

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1091

Cir. Ct. No. 2009CV1477

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WISCONSIN BELL, INC. D/B/A AT&T WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SSHD, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 PER CURIAM. Wisconsin Bell, Inc., d/b/a AT&T Wisconsin, appeals a summary judgment in favor of SSHD, Inc., on Wisconsin Bell's claims for negligence and trespass. We conclude the circuit court properly granted

summary judgment. It is undisputed that third-party contractors, not SSHD, damaged Wisconsin Bell's telecommunications equipment. Accordingly, we affirm.

BACKGROUND

¶2 SSHD is a real estate development company formed to sell vacant land in St. Croix County. SSHD is not a construction firm, owns no equipment, and has no employees. Its two shareholders, Daniel Bauer and Jason Meffert, are neither engineers nor construction contractors.

¶3 SSHD sought approval of four certified survey maps from St. Croix County. As a condition of approval, St. Croix County required SSHD to enter into a development agreement requiring certain street and utility improvements that would serve the surveyed lots. The agreement required SSHD to place improvements under Stageline Road and reconstruct the intersection between Stageline Road and Old Highway 35. SSHD hired Humphrey Engineering and F & K Trucking & Excavating, Inc., to perform these tasks.

¶4 Wisconsin Bell sued SSHD for trespass and negligence, alleging that its telecommunications equipment was buried and damaged during construction. SSHD denied damaging Wisconsin Bell's equipment and filed an affirmative defense asserting that Wisconsin Bell's damages, if any, were caused by a third party. Humphrey and F & K were briefly brought into the case by SSHD, but were dismissed by stipulation of the parties on an insurer's motion to bifurcate.

¶5 SSHD filed a motion for summary judgment, which was granted by the circuit court. It appears Wisconsin Bell did not directly rebut SSHD's assertion that any equipment damage was solely attributable to the actions of

independent contractors. Instead, Wisconsin Bell argued SSHD retained some measure of control over the project, so that it was responsible for the equipment damage. The circuit court found this assertion at odds with the complaint:

Significantly, in its complaint, Wisconsin Bell did not allege any negligence on the part of SSHD in ordering the excavation work or permitting it to continue, nor did it allege that SSHD's negligence caused a third party subcontractor to perpetuate a trespass. It simply alleged that SSHD negligently buried the telecommunications equipment. Even when, during discovery, it became apparent that a third party independent contractor had performed all of the relevant excavation work, Wisconsin Bell did not amend its complaint to assert SSHD's vicarious liability for the contractor's actions. Although this theory was suggested in response to SSHD's Motion for Summary Judgment, it does not change the fact that in Wisconsin Bell's complaint, SSHD's liability is predicated on its actual performance of the excavation work.

Based on the submissions, the court found Wisconsin Bell's complaint defective and dismissed its claims.

DISCUSSION

¶6 We review a grant of summary judgment de novo. *Park Bancorporation, Inc. v. Sletteland*, 182 Wis. 2d 131, 140, 513 N.W.2d 609 (Ct. App. 1994). We first examine the pleadings to determine whether a claim has been stated and whether a material issue of fact is presented. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by Olstad v. Microsoft Corp.*, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. Then, we look to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment. *Id.* If so, "the court must examine the affidavits and other proof of the opposing party ... to determine whether there exist disputed material facts, or undisputed material facts

from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.” *Id.*

¶7 Wisconsin Bell’s complaint purports to set forth three claims against SSHD, only two of which are relevant here.¹ Wisconsin Bell alleged that its equipment was damaged as a result of SSHD’s trespass and negligence. Factually, the complaint alleged that “on or about October 2, 2007, the defendant [SSHD], without [Wisconsin Bell’s consent], did bury [telecommunications equipment] owned and operated by the plaintiff” Wisconsin Bell alleged that, as a result of SSHD’s conduct, its equipment was damaged and it incurred expenses related to labor, services, materials and contractor costs for replacement and repair.

¶8 Wisconsin Bell, invoking Wisconsin’s notice-pleading rule, contends its complaint sufficiently sets forth claims for trespass and negligence. The notice-pleading rule is codified in WIS. STAT. § 802.02(1)(a),² which requires that a complaint include “[a] short and plain statement of the claim, identifying the transaction or occurrence ... out of which the claim arises and showing that the pleader is entitled to relief.” We construe the complaint liberally to achieve substantial justice. WIS. STAT. § 802.02(6).

¶9 If we confined our analysis to the complaint’s four corners, we might conclude the complaint passes muster. That is to say, liberally construed, the pleading, standing alone, might very well accomplish the bare minimum of

¹ Wisconsin Bell states it has abandoned a third claim for damage to its equipment caused by vandals.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

stating claims sounding in negligence and trespass against SSHD. Wisconsin Bell's problem, though, is that these claims do not comport with the undisputed facts on summary judgment.

¶10 SSHD sought summary judgment on the ground that it did not engage in any of the actions specified in Wisconsin Bell's complaint. It is undisputed that third-party contractors F & K and Humphrey, both of which were dismissed from this action, were responsible for construction and on-site supervision, respectively. It is also undisputed that F & K, not SSHD, actually buried Wisconsin Bell's equipment. Thus, there is no genuine issue of material fact for trial. The rule of liberal construction cannot save a claim unsupported by the facts on summary judgment.

¶11 In its reply brief, Wisconsin Bell attempts to manufacture a factual dispute by claiming SSHD is responsible for the negligence of its contractors. In certain situations, an employer may be liable for the work of its contractors. *See United States Fid. & Guar. Co. v. Frantl Indus., Inc.*, 72 Wis. 2d 478, 487, 241 N.W.2d 421 (1976). Liability in these cases often depends on the extent to which the employer retained control of the project. *See id.* at 487-88. Wisconsin Bell cites no facts—either in its reply brief on appeal or in its brief in opposition to summary judgment below—suggesting SSHD controlled any aspect of the work.³ Instead, Wisconsin Bell's reply brief offers only a bald assertion, without citation to the record, that SSHD “had retained control” over the relocation of Wisconsin

³ At most, Wisconsin Bell's opposition brief below argues only that SSHD was aware that Wisconsin Bell's equipment had to be relocated. The document is bereft of factual allegations regarding SSHD's supervision or control of its contractors.

Bell's equipment and "had not delegated this responsibility to any of its subcontractors." This conclusory statement is belied by the undisputed facts.⁴

¶12 Wisconsin Bell also asserts in its reply brief that there is a genuine issue of material fact "germane to the claim of trespass." However, Wisconsin Bell does not describe what factual issues remain to be resolved. It is undisputed that SSHD did not cause damage to Wisconsin Bell's equipment. Wisconsin Bell's attempts to bring SSHD within the realm of vicarious liability are not reflected in the complaint and are unsupported by the facts.

By the Court.—Judgment affirmed.

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

⁴ Daniel Bauer's affidavit states that SSHD "did not control, or have knowledge to control, Humphrey Engineering's performance of professional engineering services, including its design of the required improvements or the plans and specifications for the improvements." Likewise, SSHD "did not control, or have the knowledge or ability to control, the means, methods, sequences or procedures of construction work performed by F & K Trucking & Excavating, Inc., with respect to the required improvements." Bauer further averred that SSHD did not bury or unearth Wisconsin Bell's equipment or instruct F & K to do the same, did not provide material or equipment for the construction project, and did not have the right to issue instructions to, or discharge employees of, F & K.

