COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2984 **Cir. Ct. No. 2001CV988**

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

DONALD R. BINSFELD AND CYNTHIA M. BINSFELD,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

REGENT INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-CO-APPELLANT,

V.

DONALD S. CONRAD, WISCONSIN PUBLIC SERVICE CORPORATION AND JKL INSURANCE COMPANY,

DEFENDANTS,

ABC INSURANCE COMPANY, JOHN P. MORTENSEN, ANTHONY F. MORTENSEN D/B/A MORTENSEN PROPERTIES,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Donald Binsfeld appeals a summary judgment dismissing his negligence claims against John P. Mortensen and Anthony F. Mortensen d/b/a Mortensen Properties. Mortensen Properties cross-appeals the circuit court's holding that the worker's compensation immunity does not extend to it under the representative capacity doctrine. We affirm the circuit court's refusal to apply the representative capacity doctrine, but reverse its holding regarding Binsfeld's negligence claim.

BACKGROUND

¶2 On July 24, 1998, Binsfeld, an employee of Jones Sign Company, Inc., was electrocuted while working on an outdoor advertising billboard owned by Mortensen Properties. Knocked unconscious, Binsfeld fell forty-five feet to the ground. As a result of the accident, he is 75-80% disabled. Binsfeld received worker's compensation benefits, thereby indemnifying Jones Sign. Binsfeld is suing Mortensen Properties, alleging liability under the Wisconsin safe place statute, negligence per se, and strict liability. He alleges his injuries were caused by Mortensen Properties' failure to properly maintain a safe workplace because

the billboard contained fifteen structural deficiencies, violated WIS. STAT. § 84.30,[1] and the accident implicated nine OSHA regulations.[2]

¶3 Mortensen Properties buys and owns advertising billboards. It rents those billboards to Jones Sign.[3] John Mortensen owns both Mortensen Properties and Jones Sign. Despite this close ownership structure, Mortensen has kept the businesses separate, sharing no employees, bank accounts, or assets, and filing separate tax returns.

¶4 Mortensen Properties moved for summary judgment arguing Jones Sign's worker's compensation immunity extended to it through the representative capacity doctrine and passive negligence protects it from being liable for any damages. In granting summary judgment, the court rejected Mortensen Properties' representative capacity doctrine argument, but accepted its passive negligence argument. The parties appear to agree that the passive negligence in this case refers to Mortensen Properties' failure to locate and correct the billboard's structural flaws. Binsfeld argues the court's application of passive negligence was incorrect as a matter of law. Mortensen Properties cross-appeals the court's refusal to apply the representative capacity doctrine.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Binsfeld provided expert testimony that alleged walkways and a ladder should have been located further away from high voltage electrical wires, that parts of the sign should have been made of insulated materials, and that construction diagrams were so simplistic that they concealed the presence of the high voltage wires from licensing authorities. Moreover, Binsfeld's expert also alleged that the sign inadequately guarded against falls because there was no safety rail, nor was there a place to attach a safety harness.

[3] At the time of the accident, John and his father, Anthony, were in the Mortensen Properties partnership. After the accident, John bought out Anthony's interest in Mortensen Properties, making it a sole proprietorship.

DISCUSSION

¶5 The grant of a motion for summary judgment is a matter of law that this court reviews de novo. ***Torgerson v. Journal/Sentinel, Inc.***, 210 Wis. 2d 524, 536, 563 N.W.2d 472 (1997). We review summary judgments without deference to the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987).

A. Passive Negligence

¶6 Before addressing the applicability of passive negligence, we address the sufficiency of the pleadings.[4] Mortensen Properties contends Binsfeld's pleadings are insufficient because Binsfeld did not separately plead the safe place statute.[5] Wisconsin law does not require separately pleading a safe place claim and a common law negligence claim because both claims are for an underlying claim of negligence. ***Mullen v. Reischl***, 10 Wis. 2d 297, 308, 103 N.W.2d 49 (1960). In ***Mullen***, the supreme court held

> it is not necessary for a plaintiff to plead a violation of the safe-place statute as a separate cause of action merely because the complaint also alleges acts on the part of the defendant which would constitute negligence at common

[4] Mortensen Properties argues some type of notification language must be used to advance safe place statute, negligence per se, or strict liability claims, relying solely on ***Winnebago Homes, Inc. v. Sheldon***, 29 Wis. 2d 692, 139 N.W.2d 606 (1966). However, ***Winnebago Homes***' holding went to the pleading of estoppel claims. *See* ***id.*** Thus, ***Winnebago Homes*** is not controlling.

[5] Binsfeld also refers to negligence per se and strict liability in his brief, although he does not make it clear that he is actually pursing either theory. He only cites generalized authority for the proposition that his pleadings adequately raise these theories. Because Binsfeld's negligence claim appears to rely on the safe place statute, we confine our consideration to whether he must allege a separate negligence claim under the safe place statute.

> law. This is because there is but one cause of action and that is for negligence.

Id.; *see also* ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶18, 245 Wis. 2d 560, 630 N.W.2d 517 ("Wisconsin's safe place statute … is a negligence statute that, rather than creating a distinct cause of action, instead establishes a duty greater than that of ordinary care imposed at common law." (citations omitted)). Therefore, Binsfeld's pleadings are sufficient.

¶7 The next question is whether Binsfeld has a negligence claim against Mortensen Properties as the owner of the billboard. Binsfeld alleges the billboard's structural defects created an unsafe workplace in violation of the duty placed on property owners by the safe place statute. In a prior appeal, we concluded the billboard was a place of employment. *See* ***Binsfeld v. Conrad***, 2004 WI App 77, ¶12, 272 Wis. 2d 341, 679 N.W.2d 851.

¶8 The safe place statute creates a statutory duty on every owner of a place of employment to construct premises free of structural defects. WIS. STAT. § 101.11. The safe place statute reads, in relevant part:

> Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.
>
> … and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

Id. In granting Mortensen Properties' summary judgment motion, the circuit court adopted Mortensen Properties' argument that it was not liable because it committed no affirmative acts of negligence. Under common law negligence, a defendant is not liable for passive negligence unless a statute, a contract or a

common law exception imposes liability for passive negligence. *See* ***Estate of Thompson v. Jump River Elec. Coop.***, 225 Wis. 2d 588, 595, 593 N.W.2d 901 (Ct. App. 1999).

¶9 The safe place statute imposes a non-delegable duty on employers and workplace owners to maintain a safe workplace and failure to do so may constitute negligence. *See* ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis. 2d 120, 131-32, 301 N.W.2d 201 (1981); *see also* ***Barry***, 245 Wis. 2d 560, ¶¶22, 42. In ***Dykstra***, the supreme court held a general contractor could not transfer its safe place statute responsibilities to a subcontractor because "the duty of an owner or employer under the safe place statute is nondelegable." ***Dykstra***, 100 Wis. 2d at 130-31. Additionally, in ***Barry***, the supreme court held a property owner has safe place obligations for structural defects regardless of another entity's present control over the property. ***Barry***, 245 Wis. 2d 560, ¶¶39-44. Thus, under WIS. STAT. § 101.11, an owner of a workplace may not escape liability by transferring away possession or responsibility.

¶10 Nevertheless, Mortensen Properties argues ***Jump River*** supports the application of passive negligence to a safe place statutory claim. However, ***Jump River*** is distinguishable from the present case. In ***Jump River***, this court held a company's failure to discover and act regarding safety violations by a company hired to install power lines was passive negligence and therefore was not liable. ***Id.*** at 602. However, the plaintiff in ***Jump River*** sued the electric co-op arguing that working on power lines is inherently dangerous and the owner should have corrected safety problems. ***Id.*** at 590-91. Unlike the plaintiff in ***Jump River***, Binsfeld is suing Mortensen Properties under the safe place statute, which places a non-delegable duty on workplace owners to maintain a safe workplace. Because this duty is non-delegable, passive negligence cannot be a defense.

¶11 While Jones Sign controls and maintains the billboard, Mortensen Properties owns it. Therefore, under WIS. STAT. § 101.11, Mortensen Properties could be liable if it failed to maintain a safe workplace.

B. Worker's Compensation Immunity

¶12 Mortensen Properties argues that, even if it were negligent, it has immunity under the representative capacity doctrine. We disagree. Worker's compensation immunity prevents an employee from suing his or her employer for injuries sustained while at work if that employee receives worker's compensation benefits. *See* WIS. STAT. § 102.03(2). This court has previously held where separate legal entities exist, worker's compensation immunity generally does not apply beyond the direct employer. ***Couillard v. Van Ess***, 152 Wis. 2d 62, 66, 447 N.W.2d 391 (Ct. App. 1989). Here, the circuit court held Mortensen Properties and Jones Sign were not so closely intertwined that the exclusive remedy under worker's compensation applies to both. It is undisputed the businesses share no employees, bank accounts, or assets, and John Mortensen has kept their business records separate.

¶13 To overcome the fact of two distinct businesses, Mortensen Properties argues the representative capacity doctrine applies. The representative capacity doctrine immunizes a legal entity which owes a duty to the employer, but does not owe a duty to the employees of that employer. *See* ***Miller v. Bristol-Myers Co.***, 168 Wis. 2d 863, 880, 485 N.W.2d 31 (1992). Mortensen Properties relies heavily upon ***Miller*** to support its argument. The court in ***Miller***, however, declined to apply the representative capacity doctrine where a parent corporation had a separate duty to the employees of the subsidiary created by its actions to protect those employees. ***Id.*** at 887, 890.

¶14 Here, Mortensen Properties has a duty to the employees of Jones Sign as an owner of a workplace. *See* WIS. STAT. § 101.11. As noted, the billboard where Binsfeld was injured was Binsfeld's place of employment, and Mortensen Properties owns that billboard. In our case, Binsfeld is suing Mortensen Properties, as an owner of a workplace, for a breach of its separate duty to provide a safe work environment to Binsfeld.[6] We therefore affirm the circuit court's holding that Jones Sign's worker's compensation immunity does not extend to Mortensen Properties under the representative capacity doctrine.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.

[6] While ***Miller*** discussed the safe place statute, the two issues before the court were:

> First, whether the defendant parent corporation is immune from common law liability for such injuries under the Worker's Compensation Act? Second, if the defendant parent corporation is not so immune, whether, as a matter of law, the defendant parent corporation acted in such a manner as to assume a common law duty of care to its subsidiary's employees?

Miller v. Bristol-Myers Co., 168 Wis. 2d 863, 871, 485 N.W.2d 31 (1992) (footnote omitted). ***Miller*** did not directly decide the applicability of the representative capacity doctrine to the safe place statute.