

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 1999

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. 98-2177

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

THOMAS BURD,

PLAINTIFF-APPELLANT,

v.

**IRON COUNTY, IRON COUNTY FORESTRY DEPARTMENT,
WISCONSIN COUNTY MUTUAL, THOMAS SALZMANN, AND
STATE OF WISCONSIN-DEPARTMENT OF
ADMINISTRATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Iron County:
PATRICK J. MADDEN, Judge. *Affirmed.*

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

PER CURIAM. Thomas Burd appeals a summary judgment dismissing his personal injury action against Iron County, its forestry department, its insurer and Thomas Salzmann, a fellow State employee. Burd injured his wrist

when he fell from the County's five-wheel vehicle, driven by a State employee, that was used to transport a work crew from the highway to a work site in the forest. The complaint alleges that the County provided a defective vehicle that was negligently maintained. Because we conclude that the County is not liable for torts committed to an independent contractor's employees and that Burd has not established a factual basis for any of the exceptions to that rule, we affirm the dismissal of the action against the County, the forestry department and their insurer. Because Salzmann is immune from suit under the worker's compensation law, we affirm the dismissal as to him.

Burd worked for the Wisconsin Conservation Corps. The County Forestry Department contracted with the WCC to do forestry work as directed by the County under the immediate supervision of a WCC crew leader. The WCC board assumed all responsibility for worker's compensation liability to its employees. WCC provided most of the personal safety equipment, hard hats, face shields, safety toed boots, hearing protection, eye protection, disposable dust masks, leather work gloves, coveralls and a rainsuit. The County provided chainsaw chaps, steel toed waders and/or hip boots and personal flotation devices.

In Wisconsin, a principal employer is not liable to others for torts of an independent contractor. *See Wagner v. Continental Cas. Co.*, 143 Wis.2d 379, 388-90, 421 N.W.2d 835, 838-39 (1988). The principal employer may be liable to an independent contractor's employees for injuries caused by the principal employer's affirmative acts of negligence that increased the risk of injury. *Id.* An affirmative act which increases the risk of injury must be an act of commission, not an act of omission. *Id.* Negligence must be based on active misconduct

constituting an affirmative act, rather than passive inaction or failure to take steps to protect the plaintiff from harm.¹ *Id.*

The negligent acts alleged in the complaint do not constitute affirmative acts of commission. The allegedly defective brakes, the failure to maintain warning stickers that prohibited riders on the vehicle and the failure to instruct the work crew on safety matters all constitute acts of omission, passive inaction or failure to take steps to protect the workers.

Burd relies on *Snider v. Northern States Power*, 81 Wis.2d 224, 230-32, 260 N.W.2d 260, 262-63 (1977) which holds that one who contracts with an independent contractor can acquire liability by retaining the right to control the details of the work. As in *Snider*, however, the County did not retain such control over the details as to create liability. The work crew leader testified that he had the duty to hire, supervise and reprimand the work crew. He controlled the crew's work on a daily basis and was not under the immediate direction or supervision of anyone Iron County employed. The contract between the County and WCC gave the County only a generalized right of supervision and inspection that does not constitute sufficient retained control to impose liability on the County. *Id.* at 236, 260 N.W.2d at 265.

Burd also cites *LeMacher v. Circle Construction Co.*, 72 Wis.2d 245, 240 N.W.2d 179 (1975) and *Barth v. Downey Co. Inc.*, 71 Wis.2d 775, 239 N.W.2d 92 (1976), for the proposition that a principal employer can be held liable

¹ A principal employer may also be held vicariously liable for negligence of an independent contractor when the contractor's employee is engaged in work that is classified as abnormally dangerous or extra hazardous. Burd does not argue that his job was extra hazardous, and the record would not support such an argument.

for supplying defective equipment to an independent contractor's employee. Those cases deal with liability under the Safe Place Statute and are not applicable here. *Snider*, 81 Wis.2d at 238, 260 N.W.2d at 266. In an action based on common law negligence, an affirmative act of negligence is required.

Salzmann, like Burd, is employed by the State of Wisconsin. The State assigned him to administer the County forest. Section 102.03(2), STATS., provides that the right to recover compensation under the Worker's Compensation Act is the exclusive remedy against the employer and any other employee of that employer. Therefore, the trial court properly dismissed the action against Salzmann.

By the Court.—Judgment affirmed.

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

