COURT OF APPEALS
DECISION
DATED AND FILED

July 8, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2339 **Cir. Ct. No. 2011CV542**

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

DEAN HURT AND HURT'S RECYCLING LLC,

PLAINTIFFS-APPELLANTS,

V.

JOSH COLE, ACUITY, A MUTUAL INSURANCE COMPANY, BIG DOG CONSTRUCTION, HEGNA CONSTRUCTIONS AND H.V.A.C., JOEL A. HEGNA AND ABC INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 MANGERSON, J. Dean Hurt and Hurt's Recycling, LLC (collectively, Hurt) appeal a summary judgment dismissing their negligence

claims against Josh Cole, Joel Hegna, their businesses, and their insurers. The circuit court dismissed Hurt's negligence claims after concluding the claims were barred by the Worker's Compensation Act's exclusive remedy provision, WIS. STAT. § 102.03(2).[1] On appeal, Hurt argues § 102.03(2) cannot bar his claims because the exclusive remedy provision applies only when conditions exist for an employer's liability and the conditions do not exist in this case. He also argues Cole and Hegna are not employees. We conclude the conditions for employer liability are satisfied and Cole and Hegna are employees. Accordingly, we conclude the negligence claims are barred because of Cole's and Hegna's co-employee immunity. We therefore affirm the grant of summary judgment.

BACKGROUND

¶2 Hurt is the sole member of Hurt's Recycling LLC. Hurt's Recycling is engaged in the business of deconstructing and demolishing old buildings, and recycling any salvageable components. When Hurt's Recycling is hired to deconstruct a building, the company hires workers to assist with the building deconstruction. The workers are hired on a per job basis and enter into "independent contractor" agreements.

¶3 In 2010, Hurt's Recycling was hired to deconstruct a building in Fredonia, Wisconsin. Hurt's Recycling, in turn, hired four workers to assist with the building deconstruction: Matthew Pooler, who does business as M.P. Construction; William Pooler, who does business as Pooler Construction; Josh Cole, who does business as Big Dog Construction; and Joel Hegna, who does

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

business as Hegna Construction and H.V.A.C.[2] Hurt, through Hurt's Recycling, had these individuals sign "independent contractor" agreements.

¶4 On June 22, 2010, overhead ductwork that Cole and Hegna were deconstructing fell on Hurt, injuring him. Hurt and Hurt's Recycling brought the present negligence action against Cole and Hegna, their businesses, and their insurers (collectively, Cole and Hegna).

¶5 Cole and Hegna moved for summary judgment based on the exclusive remedy provision of the Worker's Compensation Act, WIS. STAT. § 102.03(2). That statute generally provides the Worker's Compensation Act is the exclusive remedy against employers and co-employees for job-related injuries. Cole and Hegna argued they were "employees" of Hurt's Recycling, pursuant to WIS. STAT. § 102.07(8), and not independent contractors. Accordingly, they asserted their status as "employees" made them immune from liability.

¶6 Hurt responded Cole and Hegna were not "employees" but independent contractors because they agreed to be classified as independent contractors and they met the common law definition of an independent contractor. Hurt also argued that Hurt was not an employee of Hurt's Recycling because he never "opted-in" to the Worker's Compensation Act, and, as a result, the exclusive remedy provision in WIS. STAT. § 102.03(2) could not apply.

[2] The record also reflects that Hurt hired his son, Paul Hurt, to work on the Fredonia job. According to Hurt, Paul Hurt does business as Hurt's Construction.

¶7 Cole and Hegna, in turn, argued Hurt was an "employee" of Hurt's Recycling because he was in service of Hurt's Recycling under a contract of hire. *See* WIS. STAT. § 102.07(4)(a).

¶8 The circuit court determined Cole, Hegna, and Hurt were employees of Hurt's Recycling. Accordingly, the court concluded the exclusive remedy provision in WIS. STAT. § 102.03(2) barred Hurt's negligence claims against Cole and Hegna, and it granted summary judgment in favor of Cole and Hegna. Hurt appeals. Additional facts will be set forth below.

DISCUSSION

¶9 We review a grant of summary judgment independently, 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 where 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).

¶10 The exclusive remedy provision in the Worker's Compensation Act mandates that when the conditions exist for an employer's liability, the injured employee's "right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, *any other employee of the same employer* and the worker's compensation insurance carrier …." WIS. STAT. § 102.03(2) (emphasis added). In this case, if the conditions exist for employer liability and Cole and Hegna are employees of Hurt's Recycling, Hurt is barred from bringing a negligence suit against Cole and Hegna on the basis of their co-employee immunity.

¶11 There is strong public policy in favor of the co-employee immunity provision found in WIS. STAT. § 102.03(2). In ***Hake v. Zimmerlee***, 178 Wis. 2d 417, 423, 504 N.W.2d 411 (Ct. App. 1993), we explained the co-employee immunity provision was added to § 102.03(2) because

> the main concern of the Advisory Council was the financial burden that coemployee suits imposed upon workers. Thus, the Council advised the legislature to recreate the statute so that coemployee immunity would be the rule, and coemployee liability would be the exception to that rule. In examining the purpose behind coemployee immunity this court has explained: "Injuries caused by a negligent coemployee are everyday occurrences. Such injuries are directly related to the employment, and pursuant to the stated purpose or objective of the Worker's Compensation Act, the costs should be passed on to the consuming public." ***Oliver*** [***v. Travelers Ins. Co.***], 103 Wis. 2d [644,] 648, 309 N.W.2d [383 (Ct. App. 1981)]. Because of the strong policy concerns that underlie the rule of coemployee immunity, we construe exceptions to that statutory rule narrowly.

¶12 On appeal, Hurt argues WIS. STAT. § 102.03(2)'s co-employee immunity provision cannot bar the negligence claims against Cole and Hegna. Hurt first emphasizes § 102.03(2) applies *only* when conditions exist for an employer's liability under § 102.03(1), and he asserts the conditions do not exist in this case. WISCONSIN STAT. § 102.03(1) provides, in relevant part:

> Liability under this chapter shall exist against an employer only where the following conditions occur:
>
> (a) Where the employee sustains an injury.
>
> (b) Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter.

¶13 Hurt contends the conditions for liability do not exist because Hurt was not an "employee" of Hurt's Recycling and Hurt's Recycling was not an "employer." Hurt then argues that, even if conditions for employer liability exist,

§ 102.03(2)'s co-employee immunity provision does not bar his negligence claims because Cole and Hegna were not "employees."

I. Whether Hurt is an "employee" of Hurt's Recycling

¶14 To determine whether Hurt is an "employee" of Hurt's Recycling, we first turn to the definition of employee as provided in the Worker's Compensation Act. WISCONSIN STAT. § 102.07, titled, "Employee defined," provides, in relevant part:

> "Employee" as used in this chapter means:
>
> ….
>
> (4)(a) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees[.]
>
> ….
>
> (15) A sole proprietor or partner or member electing under s. 102.075 is an employee.

¶15 Hurt argues he is not an "employee" because he is the only member of his limited liability company and he never made an election to be considered an employee under WIS. STAT. § 102.075.[3] Although he does not cite WIS. STAT.

[3] WISCONSIN STAT. § 102.075 provides:

> (1) Any sole proprietor, partner or member of a limited liability company engaged in a vocation, profession or business on a substantially full-time basis may elect to be an employee under this chapter by procuring insurance against injury sustained in the pursuit of that vocation, profession or business. This coverage may be obtained by endorsement on an existing policy of worker's compensation insurance or by issuance of a separate policy to the sole proprietor, partner or member on the same basis as any other policy of worker's compensation insurance.

(continued)

§ 102.07(15), we interpret Hurt's argument to be that, because he never elected to be an employee, he does not meet the definition of "employee" under § 102.07(15). Hurt contends he can only be considered an "employee" if he elects to be considered one, and to hold otherwise would render the election requirement superfluous.[4] Stated another way, Hurt's argument is essentially that, because he did not elect to be considered an employee under § 102.075 and did not pay the additional premium that is required when one elects,[5] he is therefore not an "employee" and the co-employee immunity provision does not prevent him from suing Cole and Hegna for negligence.

> (2) For the purpose of any insurance policy other than a worker's compensation insurance policy, no sole proprietor, partner or member may be considered eligible for worker's compensation benefits unless he or she elected to be an employee under this section.
>
> (3) Any sole proprietor, partner or member who elected to be an employee under this section may withdraw that election upon 30 days' prior written notice to the insurance carrier and the Wisconsin compensation rating bureau.

[4] As background to Hurt's argument, we observe that sole proprietors, partners, and members of limited liability companies who obtain worker's compensation insurance for their respective businesses are deemed to be insured in their capacity as employer, but not necessarily in their capacity as employee. *See* WIS. STAT. § 102.075(2). Accordingly, to be considered an "employee" for coverage purposes, sole proprietors, partners, and members of limited liability companies must "elect" to be considered an employee under § 102.075. To elect to be considered an "employee," these individuals must obtain an endorsement or separate policy (and pay an additional premium). *See* WIS. STAT. § 102.075(1); *see also* ***Adams v. London Town Chimney Sweep***, Claim No. 91045232, 1993 WL 216875 (LIRC May 28, 1993) (holding injured sole proprietor is not considered an "employee" for coverage purposes because sole proprietor failed to obtain an endorsement and pay an additional premium that would provide coverage for his injuries under the Worker's Compensation Act).

[5] We note, however, that Hurt's Recycling did not carry any worker's compensation insurance.

¶16 Cole and Hegna respond that Hurt is an employee pursuant to the definition in WIS. STAT. § 102.07(4)(a). They argue Hurt's reliance on WIS. STAT. § 102.075 is not dispositive of whether he was an "employee" because Hurt did not need to make the election if he qualified to be an "employee" under § 102.07(4)(a). They also argue that if we conclude the existence of their co-employee immunity depends on whether Hurt "elected" to be an employee and obtained the required insurance, this creates an absurd result that undermines the public policy behind co-employee immunity.

¶17 We agree with Cole and Hegna. While we appreciate Hurt's arguments that he may only be considered an "employee" if he so elected under WIS. STAT. §§ 102.07(15) and 102.075, this is not a coverage case and, were we to adopt Hurt's argument, it would create an absurd result. Essentially, it would allow Hurt, by making the deliberate decision to not obtain insurance coverage, to unilaterally take away another employee's co-employee immunity. Given the strong public policy in favor of co-employee immunity, it would be absurd to conclude Cole's and Hegna's co-employee immunity depends on whether Hurt decided to obtain insurance coverage, especially when, as discussed below, Hurt meets another definition of "employee" under the Worker's Compensation Act. We therefore conclude the fact that Hurt did not "elect" to be considered an employee under § 102.075 is not dispositive of whether Hurt is an employee under the Worker's Compensation Act.

¶18 We next consider whether Hurt was an "employee" by virtue of WIS. STAT. § 102.07(4)(a)—whether Hurt was "in service of another under any contract of hire, express or implied …." Hurt argues he cannot be considered an "employee" because there is no evidence that he received a wage, salary, or W-2 statements, or that he paid a withholding tax. He argues the evidence showing he

performed work around the job site and hauled material away does not make him an employee.

¶19 Cole and Hegna argue Hurt is an "employee" under WIS. STAT. § 102.07(4)(a) because Hurt was in service of Hurt's Recycling under a contract of hire. They argue the fact that Hurt failed to obtain the items he lists above is not dispositive of whether he was an employee; what matters is whether Hurt meets the definition of employee under § 102.07(4)(a). In support of their argument that Hurt was an employee of Hurt's Recycling, Cole and Hegna rely on ***Marlin Electric Co. v. Industrial Commission***, 33 Wis. 2d 651, 148 N.W.2d 74 (1967), and ***Kaishian v. Crystal Ridge***, Claim No. 2000007962, 2004 WL 787510 (LIRC Mar. 31, 2004).

¶20 In ***Marlin Electric***, Raymond Moloney was the majority shareholder and president of Marlin Electric, a manufacturing corporation that employed thirty to thirty-five employees. ***Marlin Elec.***, 33 Wis. 2d at 652-53. In his capacity as president, Moloney supervised and controlled the business and made all final decisions in connection with the corporation's affairs. ***Id.*** at 653. Moloney was killed in an accident while working in his capacity as president. ***Id.*** at 654.

¶21 On appeal, our supreme court considered whether Moloney was an employee of Marlin Electric at the time of the accident—specifically, whether Moloney was "in the service of another under any contract of hire." ***Id.*** at 655. The court noted the "fiction of the corporate entity" and concluded that, "normally when one can qualify as being under a contract of hire, he usually can qualify as an employee, regardless of his ownership rights in the employer corporation." ***Id.*** at 658. It noted it had previously determined a "corporate officer and director may be an employee of a corporation if such officer performs work customarily

performed by an employee." ***Id.*** at 659. Ultimately, the court concluded Moloney was in the service of Marlin Electric under a contract of hire. ***Id.*** at 661.

¶22 In ***Kaishian***, Kaishian was the sole shareholder and president of Crystal Ridge, Inc., a corporation that operated a ski hill that employed a number of workers. ***Kaishian***, 2004 WL 787510 at *1. In his capacity as president, Kaishian hired personnel, maintained and checked the equipment, oversaw the managers, and performed manual work in grooming the ski hill. ***Id.*** Kaishian was injured at the ski hill. ***Id.*** In the year he was injured, he received no salary from Crystal Ridge because Crystal Ridge was operating at a loss. ***Id.***

¶23 The Labor and Industry Review Commission concluded Kaishian was an employee under WIS. STAT. § 102.07(4)(a). ***Id.*** at *2. It first determined that, despite Kaishian's status as sole shareholder, Kaishian was "in the service of another"—specifically, his corporation, at the time he was injured. ***Id.*** The Commission reasoned a corporation is considered a separate "person" from its owner. ***Id.*** The Commission also concluded Kaishian was in the service of another at the time of his injury because he was performing the type of work one might expect to have been normally performed by an employee. ***Id.*** at *3.

¶24 The Commission then determined that Kaishian was "under a contract of hire." ***Id.*** at *4. The Commission noted that, although wages are a necessary part of an employment relationship, when a shareholder, such as Kaishian, performs services with the expectation that he or she will be paid when the business becomes profitable, that is sufficient to show a contract of hire. ***Id.*** at *5.

¶25 Cole and Hegna argue that, based on these cases, Hurt was "in the service of [another]" under "contract of hire." They first argue Hurt's limited

liability company, like a corporation, is considered a separate entity and therefore Hurt may be "in the service" of Hurt's Recycling. *See* WIS. STAT. § 183.0106(2) ("a limited liability company … has the same powers as an individual ….") . Cole and Hegna also argue that, because Hurt performed work that one might expect to be normally performed by an employee, he was under a contract of hire. Even if Hurt did not receive a salary, as the sole owner of Hurt's Recycling, Hurt had an expectation that he would be paid when the business became profitable.

¶26 Hurt responds that Cole's and Hegna's reliance on ***Marlin Electric*** and ***Kaishian*** is misplaced because in those cases the injured workers chose to "opt-in" to the Worker's Compensation Act. We disagree. The court and the commission did not determine whether the injured worker was an employee because the worker "opted-in" by purchasing insurance; rather, the court and the commission determined, respectively, the worker was an "employee" because the worker was "in the service of another under any contract of hire." *See* WIS. STAT. § 102.07(4)(a).

¶27 Hurt then concedes for the "sake of argument" that if his limited liability company is a separate entity and he may be in the service of Hurt's Recycling, he is nevertheless not an employee because Cole and Hegna have never proven a contract for hire exists between Hurt and Hurt's Recycling LLC. He contends Cole and Hegna have failed to establish the contract terms.

¶28 However, in ***Marlin Electric*** and ***Kaishian***, the court and the commission, respectively, found the presidents and shareholders were under a contract of hire for their corporations because they did work that normally would be attributed to an employee. *See* ***Marlin Elec.***, 33 Wis. 2d at 659; ***Kaishian***, 2004 WL 787510 at **2, 4-5. The record reflects, and Hurt concedes in his

appellate brief, that Hurt obtained contracts for Hurt's Recycling to deconstruct buildings, that Hurt would "make connections" with businesses and scrap dealers for the buying and selling of deconstructed components, that he handled the business's finances, that he handled the trucking aspects of the business, and that he "performed work around the job site and hauled material away." This is the type of work one might expect to have been normally performed by an employee. Accordingly, we conclude Hurt was working for Hurt's Recycling under a contract of hire, and Hurt therefore meets the definition of an "employee" under WIS. STAT. § 102.07(4)(a).

II. Whether Cole and Hegna were "employees"

¶29 Although we typically would next determine whether Hurt's Recycling is an "employer" subject to the Worker's Compensation Act, Hurt's Recycling's status as an "employer" can depend on the number of "employees" it employs. *See* WIS. STAT. § 102.04(1)(b)1. Accordingly, we next consider whether Cole and Hegna were "employees" of Hurt's Recycling. Hurt argues Cole and Hegna were not employees of Hurt's Recycling, but independent contractors. Returning to the definition of "employee" in the Worker's Compensation Act, WIS. STAT. § 102.07(8) provides, in relevant part:

> (a) Except as provided in par. (b), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.
>
> (b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:
>
> 1. Maintains a separate business with his or her own office, equipment, materials and other facilities.

> 2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
>
> 3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
>
> 4. Incurs the main expenses related to the service or work that he or she performs under contract.
>
> 5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
>
> 6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
>
> 7. May realize a profit or suffer a loss under contracts to perform work or service.
>
> 8. Has continuing or recurring business liabilities or obligations.
>
> 9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

¶30 In the circuit court, Hurt conceded that Cole and Hegna would not meet the nine-factor test in WIS. STAT. § 102.07(8)(b), and therefore, Cole and Hegna would be considered "employees" under the Worker's Compensation Act. Hurt, however, argued before the circuit court and argues again on appeal that we should not use the Worker's Compensation Act's definition of "employee" to determine Cole's and Hegna's employment status. Instead, he contends we should use the common law definition of an independent contractor and conclude, based on this common law definition, Cole and Hegna were independent contractors under the Worker's Compensation Act. In support of his assertion, Hurt relies on

Acuity Mutual Insurance Co. v. Olivas, 2007 WI 12, 298 Wis. 2d 640, 726 N.W.2d 258.

¶31 In ***Olivas***, one of the issues was whether workers were "employees" and therefore needed to be included in the premium determination of a worker's compensation policy. ***Id.***, ¶¶3-4. Our supreme court noted that the issue involved a policy dispute and the policy "directs the courts to the [Worker's Compensation] Act to determine Acuity Insurance's exposure to liability for worker's compensation for the workers at issue and thus the premiums it can charge." ***Id.***, ¶¶53, 61. The court concluded that the act, not the common law, governed whether the workers at issue were independent contractors or employees. ***Id.***, ¶61. It determined the workers were "employees" because they failed to satisfy the nine-factor test under WIS. STAT. § 102.07(8)(b).[6] ***Id.***, ¶74.

¶32 In this case, Hurt argues, without a citation to the record, that, because the insurer's policy does not direct the court to the Worker's Compensation Act, the common law definition of an independent contractor must be used. We disagree. Unlike ***Olivas***, which involved a dispute about an insurance policy, in this case, we are determining whether the exclusive remedy provision under the Worker's Compensation Act applies. Accordingly, to

[6] In ***Acuity Mutual Insurance Co. v. Olivas***, 2007 WI 12, ¶¶74, 80, 81, 85, 298 Wis. 2d 640, 726 N.W.2d 258, after determining the workers were employees and *not* independent contractors because they failed to meet the nine-factor test under WIS. STAT. § 102.07(8)(b), the court then addressed whether an employer-employee relationship existed between the workers and Olivas. There was a dispute as to whether the workers at issue were employees of Olivas or employees of someone else. ***Id.***, ¶¶80-81, 85.

Hurt does not argue that, if Cole and Hegna are employees under WIS. STAT. § 102.07(8)(b), they are not employees of Hurt's Recycling because no employer-employee relationship exists. Accordingly, we will not address the matter further.

determine whether Cole and Hegna are employees under the act, we must use the definition of employee as found in the Worker's Compensation Act. *See* ***Jarrett v. LIRC***, 2000 WI 46, ¶22, 233 Wis. 2d 174, 607 N.W.2d 326 (WISCONSIN STAT. § 102.07(8)(b) provides the sole test to determine independent contractor status under the Worker's Compensation Act.).

¶33 Based on Hurt's concession in the circuit court that Cole and Hegna would not meet the nine-factor test under WIS. STAT. § 102.07(8)(b), we conclude that, under the act, Cole and Hegna were not independent contractors of Hurt's Recycling, but employees.

III. Whether Hurt's Recycling was an "employer"

¶34 Finally, we consider whether Hurt's Recycling was an "employer." WISCONSIN STAT. § 102.04 provides, in relevant part:

> (1) The following shall constitute employers subject to the provisions of this chapter, within the meaning of s. 102.03:
>
> ….
>
> (b)1. Every person who usually employs 3 or more employees for services performed in this state, whether in one or more trades, businesses, professions, or occupations, and whether in one or more locations.
>
> 2. Every person who usually employs less than 3 employees, provided the person has paid wages of $500 or more in any calendar quarter for services performed in this state. Such employer shall become subject on the 10th day of the month next succeeding such quarter.

¶35 Hurt argues that Hurt's Recycling is not an "employer" because Cole and Hegna offered no evidence that Hurt's Recycling usually employs three or more employees or that Hurt's Recycling paid wages of $500 or more in any calendar quarter. Hurt argues the other workers on the job site, Matthew and

William Pooler, "had their own companies and were, unquestionably, independent contractors." Hurt also contends that Hurt's Recycling did not meet the statutory wage test because, given the wages paid to Cole and Hegna, Hurt's Recycling would not have become subject to the Worker's Compensation Act until July 10, 2010—eighteen days after the accident.

¶36 Hegna responds that Hurt has forfeited his ability to argue Hurt's Recycling is not an employer under WIS. STAT. § 102.04 because this argument is being raised for the first time on appeal. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (arguments raised for the first time on appeal need not be considered). We agree. The briefs on summary judgment focused only on whether the exclusive remedy provision of WIS. STAT. § 102.03(2) applied because: (1) Cole and Hegna were employees; and (2) Hurt was an employee. Further, it appears this assertion may have been conceded in the circuit court because the court noted at the summary judgment hearing that Hurt was arguing he "was not an employee but was rather *an employer*." (Emphasis added.)

¶37 In any event, even if we consider Hurt's argument on the merits, we agree with Cole and Hegna that Hurt's Recycling is an employer under WIS. STAT. § 102.04. Cole argues Hurt's Recycling is an employer because it has three or more employees. Specifically, Cole asserts both Matthew and William Pooler would be considered employees instead of independent contractors under the nine-factor test in WIS. STAT. § 102.07(8)(b). Cole emphasizes that Hurt testified at his deposition that all the workers signed the same "independent contractor" agreement and were essentially in the same position. Cole argues that the Pooler brothers, like Cole and Hegna, do not meet the "entrepreneurial risk factors" of the independent contractor test—specifically, the Pooler brothers did not incur the main expenses related to the work, they were not the ones who might realize a

profit or loss from the project, they had no recurring business liabilities or obligations in relation to the Fredonia building, their success or failure did not depend on the relationship of business receipts to expenditures, and, because they were paid a flat rate, they did not personally incur any expenditures other than living expenses.

¶38 Hurt responds that the "scant evidence in the record, viewed now for the first time, but still in the light most favorable to the non-moving party, clearly shows the Poolers did meet every element of the Chapter 102 test for independent contractor." We disagree. For example, the record shows Hurt's Recycling rented and provided the heavy equipment for the deconstruction. This shows the Pooler brothers did not incur "the main expenses related to the service or work that he or she performs under contract." *See* WIS. STAT. § 102.07(8)(b)4. We emphasize that all nine factors must be satisfied to be considered an independent contractor under § 102.07(8)(b). Because the Pooler brothers do not satisfy all nine factors, they are "employees," and Hurt's Recycling has three or more employees.

¶39 Further, Hegna argues that, even if Hurt's Recycling had less than three employees, Hurt's Recycling meets the statutory wage test because "there is ample evidence it paid $500 in a calendar quarter before the second quarter of 2010 and no evidence that it subsequently filed (or was eligible to file) a withdrawal notice under WIS. STAT. § 102.05(1)." Hegna argues that Hurt's Recycling was incorporated in 2007; that Hurt conceded Hurt's Recycling had completed large projects prior to the one in which he was injured; and that Hurt conceded Hurt's Recycling previously hired employees, "who, like Cole and Hegna, were wrongly classified and treated as independent contractors based on the fact that they signed the independent contractor agreements[.]"

¶40 Hurt's response to Hegna's argument is only that "[t]here is no evidence in the record to establish Hurt's Recycling meets the criteria of § 102.04." Hurt's response is undeveloped, and we conclude he conceded the argument that Hurt's Recycling met the statutory wage test and is therefore an employer under WIS. STAT. § 102.04. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments); *see also* ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

CONCLUSION

¶41 In summary, we conclude the conditions for employer liability under WIS. STAT. § 102.03(1) were satisfied because Hurt was an "employee" and Hurt's Recycling was an "employer." We also conclude that Cole and Hegna were employees of Hurt's Recycling. As a result, the exclusive remedy provision in § 102.03(2) applies and Hurt is barred from bringing his negligence suit against Cole and Hegna on the basis of their co-employee immunity.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.