STAT. § 101.11. Rohde claimed Selmer violated its statutory duty by failing to mark the incline or otherwise make the hazard noticeable. Selmer moved for summary judgment, arguing that, as a matter of law, it had no duty under the statute or common law. The circuit court agreed with Selmer and granted the motion.

Discussion

¶5 We review summary judgments de novo, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. Safe Place Statute

¶6 WISCONSIN STAT. § 101.11(1) requires "every employer and owner of a public building … to provide a place that is safe for employees and … frequenters of that place…." ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857. Further, every employer "shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe," and take other reasonable steps to protect the health,

safety, and welfare of employees and frequenters. WIS. STAT. § 101.11(1). Also, employers and owners must "construct, repair or maintain such place of employment or public building as to render the same safe." ***Id.***[3]

¶7 A general contractor can owe a statutory duty to a subcontractor—considered a frequenter rather than an employee—when a hazardous condition is created, but only if the general contractor has reserved a right of supervision and control over the specifics of the subcontractor's work. ***Barth v. Downey Co.***, 71 Wis. 2d 775, 778-79, 239 N.W.2d 92 (1976). Ordinarily, the general contractor reserves no such control over the work of the subcontractor, although sometimes the general contractor may reserve a right to inspect progress or control the overall plan of construction to be furnished to the client. *See* ***id.*** at 780. Control of the premises need not be exclusive to the general contractor, nor must the contractor have control for all purposes. *See* ***Ozzello v. Peterson Builders, Inc.***, 743 F. Supp. 1302, 1312 (E.D. Wis. 1990). The test is whether the general contractor "stood in the shoes of the [immediate] employer by reason of his retention of control of the premises." ***Barth***, 71 Wis. 2d at 781 (citation omitted). That is, the general contractor must retain control over "the actual manner in which the specifications were complied with," not simply a right to check for such compliance. ***Id.***

[3] The statute applies only to unsafe conditions, not unsafe acts. ***Barth v. Downey Co.***, 71 Wis. 2d 775, 779, 239 N.W.2d 92 (1976). Selmer disputes whether the ramp is an unsafe condition and asserts Rohde engaged in an unsafe act when he failed to look for hazards in his path each time he moved the lift. However, while a frequenter to a place must still exercise reasonable care for his own safety, preoccupation of a worker performing his work may minimize the standard of care to which he will be held. *See* ***Ozzello v. Peterson Builders, Inc.***, 743 F. Supp. 1302, 1313 (E.D. Wis. 1990). Because we can determine as a matter of law that Selmer owed no statutory duty to Rohde, we need not address this dispute further.

¶8 Here, there is no evidence that Selmer retained or exercised "control over the details of the work" Rohde performed. *See* ***id.*** While Rohde asked for guidance in maneuvering around a set of stairs and other areas with the scissors lift, and asked to have the vehicles in the parking lot moved, there is no evidence that Selmer ultimately controlled Rohde's job performance. Selmer did not control Rohde's use of the lift. It did not direct his method of applying sealant. It offered no specifications to Rohde on how to complete his task. Indeed, Rohde testified at his deposition that no one from Selmer ever instructed him how to perform his job. Because Selmer did not stand in for Rohde's immediate employer, Selmer could not owe a duty to Rohde under the safe place statute.[4]

II. Common Law Negligence

¶9 Summary judgment is usually inappropriate for negligence questions. *See* ***Danks v. Stock Bldg. Supply, Inc.***, 2007 WI App 8, ¶16, 298 Wis. 2d 348, 727 N.W.2d 846. If, however, we can say that, under the facts presented, no reasonable jury could find a defendant negligent, summary judgment will be appropriate. ***Id.***

[4] Rohde's reliance on ***Burmek v. Miller Brewing Co.***, 12 Wis. 2d 405, 107 N.W.2d 583 (1961), is misplaced. Rohde states the ***Burmek*** court held that where a subcontractor did nothing to alter a dangerous condition on the premises, the general contractor was in control and liable. But there was no general contractor in ***Burmek***; Miller brewing was liable as the premises owner. Nothing in that case causes us to question ***Barth***.

We are also concerned by Selmer's cite to ***Reichhoff v. Asdic, Ltd.***, 165 Wis. 2d 511, 478 N.W.2d 595 (1991), for the company's proposition that to establish liability, a plaintiff must show the general contractor assumed the role of the subcontractor in the controlling details. ***Reichhoff*** is an unpublished decision. ***Reichhoff v. Asdic, Ltd.***, No. 90-2590, unpublished slip op. (Wis. Ct. App. Nov. 14, 1991). Such a citation is contrary to WIS. STAT. RULE 809.23(3). We suspect this error is the result of reliance on an electronic database, and we remind counsel that while electronic resources may be convenient, and generally correct, they should be considered a complement to, not a replacement for, the official reporters.

¶10 As a general rule, "one who hires an independent contractor is not liable in tort for injuries sustained by an independent contractor's employee while he or she is performing the contracted work."[5] ***Id.***, ¶17. There are two exceptions to this rule of nonliability: if the hiring entity commits an affirmative act of negligence or if the independent contractor is engaged in "abnormally dangerous" work. ***Id.***, ¶23.

¶11 It is clear that Rohde was not engaged in abnormally dangerous work—examples include working with toxic gases or transporting nuclear waste. *See* ***Thompson v. Jump River Elec. Coop.***, 225 Wis. 2d 588, 597, 593 N.W.2d 901 (Ct. App. 1999).

¶12 Moreover, there is also no proof that Selmer committed an affirmative act of negligence. "An affirmative act is an act of commission—that is, something that one does—as opposed to an act of omission, which is something one fails to do." ***Ozzello***, 743 F. Supp. at 1312. Rohde alleged Selmer was negligent because it "failed to properly guard or barricade the drop-off, or in some other way make the unsafe condition noticeable or inaccessible…." These are only omissions. Because Selmer is not alleged to have committed an affirmative act of negligence, summary judgment was appropriate on this question as well.

[5] There is no dispute that for the purposes of the analysis, Klinger was an independent contractor. Also, Rohde appears to agree that ***Danks v. Stock Bldg. Supply, Inc.***, 2007 WI App 8, ¶17, 298 Wis. 2d 348, 727 N.W.2d 846, controls, but he claims this rule of nonliability goes against the general notion that every person owes a duty of ordinary care to the whole world. Despite that general rule, "limitations do exist with respect to the imposition of a legal duty in some cases." ***Rockweit v. Senecal***, 197 Wis. 2d 409, 421, 541 N.W.2d 742 (1995). This is one of those cases.

By the Court.—Judgment and order affirmed.

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