COURT OF APPEALS
DECISION
DATED AND RELEASED

January 16, 1997

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, 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. 95-3553

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

DOUGLAS M. McPHAIL,

Plaintiff-Respondent,

v.

FRANK BIRD,

Defendant,

LUKE DEMES, and
RURAL MUTUAL INSURANCE COMPANY,

Defendants-Appellants,

MARYLAND CASUALTY COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Luke Demes and his insurer, Rural Mutual Insurance Company, appeal from a judgment awarding damages to plaintiff Douglas M. McPhail. We affirm.

Some of the facts are undisputed. Luke Demes hired Frank Bird to build a house. Their agreement did not include wiring for cable television. Demes arranged for a company to do the cable TV wiring. That company sent its employee, plaintiff McPhail, to perform the work. Bird had hired the Weber brothers to perform carpentry work at the house. Demes instructed the Webers to tell the cable installer where he wanted the jacks placed, and they did so. McPhail was injured when the basement stairs fell down while he was on them. McPhail brought this third-party liability action against Bird and Demes under § 102.29(1), STATS. The jury found both negligent, and apportioned the negligence 95% to Bird and 5% to Demes. Demes and his insurer appeal.

The special verdict included the following question: "Was the defendant, Luke Demes or his agents, negligent with respect to the construction or the maintaining of his property as safe as the nature thereof would reasonably permit?" The jury answered this question in the affirmative, and went on to find that such negligence was a cause of McPhail's injury.

Demes argues that the trial court erred in its instructions and the special verdict by classifying the Webers as servant agents of Demes, rather than independent contractor agents, thereby allowing the jury to attribute the Webers' negligence to Demes. Demes implies that McPhail argued to the jury that the Webers were negligent and were agents of Demes, and therefore Demes was negligent. However, because we were not provided a transcript of closing arguments, we are unable to determine precisely what theories were argued to the jury.

Regardless of what theories were argued, Demes did not object to either the instruction or the special verdict on this point. His silence is a waiver. Section 805.13(3), STATS. Demes argues that he was not able to object at the instructions conference because McPhail had not previously argued that the Webers were negligent or agents of Demes. However, the record shows that McPhail made such an argument both in response to a motion for directed verdict and at the instructions conference. Therefore, we conclude Demes

waived this objection to the instruction and the verdict. We may not consider this argument. ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

Demes also argues the evidence was insufficient to find him directly liable under the safe place statute or common law. However, Demes does not attack the agency theory beyond the argument we rejected above. Because the negligence of Demes and of his agent were not addressed in separate verdict questions, we are unable to determine which theory the jury accepted. Therefore, even if we were to agree that the evidence of Demes' own negligence is insufficient, we would nevertheless affirm the judgment on the basis of the agency theory, which Demes does not otherwise challenge. Therefore, we need not address the arguments as to Demes' own negligence.

Demes argues that the circuit court should have granted his motion for judgment notwithstanding the verdict because an owner of a place of employment is not liable for injury to an employee of an independent contractor. His argument is based on a misreading of ***Snider v. Northern States Power Co.***, 81 Wis.2d 224, 260 N.W.2d 260 (1977). The rule relied on in ***Snider*** was not that the owner cannot be liable to an employee of an independent contractor, but that one who contracts with an independent contractor is not liable to others for the torts of the independent contractor. ***Id.*** at 232, 260 N.W.2d at 263. For such a rule to apply here, Demes would have to establish that the Webers, whose negligence may have caused the stairs to collapse, were independent contractors. However, we concluded above that Demes waived this argument by not objecting to the relevant jury instruction. Therefore, we reject this argument.

Finally, Demes argues that the court erred by granting the plaintiff's motion to bar him from informing the jury that Maryland Casualty Company appeared in this case as the worker's compensation carrier covering the plaintiff. Demes appears to argue that he was prejudiced by this ruling because, without this information, the jury may have believed the plaintiff suffered uncompensated wage and medical losses, and as a result been sympathetic to the plaintiff in its verdict. We reject the argument. Demes provides no authority to show that he is entitled to have the existence of insurance placed before the jury. Furthermore, the possibility of prejudice to Demes is so speculative that any error was harmless.

By the Court.—Judgment affirmed.

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