COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2085 **Cir. Ct. No. 2011CV57**

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

KELLI BRANDENBURG AND BRUCE BRANDENBURG,

PLAINTIFFS-APPELLANTS,

V.

ROBERT LUETHI AND MCMILLAN-WARNER MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

BRIARWOOD FORESTRY SERVICES, LLC, JEFFERY L. STEINKE, NAUTILUS INSURANCE COMPANY, AMERICAN FAMILY BROKERAGE, INC. AND DANIEL J. FLYNN,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. Kelli and Bruce Brandenburg appeal a judgment dismissing their claims against their neighbor, Robert Luethi, and his insurer, McMillan-Warner Mutual Insurance Company. The Brandenburgs' complaint alleged that Luethi hired Briarwood Forestry Services, LLC, to apply herbicides to Luethi's property, and that Briarwood's negligent application of the herbicides damaged trees and plants on the Brandenburgs' land. The circuit court concluded Luethi could not be held liable for Briarwood's alleged negligence because Briarwood was an independent contractor and the application of the herbicides was not an inherently dangerous activity. We conclude the circuit court used an improper legal standard to determine that Briarwood's work was not inherently dangerous. Under the correct standard, Briarwood's application of the herbicides was an inherently dangerous activity. We therefore reverse and remand for further proceedings.

BACKGROUND

¶2 Luethi owns twenty-two acres of land, which are adjacent to a property owned by the Brandenburgs. Luethi uses his property for agricultural purposes. Over time, one of Luethi's pastures became infested with prickly ash, which inhibited grass growth and made it difficult for Luethi to locate his cattle.

¶3 In the spring of 2008, Luethi retained Briarwood to kill the prickly ash using herbicides. On July 3, 2008, two Briarwood employees sprayed two acres of Luethi's property with a solution containing the herbicides Garlon 4 and Agrisolutions 2, 4-D LV4. About one week later, Kelli Brandenburg noticed defoliation of birch trees, ornamental bushes, and perennials on her property.

¶4 The Brandenburgs subsequently filed suit against Luethi, Briarwood, and one of Briarwood's employees, alleging that the herbicides Briarwood sprayed had drifted onto the Brandenburgs' property, causing the loss of seventy-nine trees. The Brandenburgs contended that Briarwood was negligent by failing to follow the manufacturers' instructions for use of the herbicides.

¶5 Luethi moved for summary judgment, arguing he could not be held liable for Briarwood's negligence because Briarwood was an independent contractor and "Wisconsin follows the general rule that a principal employer[1] is not liable to others for the torts of independent contractors." In response, the Brandenburgs conceded that Briarwood was an independent contractor and that, generally, a principal employer cannot be held liable for an independent contractor's torts. However, the Brandenburgs argued that a principal employer may nevertheless be held liable for injuries to a third party if the independent contractor was hired to perform "inherently dangerous" work. The Brandenburgs contended there was a factual dispute as to whether Briarwood's application of the herbicides was inherently dangerous, and summary judgment was therefore inappropriate.

¶6 In reply, Luethi asserted that the proper inquiry was not whether Briarwood's work was inherently dangerous, but whether it was "extrahazardous"—a higher level of dangerousness. Luethi contended the

[1] Wisconsin cases use the terms "principal employer," "general contractor," and "owner" interchangeably to refer to the person or entity that hires an independent contractor. ***Estate of Thompson v. Jump River Elec. Co-op.***, 225 Wis. 2d 588, 591 n.1, 593 N.W.2d 901 (Ct. App. 1999). For consistency, we use the term "principal employer" throughout this opinion.

undisputed facts showed that Briarwood's application of the herbicides was not an extrahazardous activity.

¶7 The circuit court rendered an oral ruling on December 20, 2011. The court began by stating that the dispositive issue was whether "the spraying of the herbicide … by Briarwood, at the hiring of Robert Luethi, was an inherently dangerous activity[.]" However, the court went on to state that it "wasn't satisfied" that Wisconsin law provided a good definition of the term "inherently dangerous." Consequently, the court looked to an unpublished case from the United States District Court for the District of Kansas for guidance. *See* ***Desaire v. Solomon Valley Co-op, Inc.***, 1995 WL 580064 (D. Kan. 1995).

¶8 In ***Desaire***, landowners hired an independent contractor to spray herbicides on their property, but the herbicides drifted and damaged their neighbors' plants. ***Id.*** at *2. The neighbors sued the landowners, who moved for summary judgment on the theory that they could not be held liable for the independent contractor's negligence. ***Id.*** Addressing this argument, the court stated that "Kansas law prohibits a party engaged in an inherently dangerous activity from insulating himself from responsibility by the expediency of employing an independent contractor." ***Id.*** at *3. The court then cited RESTATEMENT (SECOND) OF TORTS § 520 (1977), which sets forth six factors a court should consider to determine whether an activity is "abnormally dangerous":

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;

> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. at *4. After applying these factors, the ***Desaire*** court concluded that the "ground-based use of herbicides in a rural and agricultural environment is not abnormally dangerous." ***Id.*** at *5.

¶9 The circuit court stated it intended to use the six ***Desaire*** factors to determine whether Briarwood's application of the herbicides was an inherently dangerous activity. However, the court concluded the parties' summary judgment filings did not provide enough information for the court to make this determination. Consequently, the court denied Luethi's summary judgment motion and set the matter for a "fact-finding hearing" on the ***Desaire*** factors.[2]

[2] We have significant concerns about the procedure the circuit court used in this case to decide Luethi's summary judgment motion. Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2011-12). If a court cannot make this determination based on the submissions before it, it should deny the summary judgment motion and allow the matter to proceed to trial. Here, though, the circuit court set the matter for a "fact-finding hearing." It is axiomatic that a court does not "find facts" on summary judgment. *See* ***Kelly v. Clark***, 192 Wis. 2d 633, 646, 531 N.W.2d 455 (Ct. App. 1995). By holding a fact-finding hearing, the court essentially converted Luethi's summary judgment motion into a bench trial on the inherently dangerous activity issue.

However, neither party objected when the circuit court proposed holding a fact-finding hearing. *See* ***State v. Ndina***, 2009 WI 21, ¶¶29-30, 315 Wis. 2d 653, 761 N.W.2d 612 (Failure to timely raise an argument in the circuit court forfeits the argument on appeal.). In addition, aside from a single comment in their reply brief, the Brandenburgs do not argue on appeal that the procedure used by the court warrants reversal. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶28, 318 Wis. 2d 488, 770 N.W.2d 727 (We do not consider matters raised for the first time in a reply brief.). Thus, while we note that we do not approve of the procedure the court used, we do not reverse on that basis.

¶10 Multiple fact and expert witnesses testified at the fact-finding hearing. At the close of evidence, the court discussed the six ***Desaire*** factors and concluded, "I can't find that [under] the language used in ***Desaire*** this was abnormally dangerous and I can't find this reaches the level of a[n] ultra-hazardous activity[.]" The court therefore granted summary judgment in favor of Luethi, and the Brandenburgs appeal.

DISCUSSION

¶11 The parties dispute whether the circuit court used the proper legal standard to determine that the Brandenburgs could not hold Luethi liable for Briarwood's negligence. Whether a court employed the correct legal standard is a question of law that we review independently. ***Landwehr v. Landwehr***, 2006 WI 64, ¶8, 291 Wis. 2d 49, 715 N.W.2d 180.

¶12 In Wisconsin, "[t]he general rule is that one who contracts for the services of an independent contractor is not liable to others for the acts of the independent contractor." ***Lofy v. Joint Sch. Dist. No. 2***, 42 Wis. 2d 253, 263, 166 N.W.2d 809 (1969). However, the ***Lofy*** court recognized several exceptions to this general rule—that is, circumstances under which a principal employer may be held liable for an independent contractor's torts. *See* ***id.*** As relevant to this case, the principal employer may be held liable where the "services contracted for involve inherent danger[.]" ***Id.***

¶13 ***Lofy*** involved an automobile accident between the plaintiff's vehicle and a school bus. ***Id.*** at 256-57. The plaintiff sued the school district, which had hired the bus to transport students to a basketball tournament. ***Id.*** The supreme court concluded the school district could not be held liable for the bus driver's negligence because the bus company was an independent contractor and because

"[t]he operation of a bus between Cumberland and Madison over modern highways cannot be considered inherently dangerous." ***Id.*** at 263. The court did not, however, define the term "inherently dangerous," nor did it engage in any analysis as to what constitutes an inherently dangerous activity.

¶14 The court provided further guidance nearly twenty years later in ***Wagner v. Continental Casualty Co.***, 143 Wis. 2d 379, 421 N.W.2d 835 (1988). The issue in ***Wagner*** was whether the inherent danger exception to the general rule of nonliability for an independent contractor's negligence applied when the plaintiff, instead of being a third party, was an employee of the independent contractor. *See* ***id.*** at 400-01. Citing a number of policy considerations, the ***Wagner*** court ruled that the inherent danger exception did not apply when the plaintiff was the independent contractor's employee. ***Id.*** Instead, to hold the principal employer liable for the independent contractor's negligence, the employee had to show that the independent contractor was hired to perform "abnormally dangerous or extrahazardous" work. ***Id.*** at 401.

¶15 The ***Wagner*** court clarified that the terms "inherently dangerous" and "extrahazardous" have distinct meanings, and the latter requires a heightened showing of dangerousness. *See* ***id.*** at 392-93. Specifically, an activity is extrahazardous when "the risk of harm remains unreasonably high no matter how carefully [the activity] is undertaken." ***Id.*** at 392. The court listed transporting nuclear waste and working with toxic gases as examples of extrahazardous activities. ***Id.*** at 392-93. In contrast, an activity is merely inherently dangerous if the person performing the activity "can take steps to minimize the risk of injury." ***Id.*** at 392. Examples of inherently dangerous activities include general construction, demolition, and excavation. ***Id.*** ***Wagner***'s definition of "inherently dangerous" was subsequently incorporated into the jury instruction on liability for

an independent contractor's negligence, which states, "Inherently dangerous work is work from which one can naturally expect harm to arise unless something is done to avoid the harm." WIS JI—CIVIL 1022.6 (2005).

¶16 Following ***Lofy*** and ***Wagner***, the following principles are clear: (1) a principal employer is generally not liable for an independent contractor's negligence; (2) a principal employer may be liable to a *third party* for the independent contractor's negligence, if the independent contractor was performing *inherently dangerous* work; and (3) a principal employer may be liable to the *independent contractor's employee*, if the independent contractor was performing *extrahazardous* work. The Brandenburgs are not employees of Briarwood. Thus, to hold Luethi liable for Briarwood's negligence, the Brandenburgs must show that Briarwood's work was inherently dangerous. Contrary to Luethi's assertions, they need not show that the work was extrahazardous.

¶17 The circuit court appeared to recognize this distinction in its initial summary judgment ruling when it stated, "[T]he sole issue is whether or not there's liability on Mr. Luethi due to the *inherently dangerous* nature of spreading herbicide." (Emphasis added.) However, rather than relying on the definition of "inherently dangerous" found in ***Wagner*** and WIS JI—CIVIL 1022.6, the court

looked to ***Desaire***—an unpublished federal case—for guidance. We agree with the Brandenburgs that the court's reliance on ***Desaire*** was improper.[3]

¶18 Admittedly, ***Desaire*** is factually similar to this case. Additionally, as in this case, the operative issue in ***Desaire*** was whether an independent contractor's work was "inherently dangerous," such that a third party could hold the principal employer liable for the contractor's negligence. *See* ***Desaire***, 1995 WL 580064, *3. The problem is that ***Desaire***'s analysis of what makes an activity inherently dangerous is inconsistent with Wisconsin law.

¶19 To determine whether applying herbicides was an inherently dangerous activity, the ***Desaire*** court considered whether that activity was "abnormally dangerous," as that term is defined in § 520 of the RESTATEMENT (SECOND) OF TORTS. ***Desaire***, 1995 WL 580064, *4. Section 520 sets forth six factors a court should consider to determine whether an activity is abnormally dangerous. *See* RESTATEMENT (SECOND) OF TORTS § 520 (1977). The third factor is an "inability to eliminate the risk [of harm] by the exercise of reasonable care[.]" ***Id.*** That factor directly conflicts with the definition of "inherently dangerous" set forth in ***Wagner***, which states that an activity is inherently dangerous if steps can be taken to minimize the risk of harm. *See* ***Wagner***, 143 Wis. 2d at 392. By using § 520 to determine whether an activity was inherently

[3] Luethi argues the Brandenburgs have forfeited their right to raise this argument by failing to raise it below. We disagree. Although Luethi is correct that the Brandenburgs never specifically challenged the circuit court's reliance on ***Desaire v. Solomon Valley Co-op, Inc.***, 1995 WL 580064 (D. Kan. 1995), they consistently urged the court apply the standard set forth in ***Wagner v. Continental Casualty Co.***, 143 Wis. 2d 379, 421 N.W.2d 835 (1988). In addition, they repeatedly asserted that Wisconsin law was unambiguous and that reference to foreign authority was therefore unnecessary. Under these circumstances, the Brandenburgs have not forfeited their right to argue that the circuit court's reliance on ***Desaire*** was improper.

dangerous, the ***Desaire*** court actually employed a standard that is more akin to Wisconsin's definition of an extrahazardous activity. In fact, while the circuit court originally stated that it had to decide whether applying herbicides was an inherently dangerous activity, after considering ***Desaire***, the court ultimately concluded that applying herbicides was not "abnormally dangerous" and did not "reach the level of a[n] ultra-hazardous activity[.]" As discussed above, the Brandenburgs needed only to show that Briarwood's activities were inherently dangerous, not extrahazardous. As a result, the circuit court's reliance on ***Desaire*** was improper.

¶20 Moreover, even absent any conflict with Wisconsin law, we are not convinced that ***Desaire***'s reliance on § 520 was correct. Section 520 is found in Chapter 21 of the Restatement, which deals with situations in which a person may be subject to strict liability for harm caused by abnormally dangerous activities. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 519, 520B, 520C (1977). Chapter 21 does not address employer liability for harm caused by an independent contractor. That topic is instead discussed in Chapter 15, which contains a section that specifically addresses an employer's liability for inherently dangerous activities. *See* ***id.***, § 427 ("Negligence as to Danger Inherent in the Work"). We find it inexplicable that, in searching for a definition of the term "inherently dangerous," the ***Desaire*** court looked to § 520, which pertains to an unrelated topic. If the court felt the need to reference the Restatement, it should have looked to § 427, which is directly on point.

¶21 Having concluded that the circuit court used an improper legal standard to determine whether Briarwood's application of herbicides was an inherently dangerous activity, we next consider whether that activity was inherently dangerous under the proper standard. Under ***Wagner*** and the applicable

jury instruction, two elements are necessary for an activity to be considered inherently dangerous: (1) the activity must pose a naturally expected risk of harm; and (2) it must be possible to reduce the risk to a reasonable level by taking precautions. *See* ***Wagner***, 143 Wis. 2d at 392; WIS JI—CIVIL 1022.6 (2005). Based on the undisputed facts, we conclude as a matter of law that Briarwood's application of herbicides met this standard.[4] *See* ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶31, 283 Wis. 2d 384, 700 N.W.2d 27 (application of undisputed facts to a legal standard is a question of law subject to independent review).

¶22 At the fact-finding hearing, Brian Borreson, Briarwood's owner, testified that when spraying herbicides, there is a risk that drift will occur and cause damage to neighboring properties. Lee Shambeau, Luethi's expert witness, also described various ways that sprayed herbicides can cross property lines, and he admitted that herbicide drift can cause harm. In addition, the Brandenburgs' expert, Gary LeMasters, testified that spraying herbicides involves a risk of drift onto neighboring properties. Luethi did not present any evidence to the contrary. Thus, the undisputed evidence established that Briarwood's spraying of the herbicides posed a risk of harm. Moreover, common sense dictates that herbicides sprayed outdoors on one property will not necessarily be contained to that property. Consequently, the risk of harm is one that could be naturally expected to arise in the absence of precautions.

[4] At first blush, it may seem incongruous for us to determine as a matter of law that Briarwood was engaged in an inherently dangerous activity, given our earlier criticism of the circuit court for finding facts on summary judgment. However, as we explain below, the relevant facts were actually undisputed. Thus, fact finding is unnecessary, and we must simply determine whether the undisputed facts met the legal standard for an inherently dangerous activity.

¶23 Undisputed evidence also showed that the risk of harm could be reduced to a reasonable level by taking certain precautions. Both Borreson and Shambeau testified that various practices can be used to reduce the possibility of drift, including: (1) avoiding spraying during high velocity winds; (2) spraying when the wind is blowing away from a neighbor's property; (3) spraying in cooler weather; (4) using low pressure spray nozzles; (5) using a thickening agent; and (6) keeping spray nozzles close to the ground. While these practices do not completely eliminate the possibility of drift, Borreson testified they "should be fairly effective in controlling the situation[.]" Similarly, Shambeau testified that the risk of drift can never be eliminated "100 percent," but it can be reduced by taking precautions. LeMasters agreed that the risk cannot be completely eliminated, but he stated the herbicides in question can be "applied safely without drift[.]" The circuit court aptly summarized the witnesses' testimony, stating that, although the risk of harm can never be eliminated entirely, it can be reduced "to a large degree by using reasonable care."

¶24 The undisputed evidence therefore established that Briarwood's application of the herbicides posed a naturally expected risk of harm, and that certain precautions could be taken to reduce the risk to a reasonable level. Consequently, spraying the herbicides was an inherently dangerous activity, and, as a result, the general rule of nonliability for an independent contractor's torts did not apply. However, the factual question remains for the jury to determine whether Luethi exercised ordinary care to prevent damage to the Brandenburgs' property. *See* WIS JI—CIVIL 1022.6 (2005). We therefore reverse the judgment dismissing the Brandenburgs' claims against Luethi and his insurer, and we remand for further proceedings.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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