

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 27, 1995

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(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2787

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT II

KURT KOLLER, RICHARD T. KLUNCK,  
KENNETH J. THELEN, JENNIFER THELEN,  
VICTORIA S. THELEN, a minor,  
JACOB D. THELEN, a minor,  
DANIEL R. CORDY, BRENDA S. CORDY  
DEANNA R. CORDY, a minor,  
DANIEL J. CORDY, a minor,  
JUDITH H. NACK, WILLIAM P. JUNK, SR.,  
BONNIE L. JUNK, KANDIE A. JUNK,  
MICHAEL J. MILLER and  
WESTFIELD INSURANCE COMPANY,

Plaintiffs,

v.

LIBERTY MUTUAL INSURANCE  
COMPANY and SHOPKO STORES, INC.,

Defendants-Respondents,

CONTINENTAL CASUALTY COMPANY  
and HOWARD IMMEL, INC.,

Defendants-Third Party Plaintiffs,

v.

DHO, INC.,  
and WESTFIELD INSURANCE  
COMPANY,

**Third Party Defendants-Appellants.**

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. DHO, Inc. and Westfield Insurance Company (collectively, DHO) appeal from a summary judgment dismissing claims against Shopko Stores, Inc. and its insurer, Liberty Mutual Insurance Company (collectively, Shopko), for personal injuries caused by the collapse of a concrete wall during the construction of a Shopko store. The issue is whether Shopko, under its contract with Howard Immel, Inc., the general contractor, retained any control over the project such that it owed the injured workers a duty of care. We conclude that despite Shopko's right to make changes in the plans and specifications, the contract assigned all responsibility for the means, methods and safety of construction to Immel. We affirm the judgment.<sup>1</sup>

DHO was the masonry subcontractor in the construction of a new Shopko store. When a concrete block wall collapsed, several DHO employees were severely injured and one was killed. Those employees or their representatives brought an action against Shopko for negligence and violation of the safe-place statute. Immel was also alleged to be negligent. Immel filed a third-party complaint against DHO for indemnification.

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<sup>1</sup> Despite that DHO has no claim or potential cause of action for contribution against Shopko, we determined that DHO has standing to appeal the summary judgment. *Koller v. Liberty Mut. Ins. Co.*, 190 Wis.2d 264, 526 N.W.2d 799 (Ct. App. 1994).

Shopko's negligence allegedly results from the conduct of the on-site construction manager (OSCM) employed by Shopko.<sup>2</sup> In a preconstruction meeting, DHO was directed by Immel representatives and Chester Konitzer, the OSCM, that the wall would be built to its full height with pockets left for later insertion of steel joists. The architectural plans provided for pockets of approximately 4x3 inches. Mark Elmer, DHO supervisor, testified that Konitzer directed DHO to make 8x18 inch pockets in the wall so that the steel workers would have adequate room to work. On the date of the accident, a Friday, Konitzer indicated that the wall had to be completed that day because the steel was coming the following Monday.

Prior to the day of the accident, DHO had built the wall to the height of four feet and utilized a "low lift" grouting method.<sup>3</sup> The construction plan called for low lift grouting but authorized grouting in eight-foot lifts if sufficient clean out holes were placed. As construction of the wall proceeded, grouting was not available at the time at which it should have first been used. Konitzer directed DHO to continue building the wall upward until the grout arrived. When the wall was as high as eight feet, DHO began to grout as directed by Konitzer and at the same time continued to build new wall. The wall collapsed at approximately the level where the pockets were placed.<sup>4</sup>

Shopko sought summary judgment on the ground that it was not negligent as a matter of law because it had no control over the methods of construction used in the project. Although Shopko conceded that the wall collapsed because of improper procedures utilized in its construction, it argued that under *Kaltenbrun v. City of Port Washington*, 156 Wis.2d 634, 643, 457 N.W.2d 527, 530 (Ct. App. 1990), it owed no duty of care because authority over

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<sup>2</sup> For the purposes of summary judgment, we accept, as does Shopko, that the facts in the affidavits in opposition to summary judgment are true.

<sup>3</sup> A low lift grouting method requires grout to be poured into the cells of the concrete blocks every four feet in height. A high lift grouting method permits building to a higher height provided "clean out" holes are left which will permit the grout to get down to the bottom.

<sup>4</sup> An expert civil engineer opined that Konitzer's direction to use nonstandard grouting methods and to cut voids into the concrete block large enough to accommodate the steel joists was a failure to exercise reasonable care and a cause or substantial factor resulting in the collapse.

and control of the means and methods of construction had been contractually assigned to Immel.

In *Kaltenbrun*, 156 Wis.2d at 642, 457 N.W.2d at 530, we recognized that when an owner undertakes a construction project, the owner has a duty to exercise reasonable care. We concluded that by contracting with an independent contractor, relinquishing all control over the site and specifically obligating the contractor to implement all safety precautions associated with the project, the owner has discharged its duty to act with due care. *Id.* at 642-43, 457 N.W.2d at 530. We held "that an owner who has contracted with a reliable and qualified independent contractor to implement all safety precautions associated with the work has fulfilled its duty of reasonable care to those employees of the general contractor or those employed by subcontractors whom the general contractor has hired." *Id.* at 643, 457 N.W.2d at 530.

We must examine the contract between Shopko and Immel.<sup>5</sup> Shopko contends that under the contract Immel had the sole responsibility and authority to control all aspects of the means and methods of construction, including necessary safety precautions. Subparagraph 3.3.1 provides:

The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

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<sup>5</sup> The methodology we apply in summary judgment analysis has been stated often and we need not repeat it. *Wegner v. Heritage Mut. Ins. Co.*, 173 Wis.2d 118, 123, 496 N.W.2d 140, 142 (Ct. App. 1992). Summary judgment should be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; see also *Roebke v. Newell Co.*, 177 Wis.2d 624, 632, 503 N.W.2d 295, 297 (Ct. App. 1993). Interpretation of a contract is a question of law. *Ondrasek v. Tenneson*, 158 Wis.2d 690, 694, 462 N.W.2d 915, 917 (Ct. App. 1990).

Subparagraph 10.1.1 provides that the contractor "shall be responsible for initiating, maintaining and supervising all safety precautions and programs" regarding the project.

The above contract provisions have the effect of contracting away all authority at the construction site and satisfying Shopko's duty of care. DHO argues that despite these provisions, Shopko retained significant control of the project, particularly through its OSCM and provisions which gave the OSCM authority usually reserved for the architect.

The contract gave the OSCM the authority to act on Shopko's behalf only to the extent provided in the contract documents.<sup>6</sup> The OSCM was given authority under subparagraph 2.5.4 to prepare "change orders and construction change directives" as well as "authorize minor changes in the Work as provided in Paragraph 7.4"<sup>7</sup> Under paragraph 7.4.1, the OSCM had authority to order minor changes in the work which did not require an adjustment of the contract sum or timetable and not inconsistent with the intent of the contract documents. The provision concluded that "[s]uch changes shall be effected by written order issued as clarifications and shall be binding on the Owner and Contractor."

The authority of the OSCM to make minor changes in the work distinguishes the contract here from that in *Kaltenbrun*. Shopko concedes that it had authority to make changes in plans and specifications and that the OSCM's duties included more than mere inspection. Thus, Shopko has retained more than the mere right of inspection and the holding in *Kaltenbrun* does not directly apply.

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<sup>6</sup> Subparagraph 4.2.1

<sup>7</sup> The contract defines the term "Work" as "the construction and service required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor" and "may constitute the whole or a part of the Project."

However, the contract contains the following language in paragraph 2.5.7:

The OSCM will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraph 3.3. The OSCM will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The OSCM will not have control over or charge of and will not be responsible for acts or omissions of the Contractor, Subcontractor, or their agents or employees, or of any other persons performing portions of the Work.

Further, subparagraph 3.3.3 provides:

The Contractor shall not be relieved from obligations to perform the Work in accordance with the Contract Documents either by activities or duties of the Architect in the Architect's administration of the Contract, by the activities or duties of the OSCM, or by tests, inspections, or approvals required or performed under Paragraph 13.5 by persons other than the Contractor.

Under these provisions, Immel remained solely responsible for the means and methods of construction and safety. Although, as Shopko concedes, Konitzer's directions involved the ability to change plans, Immel was obligated to carry out those directions as it saw fit to ensure safety.

We need not address whether Shopko is responsible under apparent authority or respondeat superior principles. The change in the size of the pockets and the grouting method did not change the contract price or completion schedule. The change was a minor change in the work which the

OSCM was authorized to make under the terms of the contract. Yet Immel assumed responsibility under the contract.<sup>8</sup>

We conclude that Shopko was entitled to judgment as a matter of law because even though the changes which contributed to the collapse were required by Shopko through its OSCM, under the contract Immel was responsible for safety, means and methods of construction.

*By the Court.* – Judgment affirmed.

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

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<sup>8</sup> It may be that serious public policy questions exist about the enforceability of contractual provisions which contract away duties regarding safety when the owner retains rights to make on-site changes. However, those potential public policy issues have not been raised here.