COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1805

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

TERRY J. HUFFMAN AND DOROTHY A. HUFFMAN,

PLAINTIFFS-APPELLANTS,

THE MAIL HANDLERS BENEFIT PLAN,

SUBROGATED-PLAINTIFF,

V.

IRVIN KROENKE AND WAUSAU UNDERWRITERS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Reversed and cause remanded.*

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

PER CURIAM. Terry Huffman and Dorothy Huffman appeal a summary judgment dismissing their personal injury action against Irvin Kroenke

and Wausau Underwriters Insurance Company. They argue that the trial court erroneously (1) applied the open and obvious danger doctrine; (2) determined that Terry's negligence exceeded Kroenke's as a matter of law; and (3) ruled that the Huffmans' duty under the safe place statute is non-delegable as a matter of law. Because the record reveals disputed issues of material fact, we reverse the summary judgment and remand for further proceedings.

This action arises out of injuries Terry received in a fall from an open loft in his home that was under construction.[1] The Huffmans entered into an agreement that Irvin Kroenke & Sons would build their new home.[2] Terry testified at his deposition that Kroenke gave him the list of contractors who would do the plumbing, excavation, roofing and drywall. The record indicates that Kroenke also arranged for the foundation work, the drywallers, obtained the lumber supplies and performed the carpentry work.

Terry decided to buy a different type of furnace and to obtain the services of a different electrician than Kroenke selected. Terry chose the heating contractor, electrical contractor, floor finisher, and carpet installer. He also planned on doing his own painting and staining, and his wife would do the landscaping. Terry testified that Kroenke paid the subcontractors, with the exception of the electrician and floor finisher. He did not remember who paid the heating contractor.

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[1] Both parties' record citations would be more helpful if they would identify the document number of those parts of the record to which they direct the court's attention. *See* § 809.19(1)(d) and (e), STATS.

[2] Terry testified at his deposition that he signed a contract with the builder; the parties do not tell us whether the contract is part of the record. Terry also testified that Joel Kroenke designed the home and drafted the plans. The record indicates that Joel and Irvin are owners of the company. As a result, we will refer to both as "Kroenke."

Lawrence Schroeder, Kroenke's foreman, testified that it was his job to "run the crew" and supervise the subcontractors. He agreed that one of his responsibilities as foreman was to maintain safety on the job site. He testified that on most jobs, Kroenke acts as a general contractor and sets up the contracts and schedules for subcontractors. Schroeder was the foreman at the Huffmans' job site and supervised the framing of the building. He testified that when they were doing finish work he took down the temporary guardrail they had put up to protect the people on the second floor from falling to the floor below. Terry would occasionally show up during the week to observe the progress but took no part in framing. The work Schroeder saw Terry do was limited to staining and landscaping, which generally took place on weekends.

During the construction, Terry, who lived out of town, decided to stay overnight at the home in order to continue staining the next morning. He did not have a key to the partially constructed house, so Kroenke left him one under the front steps. Kroenke advised him to sleep in the upstairs area of the house as that would be the warmest. Because no electricity was available upstairs, Terry brought along a flashlight.

Around midnight, after several hours of staining, Terry went upstairs to sleep. When he went upstairs, he was concerned because the railing in the loft area had not been completed, although he had requested Kroenke to finish it several times. A fourteen- to sixteen-inch "wall" had been completed, but the railing that was to go on top of it had not yet been installed. When Terry had voiced his concerns, Kroenke replied that it would be a good idea and that "we need to get that done." Terry chose the loft area to sleep, as it was the warmest and the rest of the house was full of construction debris.

Around 2 a.m. the telephone on the main floor began to ring. Terry believed it must have been a wrong number and did not answer it immediately. After approximately one minute, he began to think it may be an emergency. He sat up, put on his underwear and his glasses and turned on his flashlight. He stood up, got out of the sleeping bag and walked along a cleared pathway to the steps leading downstairs. Before he got to the steps, his foot struck the short fourteen- to sixteen-inch wall that tripped him, and he somersaulted to the first floor.

The trial court granted Kroenke's motion for summary judgment, concluding that the Huffmans had a non-delegable duty under the safe place statute to keep the premises safe, that Terry confronted an open and obvious danger and that his negligence outweighed Kroenke's as a matter of law.

Summary judgment is appropriate only when material facts are not in dispute and any inferences that reasonably may be drawn from those facts lead only to one conclusion. ***Wagner v. Dissing,*** 141 Wis.2d 931, 946, 416 N.W.2d 655, 660-61 (Ct. App. 1987). "[I]t is for the trier of the fact to draw the proper inference and not for the court to determine on summary judgment which of the two or more permissible inferences should prevail." ***Fischer v. Mahlke,*** 18 Wis.2d 429, 435, 118 N.W.2d 935, 939 (1963). "By their very nature, negligence actions are rarely susceptible to resolution in summary proceedings." ***Wagner,*** 141 Wis.2d at 946, 416 N.W.2d at 661.

Typically, whether a condition is an open and obvious danger is a question of fact. ***Griebler v. Doughboy Recreational, Inc.,*** 160 Wis.2d 547, 559, 466 N.W.2d 897, 902 (1991). In the ordinary negligence case, "if an open and obvious danger is confronted by the plaintiff, it is merely an element to be considered by the jury in apportioning negligence and will not operate to

completely bar the plaintiff's recovery." ***Rockweit v. Senecal,*** 197 Wis.2d 409, 423, 541 N.W.2d 742, 748-49 (1995). Because Wisconsin is a comparative negligence state, *see* § 894.045, STATS., only strong public policy justifies the direct abrogation of comparative negligence principles. ***Hertelendy v. Agway Ins. Co.,*** 177 Wis.2d 329, 334-35, 501 N.W.2d 903, 906 (Ct. App. 1993). The "open and obvious danger" analysis should not be used to resolve liability in ordinary negligence cases. ***Id.***

We conclude that the facts presented permit more than one inference. Unlike the plaintiff in ***Griebler,*** Terry did not choose to dive head first into a pool of unknown depth. Terry testified that he was aware there was only a fourteen-inch "wall" onto which the railing was to be installed, and that he put on his glasses, turned on his flashlight and walked to the stairs, but tripped when his toe accidentally struck the edge of the wall. The record fails to indicate the degree to which the flashlight illuminated the area, the width of the pathway, or the location of the unguarded edge in relation to the sleeping area. Whether Terry confronted an open and obvious danger or attempted to avoid an open and obvious danger cannot be determined as a matter of law from the sketchy facts of record.[3]

We also conclude that the record fails to demonstrate that Terry's negligence exceeded Kroenke's as a matter of law. Kroenke contends that Terry was aware of the danger, took no steps to barricade or illuminate the area, and chose to sleep near the area. The record, however, shows that Terry had no carpentry skills that would lead him to believe he could effectively barricade or

[3] Terry also argues that the open and obvious danger defense is inapplicable to his claim based upon negligence per se for violating a safety statute. Because we resolve the issue on other grounds, we need not address this issue. ***Gross v. Hoffman,*** 227 Wis. 296, 277 N.W. 663 (1938).

enclose the area. It fails to establish that the flashlight did not provide sufficient illumination, and further fails to disclose the proximity of Terry's sleeping area to the unguarded area.

On the other hand, the record does permit an inference that Kroenke's crew took down a temporary railing, was aware of the danger presented by the open loft, agreed to install a safety railing and failed to do so. "We do not think that the mere fact that (the decedent) fell into an unguarded opening, which it was the defendant's duty to guard, is evidence that he was negligent." ***Umnus v. WPS,*** 260 Wis. 433, 440, 51 N.W.2d 42, 46 (1952). We are also mindful that it was Kroenke who suggested Terry sleep in the loft area, knowing the railing was not in place.

The parties dispute whose duty it was to maintain a railing around the opening. Kroenke contends that as the property owners, the Huffmans have a non-delegable duty under the safe place statute, § 101.11, STATS., to keep the place safe. On the record before us, whether the Huffmans as property owners have any duty under the safe place statute is a factual inquiry. Wisconsin's safe place statute obligates an owner to "construct, repair or maintain such place of employment … as to render the same safe." Section 101.11(1), STATS. The Huffmans do not dispute that their residence under construction is a place of employment. They argue, however, that the degree to which they retained control of the premises is disputed. "A safe-place duty is imposed … only when there is retention of a right of control beyond mere legal ownership or right of inspection." ***Kaltenbrun v. City of Port Washington,*** 156 Wis.2d 634, 646, 457 N.W.2d 527,

531 (Ct. App. 1990).[4] Generally, the issue of control is a jury question. *See* ***Lee v. Junkans,*** 18 Wis.2d 56, 61, 117 N.W.2d 614, 617 (1962).

Kroenke argues that the Huffmans retained a large degree of control due to the fact that they hired some of the subcontractors and did staining and landscaping. His argument neglects other facts that permit opposing inferences. After Kroenke's crew had taken down the temporary railing and Terry asked them to replace it, Kroenke replied that "we need to get that done." This response would permit an inference that Kroenke agreed to take responsibility for putting up the railing.

This response also permits the inference that Kroenke retained control and supervision of safety precautions on the job site. Other facts consistent with this inference are that the Huffmans were out-of-town owners who did not have a key and that the day-to-day responsibility for supervising the construction of the house was Kroenke's. Schroeder testified that as the foreman it is generally his responsibility to maintain safety at a work site. This raises

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> [4] [W]hen an owner turns over to an independent contractor the complete control and custody of a safe place, whereon or whereunder the contractor creates a place of employment for the purpose of fulfilling the terms of the contract, the owner reserving no right of supervision or control of the work excepting that of inspection or to change the plan with reference to the construction to be furnished, if thereafter in the performance of the work under the contract the premises are changed by the contractor and as a result a hazardous condition is created, the owner does not become liable to the contractor's employee injured as a consequence of such hazardous condition while acting in the scope of his employment.

Potter v. Kenosha*,** 268 Wis. 361, 372, 68 N.W.2d 4, 10 (1955); s*ee also* ***Weber v. City of Hurley, 13 Wis.2d 560, 569-70, 109 N.W.2d 65, 70-71 (1961).

questions as to the extent of the control and supervision the Huffmans retained, properly reserved for determination by the trier of fact. *See* ***Lemacher v. Circle Constr. Co.,*** 72 Wis.2d 245, 250, 240 N.W.2d 179, 181-82 (1976) (In action under safe place statute, the trial court erred in failing to instruct jury that duty of general contractor depended upon extent to which general contractor retained control and supervision.).

Not insignificantly, the role of the safe place statute as a defensive tool is not well-developed by the parties' briefs. The safe place statute imposes a duty more stringent than ordinary care, ***Topp v. Continental Ins. Co.,*** 83 Wis.2d 780, 784, 266 N.W.2d 397, 400 (1978), but does not impose an absolute liability or make an owner strictly liable. ***May v. Skelley Oil Co.,*** 83 Wis.2d 30, 36 n.4, 264 N.W.2d 574, 577 n.4 (1978); ***Carr v. Amusement, Inc.*** 47 Wis.2d 368, 373-74, 177 N.W.2d 388, 391 (1970). We conclude that a party's violation of the statute would not absolutely resolve the liability issue as a matter of law.

Finally, we note that Kroenke contends that because the Huffmans' complaint failed to specifically plead certain federal regulations relating to guardrails, they waived their claim that Kroenke was negligent per se. We disagree. Although the complaint failed to cite these regulations, it did allege the facts upon which it relied and alleged common law negligence and negligence per se. We conclude that the allegations are adequate, reasonably putting Kroenke on notice as to the Huffmans' position in the case. A plaintiff is "only required to draft … 'a short and plain statement of the claim, identifying the transaction, occurrence or event out of which the claim arises and showing that the pleader is entitled to relief.'" ***Olson v. Ratzel,*** 89 Wis.2d 227, 252, 278 N.W.2d 238, 250 (Ct. App. 1979) (citation omitted). Their failure to cite these regulations in their complaint is not fatal to their claim. *Cf.* ***Eder v. Lake Geneva Raceway,*** 187

Wis.2d 596, 612-13, 523 N.W.2d 429, 434-35 (Ct. App. 1994) (although statutory section was not cited, allegations were minimally adequate to state claim for negligence and safe-place statute violations). Because the record discloses issues of material fact with respect to supervision, control, negligence and negligence per se, we reverse and remand for further proceedings.

By the Court.— Judgment reversed and cause remanded.

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