COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 9, 1996

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. 95-2833-FT

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

BRIAN TORGERSON and
TAMARA TORGERSON,

Plaintiffs-Appellants,

v.

REUBEN JOHNSON & SON, INC., and
AETNA CASUALTY & SURETY COMPANY,

Defendants-Respondents,

v.

L. H. SOWLES COMPANY and AMERICAN
MUTUAL INSURANCE COMPANY,

Third-Party Defendants-Respondents.

APPEAL from a judgment of the circuit court for Douglas County: JOSEPH A. McDONALD, Judge. *Affirmed.*

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

LaROCQUE, J. Brian and Tamara Torgerson appeal a summary judgment dismissing their tort claim against Reuben Johnson & Son, Inc. (RJS), a general contractor.[1] The Torgersons alleged that the negligence of Les Korhonen, a crane operator at a building construction site, caused Brian's injuries. The issue is whether Korhonen was a special employee of Brian's employer, L. H. Sowles Company (Sowles), the subcontractor on the job. If so, the workers compensation statute bars tort recovery.[2] Because it decided Korhonen was Sowle's special employee, the circuit court dismissed the Torgersons' negligence claim. We affirm the summary judgment.

The relevant facts are undisputed. A developer hired RJS as a general contractor to construct a warehouse. RJS hired Sowles as a subcontractor to erect the steel structure. Brian Torgerson was a laborer for Sowles. Sowles originally submitted a bid of approximately $272,000 to erect the steel structure, but later acceded to a reduced bid of approximately $232,000 in return for RJS' promise to provide the crane and crane operator to Sowles. Under the arrangement, Sowles was to take custody and control of the crane for purposes of the steel erection project. Korhonen, the loaned employee, operated the crane under the detailed direction of Sowles' employees. Brian's injuries occurred when Korhonen set some steel bundles down with the crane on a structure on which Brian was standing. The load caused the structure to sway, and Brian fell to the ground, sustaining wrist and spine injuries.

The Torgersons' claim against RJS is grounded upon the agency principle of respondeat superior (let the master answer), holding a master liable for the wrongful acts of his servant. RJS obtained summary judgment on the

---

[1] This is an expedited appeal under RULE 809.17, STATS. Although the court's decision is designated an order, we interpret it as a summary judgment granted pursuant to § 802.08(2), STATS.

[2] Section 102.03(2), STATS., provides in part:

> Where such conditions exist the right to recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employe of the same employer and the worker's compensation insurance carrier.

grounds that Korhonen was a special employee of Sowles at the time of the accident, making Sowles Korhonen's employer for purposes of tort claims.[3]

We apply the summary judgment standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. *See* ***Hake v. Zimmerlee***, 178 Wis.2d 417, 421, 504 N.W.2d 411, 412 (Ct. App. 1993). Application of a statute to an undisputed set of facts is a question of law we review de novo. ***Id***.

With a notable exception, inapplicable here but discussed later, ***Seaman Body Corp. v. Industrial Comm'n***, 204 Wis. 157, 163, 235 N.W. 433, 435 (1931), first applied the four-part test to determine whether a loaned employee retains his employment with his loaning employer (the general employer) or becomes the employee of the borrowing employer (the special employer). Under the borrowed servant rule, the special employer or borrowing master, not the general employer or loaning master, is liable for the negligent acts of a loaned servant if the loaned servant becomes the servant of the borrowing master. ***DePratt v. Sergio***, 102 Wis.2d 141, 306 N.W.2d 62 (1981). The test questions are:

(1) Did the employee actually or impliedly consent to work for a special employer?
(2) Whose was the work he was performing at the time of injury?
(3) Whose was the right to control the details of the work being performed?
(4) For whose benefit primarily was the work being done?

Id. at 143, 306 N.W.2d at 63.

Thus, the initial inquiry is whether Korhonen actually or impliedly consented to work for Sowles. An employee who receives all of his directions on the job in question from the special employer and complies with those directions constitutes sufficient performance and acquiescence to imply his

[3] Sowles has an agreement with RJS that may require it to indemnify RJS for any amount it has to pay in this suit. By order dated December 11, 1995, we allowed Sowles to participate as a third-party defendant in this appeal.

consent to work for the special employer. ***Huckstorf v. Vince L. Schneider Enters.***, 41 Wis.2d 45, 52-53, 163 N.W.2d 190, 194 (1968). Korhonen gave his implied consent to work for Sowles.

The next inquiry is whose work Korhonen was performing at the time of Brian's injury. In ***Huckstorf***, the court held that the crane operator, whose services along with the crane were leased to the special employer, was the employee of the special employer whose job was to erect the building addition under construction. ***Id.*** at 53, 163 N.W.2d at 194. The special employer in this case, Sowles, was similarly responsible for the construction of the steel structure that led directly to Brian's injury.

Other facts in our case closely parallel those of ***Huckstorf***. In each case, the crane operator remained on the payroll of the general employer. *See* ***id.*** at 47, 163 N.W.2d at 192. In each case, the general employer received a form of financial reimbursement or compensation from the special employer: In ***Huckstorf***, the general employer agreed to lease the crane and operator for a monthly rental to the special employer, ***id.*** at 47, 163 N.W.2d at 191. In this case, the general employer agreed to loan the crane and operator in return for a reduced contract price for the special employer.

The inquiry for whose benefit primarily was the work being done, as noted in ***Huckstorf***, is somewhat analogous to the second test "whose work" was being done. ***Id.*** at 53, 163 N.W.2d at 195. Further, as in ***Huckstorf***, the work done here was done to facilitate its obligation under the construction contract. *See* ***id.***

Perhaps the determinative question should be who had the right to control the details of the work. As in ***Huckstorf***, the special employer, Sowles, used the crane operator to facilitate its work in the construction project, and did control the details of the work. *See* ***id***. at 53, 163 N.W.2d at 195. The right to control the details of the work here was with the subcontractor and special employer, Sowles.

We turn now to the exception to the four-part ***Seaman*** test, which both the Torgersons and RJS pursued in the circuit court and pursue again on appeal. We conclude that the exception does not apply here. In ***Gansch v. Nekoosa Papers***, 158 Wis.2d 743, 463 N.W.2d 682 (1990), our supreme court

perceived § 102.29(6), STATS., as a legislative response to the court's criticism of the four-part loaned employee test. The legislature passed § 102.29(6) and replaced the ***Seaman*** four-part test with an inquiry that hinges on a showing that the plaintiff's employer meets the definition of a "temporary help agency" contained in § 102.01(2)(f), STATS. ***Gansch***, 158 Wis.2d at 751-52, 463 N.W.2d at 685. Section 102.29(6) provides:

> No employe of a temporary help agency who makes a claim for compensation may make a claim or maintain an action in tort against any employer who compensates the temporary help agency for the employe's services.

Section 102.01(2)(f), STATS., defines "temporary help agency" as "an employer who places its employe with or leases its employes to another employer who controls the employe's work activities and compensates the first employer for the employe's services ...."

However, at about the time RJS and the Torgersons were arguing the two-part ***Gansch*** analysis in the circuit court, our supreme court restricted ***Gansch*** in ***Bauernfeind v. Zell***, 190 Wis.2d 702, 528 N.W.2d 1 (1995). ***Bauernfeind*** held that when the plaintiff's employer is not a temporary help agency, the test to determine whether an employee is a "loaned employee" is still controlled by ***Seaman***. ***Bauernfeind***, 190 Wis.2d at 712, 528 N.W.2d at 5.

Under the plain language of § 102.29(6), STATS., and our supreme court's holding in ***Bauernfeind***, the statute exempts only a "temporary help agency," which is the employer of the employee who makes the claim. The Torgersons and RJS focus their arguments on whether RJS acted as a temporary help agency by lending the crane operator, Korhonen, to Sowles. Sowles correctly argues that the relevant inquiry is whether the *employer of the plaintiff*, in this case Sowles, is a "temporary help agency." *See* § 102.29(6), STATS.; *see also* ***Bauernfeind***, 190 Wis.2d at 712, 528 N.W.2d at 5. The Torgersons do not assert that Sowles is a temporary help agency. It is undisputed that Brian worked for Sowles. We conclude that Sowles was not a temporary help agency, so that the Torgersons' claim falls outside the scope of the statute.

In conclusion, the four-part loaned employee doctrine applies here and, because the negligent crane operator, Korhonen, was Sowles' employee at the time of injury, the Torgersons' tort claim is barred.

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.