COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2199

Cir. Ct. No. 2006CV248

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

EDWARD J. ADAMS AND KIM J. ADAMS,

PLAINTIFFS-RESPONDENTS,

V.

SYNERGY HEALTH CARE,

DEFENDANT,

SCHNEIKER CONCRETE CONSTRUCTION, INC.,

DEFENDANT-APPELLANT,

ALLAN BUILDERS & DEVELOPERS LLC, NKA A&B DEVELOPERS LLC,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Schneiker Concrete Construction, Inc., and Allan Builders & Developers LLC, n/k/a A & B Developers LLC ("Allan Builders"), appeal from a judgment in favor of Edward and Kim Adams.[1] A jury returned a verdict finding all three parties causally negligent. Schneiker Concrete and Allan Builders contend the trial court improperly instructed the jury on the safe-place statute, WIS. STAT. § 101.11 (2007-08).[2] We disagree and affirm.

¶2 The Adamses hired Allan Builders as the general contractor to construct their new house. To save money, Adams agreed to do the exterior staining and job site cleanup. Allan Builders subcontracted the concrete work to Schneiker Concrete. After pouring the basement floor, Schneiker Concrete workers left a fourteen-foot aluminum ladder belonging to Allan Builders in the open stairwell. Per their practice, the workers placed the ladder upside-down, the rubber feet up and the metal tips down. Adams arrived two days later to do cleanup. As he descended the ladder into the basement, the metal tips slipped on the concrete floor. Adams fell, breaking several facial bones.

¶3 The Adamses filed suit against Allan Builders and Schneiker Concrete, alleging negligence against both and a violation of the safe-place statute against Allan Builders. The two contractors argued that Adams was contributorily negligent because he failed to recognize or remedy the ladder's upside-down position. At the final jury instruction conference, the trial court opined that the safe-place theory was a "red herring," but nonetheless decided to give the standard safe-place instruction in regard to both contractors' duties. *See* WIS JI—CIVIL 1900.4. Schneiker Concrete objected but did not request an alternate instruction.

[1] "Adams" in the singular will refer to Edward.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

The jury allocated 66% negligence to Schneiker Concrete, 4% to Allan Builders and 30% to Adams. Schneiker Concrete moved after verdict for a new trial on the basis that the safe-place instruction was error. The court denied the motion and ordered judgment on the verdict. Schneiker Concrete and Allan Builders appeal.[3]

¶4 Schneiker Concrete again argues that the trial court erroneously instructed the jury on the safe-place statute. It contends the statute does not apply because: (1) having assumed certain construction-related tasks, Adams himself fit under the statute as an "owner" of a "place of employment" and cannot use the statute to assert against another a duty identical to his own, and (2) even if Adams was a "frequenter," the statute does not apply against Schneiker Concrete because it did not have "present control" over the premises when Adams fell. Proceeding on the assumption that the instruction was wrongly given, Schneiker Concrete then argues that the instruction prejudiced it, necessitating a new trial on liability. None of these arguments persuades us.

¶5 A trial court has broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case. ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶50, 246 Wis. 2d 132, 629 N.W.2d 301. The issue, therefore, is whether—and if so how—the safe-place statute applies to the facts of this case. This requires us to interpret and apply WIS. STAT. § 101.11, presenting a question of law that we review de novo. *See* ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶17, 245 Wis. 2d 560, 630 N.W.2d 517.

[3] Allan Builders did not file a motion after verdict because it was not seeking a new trial. It instead wrote the court a letter, which is not in the record, and argued at the postverdict motion hearing that the safe-place instruction was error. On appeal, Allan Builders takes no position on the substantive issues Schneiker Concrete raises but aligns itself with Schneiker Concrete to the extent this court should conclude that the safe-place statute does not apply.

¶6 Schneiker Concrete first argues that Adams' contractual agreement to perform job-site cleanup qualified him as an "owner" under the safe-place statute. An owner is "any person, firm [or] corporation … having ownership, control or custody of any place of employment … or of the construction, repair or maintenance of any place of employment." WIS. STAT. § 101.01(10). An owner has a duty to "construct, repair or maintain [the] place of employment … as to render [it] safe." WIS. STAT § 101.11(1). Schneiker Concrete contends that Adams cannot hold someone else to a safe-place duty to remedy a workplace hazard he himself had the duty to correct.

¶7 Adams responds that the determining factor is who retains control of access to the premises. He asserts that despite being the legal owner, he was permitted on the jobsite only as a "frequenter." A frequenter is any non-employee person at a place of employment under circumstances which render the person other than a trespasser. WIS. STAT. § 101.01(6). Adams contends that even if as title owner he had a right of inspection, his limited activities of site cleanup and exterior staining had nothing to do with creating or being responsible for the ladder hazard present on his arrival. We agree.

¶8 "Before a person has a duty to furnish a safe place of employment, the person must have the right to present control over the place so that the person can perform the duty to furnish a safe place of employment." ***Powell v. Milwaukee Area Technical Coll. Dist. Bd.***, 225 Wis. 2d 794, 813, 594 N.W.2d 403 (Ct. App. 1999) (quoting WIS JI—CIVIL 1911). A title owner has a safe-place duty only when it retains a right of control beyond mere legal ownership or right of inspection. ***Couillard v. Van Ess***, 141 Wis. 2d 459, 463, 415 N.W.2d 554 (Ct. App. 1987). Where the title owner turns over the control and custody of a place that is safe at the time to a contractor who then creates a hazardous condition, the

title owner—although retaining the right of inspection—is not liable under the safe-place statute for injuries arising from that hazard. ***Potter v. City of Kenosha***, 268 Wis. 361, 372, 68 N.W.2d 4 (1955). Adams turned over a safe place to the contractors and encountered a hazardous condition he did not create. He is not liable under the safe-place statute for injuries arising from that hazard.

¶9 Schneiker Concrete argues that, even if Adams was a frequenter, it is not liable because it did not have "present control" over the job site when he was injured, since it had finished its work two days before and permanently left the premises. Therefore, Schneiker Concrete asserts, it already had ceded the right of present control. This argument also fails.

¶10 First, Schneiker Concrete is not relieved of a safe-place duty simply by vacating the premises. "The rule in Wisconsin is that the owner or occupant is absolved of [its] duty only if [it] relinquishes complete control of the premises to the contractor and that the premises are then in a safe condition." ***Hrabak v. Madison Gas & Elec. Co***., 240 F.2d 472, 477 (7th Cir. 1957), *citing* ***Potter,*** 268 Wis. at 374. Schneiker Concrete knew of the potential hazard, the upside-down ladder, and had the power to remedy it, yet did not do so. *See* ***Neitzke v. Kraft-Phenix Dairies, Inc.***, 214 Wis. 441, 447-48, 253 N.W. 579 (1934).

¶11 Second, control is a jury question. *See* ***Lee v. Junkans***, 18 Wis. 2d 56, 61, 117 N.W.2d 614 (1962). Schneiker Concrete claims the safe-place instruction was error, but it did not request an instruction asking the jury to determine that Adams had the requisite control. Failure to request an instruction constitutes waiver. ***Leckwee v. Gibson***, 90 Wis. 2d 275, 289, 280 N.W.2d 186 (1979); ***Bergeron v. State***, 85 Wis. 2d 595, 604, 271 N.W.2d 386 (1978).

¶12 Third, even if the court improperly instructed the jury, Schneiker Concrete has not shown that the error was prejudicial. *See* ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 750-51, 235 N.W.2d 426 (1975). The test for prejudice is the probability, and not mere possibility, that the jury was misled. ***Id.*** at 751. Stated another way, an error is prejudicial if it appears the result would be different had the error not occurred. ***Id.*** Schneiker Concrete contends comments the trial court made about the safe place theory being "a red herring" reflect the error of the instructions. It asserts that the prejudice was that the erroneous instructions confused the jury, likely causing it to assess a relatively higher percentage of causal negligence.

¶13 The trial court did opine that safe place was a red herring because the suit was "just a simple negligence case." It heard the parties' arguments, however, and concluded that WIS JI—CIVIL 1911, regarding the necessity of "present control," gave Schneiker Concrete the opportunity to argue that the premises were safe when they relinquished control but something intervened to make them unsafe. During deliberations, the jury returned with a request for additional instructions. It asked (1) whether the safe-place instruction applied to both contractors and (2) which contractor was responsible for the ladder's position in the stairwell between the time that Schneiker Concrete left and Adams fell.

¶14 The necessity for, the extent of, and the form of reinstruction rests in the sound discretion of the court. ***Hareng v. Blanke***, 90 Wis. 2d 158, 166, 279 N.W.2d 437 (1979); *see also* WIS. STAT. § 805.13(5). The court discussed the jury's questions with counsel for the parties and observed that its "gut reaction" was that the questions were "a good sign … that [the jurors] are really getting to the gravamen of the problem." Counsel agreed to the court's proposed answers: (1) that both defendants were contractors and (2) responsibility for the ladder was

a question of fact for the jury. The jury ultimately was able to complete a unanimous verdict. Based on the record before us, we conclude the initial instructions fully and fairly informed the jury of the rules and principles of law applicable to the case, *see* ***Nommensen***, 246 Wis. 2d 132, ¶50, and that the court did not erroneously exercise its discretion in answering the jury's questions.

¶15 Finally, Schneiker Concrete contends in the Conclusion paragraph of its brief that the pleadings are insufficient because the Adamses did not separately plead the safe-place statute. Wisconsin law does not require separately pleading a safe-place claim and a common-law negligence claim because both are for an underlying claim of negligence. ***Mullen v. Reischl***, 10 Wis. 2d 297, 308, 103 N.W.2d 49 (1960). The safe place statute does not create a cause of action or change the causation analysis. ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶96, 262 Wis. 2d 539, 664 N.W.2d 545. It merely affects the level of one's duty of care. ***Id.***

By the Court.—Judgment affirmed.

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