COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2014

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. 2013AP1194

Cir. Ct. Nos. 2011CV887
2012CV94
2012CV137

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

KENNETH R. TAYLOR AND JULIE TAYLOR,

PLAINTIFFS-APPELLANTS,

V.

CEDAR FALLS BUILDING SYSTEMS, INC.,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

GENERAL CASUALTY COMPANY OF WISCONSIN AND SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA,

DEFENDANTS-RESPONDENTS,

V.

LEWIS CONSTRUCTION, INC. AND QBE-GENERAL CASUALTY INSURANCE,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

ESTATE OF KEVIN M. KADRLIK, BY ROMAINE L. KADRLIK, SPECIAL ADMINISTRATOR, ROMAINE L. KADRLIK, ALAINA A. KADRLIK, A MINOR AND JACOB M. KADRLIK, A MINOR, BY THEIR GUARDIAN AD LITEM, J. DREW RYBERG,

PLAINTIFFS-CO-APPELLANTS,

V.

CEDAR FALLS BUILDING SYSTEMS, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA,

DEFENDANT-RESPONDENT,

ALIAS INSURANCE COMPANY NO. 1,

DEFENDANT,

GENERAL CASUALTY COMPANY OF WISCONSIN,

NOMINAL-DEFENDANT-RESPONDENT,

V.

LEWIS CONSTRUCTION, INC. AND QBE-GENERAL CASUALTY INSURANCE,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

ROBIN WEIBEL AND MICHELLE WEIBEL,

PLAINTIFFS-CO-APPELLANTS,

V.

CEDAR FALLS BUILDING SYSTEMS, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA AND GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY NO. 1,

DEFENDANT,

V.

LEWIS CONSTRUCTION, INC. AND QBE-GENERAL CASUALTY INSURANCE,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This case involves Wisconsin's safe-place statute, WIS. STAT. § 101.11 (2011-12).[1] Kenneth R. Taylor and Julie Taylor, the Estate of Kevin Kadrlik and Kadrlik's surviving wife and children, and Robin Weibel and Michelle Weibel (collectively, the Taylor plaintiffs) are co-appellants in this

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

consolidated action. We affirm the order granting summary judgment in favor of Cedar Falls Building Systems, Inc., and its insurer, Selective Insurance Company of South Carolina (collectively, Cedar Falls), and dismissing the Taylor plaintiffs' safe-place statute and common-law negligence claims.

¶2 Cedar Falls was the general contractor on a construction project owned by EOG Resources, Inc. Cedar Falls subcontracted with Lewis Construction to erect concrete silo foundation walls. Lewis employees Kenneth Taylor, Robin Weibel, and Kevin Kadrlik, experienced concrete workers, worked on the project. One of the walls collapsed due to inadequate bracing. Taylor and Weibel were seriously injured; Kadrlik was killed. Taylor and Weibel received worker compensation for their injuries and Kadrlik's family received worker compensation death benefits. Taylor, Kadrlik's estate, and Weibel commenced actions against Cedar Falls, alleging negligence and a violation of the safe-place statute. The circuit court consolidated the cases.

¶3 The Taylor plaintiffs moved for partial summary judgment. They argued that, in addition to common-law negligence, Cedar Falls was liable as a matter of law under the safe-place statute because, pursuant to its contract with Lewis, Cedar Falls retained the right of control and supervision over Lewis's operations. That, they argued, triggered Cedar Falls' safe-place duty to frequenters[2] and, the duty being nondelegable, any negligence attributable to Lewis must be imputed to Cedar Falls.

[2] A frequenter is a "person, other than an employee, who may go in or be in a place of employment … under circumstances which render such person other than a trespasser." WIS. STAT. § 101.01(6).

¶4 Cedar Falls, joined by Lewis, also moved for summary judgment. Cedar Falls argued that the independent contractor rule precluded the tort claims, that it did not have notice of an unsafe condition, and that it did not retain the right of control over Lewis's work and so had no duty under WIS. STAT. § 101.11.

¶5 The circuit court granted Cedar Falls' motion and dismissed the Taylor plaintiffs' claims. It reasoned that, with regard to safety, supervision and control, the contractual provisions between EOG and Cedar Falls were not specific enough to make the safe-place statute applicable to Cedar Falls and found that Lewis was an independent contractor as a matter of law, that Cedar Falls' failure to inspect Lewis's work was an act of omission, not commission, and that the evidence was insufficient to show that Cedar Falls retained the right to control the details of Lewis's work. The Taylor plaintiffs appeal.

¶6 WISCONSIN STAT. § 802.08 governs summary judgment. We need not repeat the familiar methodology so often set forth. *See, e.g.*, ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987).

¶7 Wisconsin's safe-place statute provides that every employer "shall furnish employment which shall be safe for the employees therein …." WIS. STAT. § 101.11(1). It is "a negligence statute that, rather than creating a distinct cause of action ... establishes a duty greater than that of ordinary care imposed at common law." ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶18, 245 Wis. 2d 560, 630 N.W.2d 517.

¶8 A general contractor has no duty to superintend the activities of a subcontractor's employees, however.

> Ordinarily, … the general contractor reserves no right or control of the work excepting that of inspection or of

> changing the plan with reference to the construction to be furnished. That alone is not enough to make … such general contractor liable for a frequenter's injury while such frequenter was acting in the scope of his [or her] employment for someone other than such … general contractor.

Barth v. Downey Co., 71 Wis. 2d 775, 780-81, 239 N.W.2d 92 (1976). Thus, for liability to attach under the safe-place statute, a general contractor's duty to the employees of a subcontractor arises "only if the … general contractor has reserved a right of supervision and control." ***Lemacher v. Circle Const. Co.***, 72 Wis. 2d 245, 249, 240 N.W.2d 179 (1976).

¶9 ***Lemacher*** arose on similar facts. There, a subcontractor's employee sued the general contractor for work-related injuries sustained in the collapse of improperly supported scaffolding installed by the subcontractor employer. ***Id.*** at 246-47. The court held that "something more" than the fact of its status was needed to make a general contractor liable for injuries a subcontractor's employee sustains due to defective equipment the subcontractor provides. ***Id.*** at 248. Under the safe-place statute, the "something more" is the general contractor's reservation of the right to supervise and control. ***Id.*** at 249. The test is whether the general contractor "stood in the shoes of" the subcontractor by retaining control of the premises and the details of the work. ***Barth***, 71 Wis. 2d at 781 (citation omitted).

¶10 The Taylor plaintiffs latch onto "control of the premises." They argue that Cedar Falls reserved the right to control the worksite because, for instance, its contract with EOG provided that Cedar Falls "shall have overall responsibility for safety precautions and programs in performance of the Work."

¶11 We disagree. "Even a retained right to check as to compliance with specifications, and to stop construction progress for lack of compliance with

specifications … is not an exercise of control over … the actual manner in which the specifications were complied with." ***Id.*** Further, that same contract provision went on to say that the provision "do[es] not relieve Subcontractors … of their responsibility for the safety of persons or property in the performance of their work." In fact, the subcontract between Cedar Falls and Lewis obligated Lewis to "implement appropriate safety measures pertaining to the Subcontract Work and the Project" and cautioned that the failure of Cedar Falls to stop any of Lewis's unsafe practices "shall not relieve [Lewis] of the responsibility therefor." The EOG/Cedar Falls contract's broad safety language does not demonstrate that Cedar Falls retained control of the details of Lewis's work.

¶12 To the contrary, the undisputed facts are that Cedar Falls was not responsible for and did not control the building of the concrete silos. It did not direct the placement of the bracings or inspect them once installed. Rather, Lewis directed the means and methods for their construction and Lewis's laborers—Taylor, Kadrlik, and Weibel—were experienced in erecting poured concrete walls, reported directly to Lewis supervision and expected no input from Cedar Falls.

¶13 The parties next debate whether the improper bracing of the concrete wall was a "structural defect" or an "unsafe condition associated with the structure" of which Cedar Falls had notice. If it was a structural defect, liability could attach regardless of notice, whereas if it was an unsafe condition, the defendant had to have had either actual or constructive notice. *See* ***Barry***, 245 Wis. 2d 560, ¶¶22-23. In either case, the issue devolves to whether Cedar Falls reserved the right to supervise and control Lewis's work. It did not.

¶14 We turn to the Taylor plaintiffs' common-law negligence claim.[3] Cedar Falls contends it is barred by the independent-contractor rule. As is relevant here, the rule provides that for a principal employer to be liable to an independent contractor's employee, the employee's injuries must be caused by the principal employer's affirmative act of negligence. *See* ***Wagner v. Continental Cas. Co.***, 143 Wis. 2d 379, 388, 421 N.W.2d 835 (1988). The rationale for the rule is that the principal employer generally should be protected from tort liability, as "it already has assumed financial responsibility for injuries to the independent contractor's employees" via its contract payments to the independent contractor. ***Tatera v. FMC Corp.***, 2010 WI 90, ¶16, 328 Wis. 2d 320, 786 N.W.2d 810. Further, "imposing liability on a principal employer for injuries sustained by an independent contractor's employee runs counter to the notion that the principal employer has relinquished control to the independent contractor [who] is in the best position to guard against injuries to employees while performing the contracted work." ***Id.***, ¶17.

¶15 The Taylor plaintiffs contend that the independent-contractor rule does not apply because Cedar Falls' duty under the safe-place statute is non-delegable. This argument falls flat: there first must be a duty. We already have determined that Cedar Falls was freed of its safe-place obligation when it relinquished control over the details of how Lewis performed its work.

[3] Cedar Falls asserts that if the safe-place claims are dismissed, the common-law negligence claims also must be dismissed. Although once true, this no longer is the case, as "safe[-]place and common[-]law standards of care address different types of negligence—the safe[-]place statute addresses unsafe conditions and common law addresses negligent acts." ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App 117, ¶23, 329 Wis. 2d 91, 789 N.W.2d 106.

¶16 Here, the circuit court concluded that Cedar Falls' failure to provide a safety supervisor, to inspect the premises for compliance with federal regulations, and to inspect the bracing were acts of omission. We agree. An act of omission is not an affirmative act of negligence. *See* ***Wagner***, 143 Wis. 2d at 389.

By the Court.—Order affirmed.

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