COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP406 **Cir. Ct. No. 2008CV1928**

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

RICHARD A. GRIEGER AND MARY M. GRIEGER,

PLAINTIFFS-APPELLANTS,

V.

SMITHFIELD BEEF GROUP-GREEN BAY, INC., F/K/A PACKLAND PACKING COMPANY, INC.,

DEFENDANT-RESPONDENT,

THE TRAVELERS INDEMNITY COMPANY AND ABC INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MCKAY, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Richard Grieger appeals a summary judgment dismissing his personal injury action that alleged negligence and safe-place violations.[1] Grieger argues the circuit court erroneously concluded that the safe-place statute was inapplicable. Grieger further contends the court erroneously dismissed his claim that Smithfield Beef Group-Green Bay, Inc. is liable for ordinary negligence either because transporting cattle is extrahazardous work or because Smithfield committed affirmative acts of negligence. We reject Grieger's arguments and affirm.[2]

BACKGROUND

¶2 Grieger worked as a driver for RG Trucking, transporting cattle. RG Trucking did not provide Grieger with any personal protective equipment, but he wore steel-toed boots, leather gloves, and heavy coveralls. Grieger delivered cattle to five or six different processing facilities. None of those facilities required him to wear any type of protective gear, including a helmet, and Grieger never requested that anyone at the facilities provide him with any.[3]

¶3 On the day of the accident, Grieger unloaded his truck at one of Smithfield's loading docks. The cattle were initially moved into a holding area before being taken to the scales. As the cattle moved along an alleyway, one cow

[1] Mary Grieger is also a named plaintiff, alleging derivative claims. For simplicity's sake, we refer singly to Richard Grieger throughout this opinion.

[2] As additional grounds for affirming the circuit court, Smithfield argues Grieger's negligence exceeds Smithfield's, as a matter of law. Because we affirm on other grounds, we need not reach this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997).

[3] Indeed, Greiger testified at his deposition that he would not have worn a helmet had one been offered, because he would have been required to clean it.

separated from the group. It turned back toward Grieger and charged him. Grieger waved his hands in the air, but the cow struck him, causing him to fly back and strike his head.

¶4 Grieger sued Smithfield. Smithfield moved for summary judgment dismissing Grieger's complaint. The circuit court granted the motion in a written decision, without hearing oral argument. Grieger appeals.

DISCUSSION

The safe-place statute

¶5 The safe-place statute, WIS. STAT. § 101.11, places a duty on employers to furnish safe employment for employees.[4] ***Leitner v. Milwaukee Cnty.***, 94 Wis. 2d 186, 189, 287 N.W.2d 803 (1980). In addition to the safe *employment* requirement, the statute also requires employers to furnish a safe *place* of employment for employees and frequenters and imposes requirements regarding the safety of methods and processes. ***Id.*** "Under this statute an employer has a duty to make the 'place of employment' as safe as the nature of the employment will reasonably permit, a higher duty than that of ordinary care." ***Gross v. Denow***, 61 Wis. 2d 40, 46, 212 N.W.2d 2 (1973). However, ***Leitner*** makes one limitation of the statute very clear:

> [The] duty [is] not to provide safe employment but rather a safe place of employment for ... a frequenter. ...
>
> [T]he duty to furnish safe employment does not extend to frequenters. ...

[4] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

> The statutory duty to furnish safe employment (unlike the duty to furnish a safe place of employment) runs only to employees but not to frequenters[.] ...
>
> [T]he safe-place statute does not make the employer an insurer of the safety of a frequenter on the premises. Rather, the statute deals with unsafe conditions of the employer's premises and not with negligent or inadvertent acts of employees or activities conducted on the premises. ...
>
> [I]njuries to a frequenter caused by unsafe conditions of an employer's premises are covered by the safe place statute, while injuries caused by negligent, inadvertent, or even intentional acts committed therein, are not.

Leitner, 94 Wis. 2d at 193-95 (citations and emphasis omitted).

¶6 Nonetheless, Grieger argues the statute applies to Smithfield's failure to provide him, a frequenter, with protective head gear.[5] In ***Leitner***, where a burglar killed a security guard, the plaintiffs similarly alleged a failure "to provide Leitner adequate means to protect himself against physical harm." ***Id.*** at 188. Because the security guard was merely a frequenter, the safe-place statute did not apply. ***Id.*** at 193 ("[N]one of the allegations made in the complaint relate to a safe place of employment."). We similarly conclude that Grieger has no safe-place statute claim.

¶7 Grieger primarily bases his argument on the language of the statute. However, even if that argument was persuasive, accepting it would require us to ignore or overrule precedent holding that the duty to provide safe employment does not extend to frequenters. That is something we cannot do. *See* ***Cook v.***

[5] "'Frequenter' means every person, other than an employee, who may go in or be in a place of employment or public building under circumstances which render such person other than a trespasser." WIS. STAT. § 101.01(6).

Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (court of appeals may not overrule, modify, or withdraw language from a prior published opinion).

¶8 Specifically, Grieger relies on the following language: "Every employer ... shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the [safety] of such employees and frequenters." WIS. STAT. § 101.11(1). Grieger then turns to ***Leitner***'s statement that the "Wisconsin safe-place statute provides that it is an employer's duty to provide safe employment, premises and equipment for the protection of his employees and frequenters." ***Leitner***, 94 Wis. 2d at 195 (quoting ***Stefanovich v. Iowa Nat'l Mut. Ins. Co.***, 86 Wis. 2d 161, 166, 271 N.W.2d 867 (1978)).

¶9 Considered out of context, and ignoring ***Leitner***'s facts and holding, Grieger's reliance on the foregoing statement might appear reasonable. However, the statement is followed by language, both original and quoted, making clear that as to frequenters the safe-place statute applies only to unsafe conditions of the premises. *See* ***id.*** at 195. Thus, while the statute might, for example, require employers to provide protective devices or equipment such as guards over sawblades or mirrors at blind corners, it does not require employers to issue frequenters equipment to protect them from dangers unrelated to conditions of the premises. In fact, ***Stefanovich*** discussed a prior case involving an example of the statute's requirement to provide safeguards for frequenters:

> In the ***Gross*** case, the defendant race-track operator maintained a narrow roadway he knew to be simultaneously used by both pedestrian frequenters and the vehicular traffic to exit from defendant's premises. The defendant was found to have violated the safe-place statute

> in that the roadway did not provide protections [i.e., a fence] for pedestrian frequenters from vehicular traffic.

Stefanovich, 86 Wis. 2d at 167-68 (citing ***Gross***, 61 Wis. 2d at 47-48). As that example illustrates, ***Leitner***'s ***Stefanovich*** quotation does not compel the conclusion that Smithfield had a duty to provide Grieger with a helmet to protect him from an angry cow that Grieger brought onto the premises. Rather, that duty fell on Grieger's employer, RG Trucking. *See* ***Leitner***, 94 Wis. 2d at 194.[6]

Ordinary negligence

¶10 As a general rule, "one who hires an independent contractor is not liable in tort for injuries sustained by an independent contractor's employee while he or she is performing the contracted work." ***Danks v. Stock Bldg. Supply, Inc.***, 2007 WI App 8, ¶17, 298 Wis. 2d 348, 727 N.W.2d 846. There are, however, two exceptions to the rule of nonliability: where the hiring entity has a nondelegable duty because the independent contractor is engaged in extrahazardous work, or where the entity commits an affirmative act of negligence. *See* ***id.***, ¶¶17, 23 n.4. Grieger argues both exceptions apply and render Smithfield liable.

¶11 Whether an activity is extrahazardous is a question of law for the court to decide. ***Wagner v. Continental Cas. Co.***, 143 Wis. 2d 379, 402, 421 N.W.2d 835 (1988). Not all dangerous work activities will meet the standard.

[6] Grieger also asserts that the safe-place statute applies because Smithfield engaged in unsafe methods and processes. This argument, however, incorporates his helmet argument, and is not adequately developed as an independent argument. We need not decide issues that are inadequately briefed. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994). However, to the extent we can discern Grieger's rationale, it appears he is arguing Smithfield failed to provide Grieger safe employment.

Activities that are inherently dangerous because of the absence of special precautions do not qualify as extrahazardous:

> A person engaged in an activity of the first type, i.e., one that is inherently dangerous without special precautions, can take steps to minimize the risk of injury. Examples include general construction, demolition, and excavation.
>
> By contrast, an activity that is said to be extrahazardous, or abnormally dangerous, is one in which the risk of harm remains unreasonably high no matter how carefully it is undertaken. Examples would include transporting nuclear waste or working with toxic gases.

Id. at 392-93. As another example, working with high voltage electricity is not an extrahazardous activity. ***Thompson v. Jump River Elec. Coop.***, 225 Wis. 2d 588, 596, 593 N.W.2d 901 (Ct. App. 1999).

¶12 Grieger argues that handling cattle is extrahazardous, citing Smithfield's safety director's admissions that cattle are unpredictable and accidents happen even when everything is done properly; reports of numerous injuries to workers who were kicked or struck by livestock in Smithfield's barn; and a national statistic that 107 fatalities were caused by blunt force trauma to the head or chest by cattle between 2003 and 2007.

¶13 No doubt, Grieger was engaged in inherently dangerous work when he was injured. However, his argument is undermined by his claim that protective head gear would have prevented his injury. *See* ***id.*** (high voltage work not extrahazardous because wearing rubber gloves would have prevented the accident). Indeed, elimination of risk is not the test. Available precautions need only minimize the risk of harm such that it is no longer unreasonably high. *See* ***id.***

¶14 We also reject Grieger's argument that Smithfield is liable because it committed an affirmative act of negligence. Under this exception to nonliability,

negligence alone is insufficient. Rather, there must be "'something extra,' an affirmative act of negligence that increased the risk of injury." ***Wagner***, 143 Wis. 2d at 389 (citation omitted). Although the distinction between acts and omissions—between "misfeasance" and "nonfeasance"—is not always clear:

> "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs."

Id. at 389-90 (quoting PROSSER & KEETON, THE LAW OF TORTS § 56, at 373 (1984)).

¶15 Grieger argues Smithfield engaged in two affirmative acts of negligence. First, he asserts Smithfield provided protective equipment to its own employees but affirmatively chose not to provide such equipment to frequenters. This argument fails because neither Smithfield's provision of safety equipment to its employees, nor its decision to not provide equipment to frequenters created a new, additional danger.

¶16 Second, Grieger contends Smithfield was affirmatively negligent by requiring drivers, after delivering cows to the holding pen, to engage in the process of moving cows to the weigh station. We need not determine whether this could constitute an affirmative act of negligence. Grieger provides no record support for his assertion that drivers were required to go beyond the holding pen. Instead, Grieger's cited records reveal that Smithfield merely "allows" drivers to do so.[7]

[7] We caution counsel that affirmatively misrepresenting the record is grounds for sanctions. *See* WIS. STAT. RULE 809.83(2).

By the Court.—Judgment affirmed.

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