COURT OF APPEALS
DECISION
DATED AND FILED

July 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2917 **Cir. Ct. No. 2009CV732**

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

REINA VILLANUEVA,

PLAINTIFF-APPELLANT,

MIGUEL VILLANUEVA,

PLAINTIFF,

RURAL MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

ALSUM PRODUCE, INC., ALSUM TRANSPORT, INC. AND LIBERTY MUTUAL FIRE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Columbia County: ALAN J. WHITE, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Reina Villanueva appeals a summary judgment entered against her, dismissing her claims against Alsum Produce, Inc., Alsum Transport, Inc. and their insurer Liberty Mutual Fire Insurance Company brought under Wisconsin's Safe Place Statute and her common negligence claims. Villanueva's claims arise from a work-related injury that occurred while she was working for her employer, John E. Bobek, III, d/b/a Trembling Prairie Farms, at Alsum Produce, Inc.'s warehouse. For the reasons we explain below, we affirm the circuit court's summary judgment order in favor of Alsum.

Background

¶2 Reina Villanueva was employed by John C. Bobek III d/b/a Trembling Prairie Farms (Bobek). In October 2006, Villanueva was injured while working for Bobek at a warehouse owned by Alsum Produce, Inc. Alsum Produce, Inc. and Alsum Transport, Inc. are owned by Lawrence A. Alsum. Alsum Transport is a wholly-owned subsidiary of Alsum Produce, Inc.[1] The companies are based in a warehouse in Friesland, Wisconsin, where Villanueva's injury occurred. In 2006, Bobek had a verbal contract to rent a storage bin at Alsum to store potatoes he harvested until they could be sold by Alsum. On the day Villanueva was injured, Bobek had brought his own equipment to Alsum to transfer the potatoes from the wagon to the storage bin. Bobek's equipment included a conveyor belt system for moving the potatoes from his wagons to the bin. Bobek used Alsum's electricity to power the hydraulic motor and to power

[1] Hereinafter, we will refer to the defendants collectively as "Alsum."

other components of Bobek's conveyor belt system. The electricity and ventilation were part of the rental cost of the storage bin.

¶3 While Villanueva was grading potatoes as they moved along the conveyor belt from the farm wagon to the Alsum storage bin, her clothing got caught on an unshielded, rotating bolt that extended outward from the drive shaft of the conveyor apparatus. The bolt had been improperly substituted for a sheer pin by another Bobek employee a few weeks earlier. As a result, Villanueva suffered severe injuries to her right hand, arm and shoulder. No Alsum employees assisted the Bobek employees in unloading the potatoes on the day of Villanueva's injury, but Alsum personnel did assist with providing first aid to Villanueva after she was injured.

¶4 Villanueva sued Alsum and its insurer alleging a violation under Wisconsin's Safe Place Statute (WIS. STAT. § 101.11 (2003-04)[2]), and claims of negligence and minor child's loss of consortium. Villanueva and Alsum filed cross-motions for summary judgment.

¶5 The circuit court dismissed Villanueva's safe place statute claim on two grounds. First, it found that the farming exclusion of the safe place statute applied and therefore Alsum was not covered by the statute. As for the second ground, the court concluded that, under ***Barth v. Downey Co.***, 71 Wis. 2d 775, 239 N.W.2d 92 (1976), the duty to furnish safe equipment belonged to Villanueva's immediate employer, Bobek, not Alsum. Accordingly, it held that Alsum had no duty to Villanueva under the safe place statute. The court then, without further

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

elaboration, dismissed Villanueva's common law negligence claim against Alsum "for similar reasons set forth above" and granted Alsum's motion for summary judgment, dismissing Villanueva's complaint in its entirety. We read "for similar reasons set forth above" as referring to the same reasons the court dismissed Villanueva's safe place statute claim. Villanueva appeals. Additional facts, as necessary, are set forth in the discussion section.

Standard of Review

¶6 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "[W]e draw all reasonable inferences from the evidence in the light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

¶7 Statutory interpretation is a question of law subject to de novo review. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995).

Discussion

A. Safe Place Statute Claim

¶8 Villanueva contends that Alsum violated Wisconsin's Safe Place Statute, WIS. STAT. § 101.11,[3] by failing to provide reasonably safe equipment, which Bobek owned, for use by Bobek's employees to transfer the potatoes from the wagon owned by Bobek to the storage bin that Alsum rented to Bobek. Specifically, Villanueva contends that Alsum had a duty under the safe place statute to provide safe working conditions for frequenters of its place of

[3] WISCONSIN STAT. § 101.11 provides, in pertinent part:

> **Employer's duty to furnish safe employment and place**. **(1)** Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and 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 life, health, safety, and welfare of such employees and frequenters. 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.
>
> **(2)**(a) No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters; 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.

employment, such as her, which includes providing reasonably safe equipment for the execution of employment tasks.

¶9 In response, Alsum argues that as the owner of a place of employment, as opposed to an employer, its duty extends only to providing a safe place of employment by constructing, repairing, and maintaining its place of employment so as to render it as free from danger as the nature of the employment and place of employment will reasonably permit, citing ***Asen v. Jos. Schlitz Brewing Co.***, 11 Wis. 2d 594, 602, 106 N.W.2d 269 (1960) (interpreting and applying WIS. STAT. § 101.06, now WIS. STAT. § 101.11(1)).[4] Alsum further argues that its duty under the safe place statute as an owner of a place of employment extends to a frequenter only if the owner retains the right to supervise and control the work performed by the frequenter, citing ***Barth***, 71 Wis. 2d at 778-780. Alsum points out that because Villanueva was a frequenter and not one of its employees, and because the summary judgment record contains no evidence that it retained the right to supervise and control Villanueva's work, it had no duty under the safe place statute to Villanueva. In the alternative, Alsum argues that it falls under the farming exclusion of WIS. STAT. § 101.11, and therefore owes no duty to Villanueva under the safe place statute.

¶10 For the reasons we explain below, we conclude that, as the owner of a place of employment, Alsum had no duty to Villanueva, who was not an employee of Alsum, to provide reasonably safe equipment for her employment. Rather, that duty belonged to her employer, Bobek.

[4] Wisconsin's Safe Place Statute has not substantially changed in its over 100 year history and those changes that have been made do not affect the interpretation of the points of law as set forth by the decisions cited herein or our decision in this case.

¶11 The Wisconsin 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." ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶18, 245 Wis. 2d 560, 630 N.W.2d 517. The safe place statute provides 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." WIS. STAT. § 101.11(1). Thus, this section creates three categories of persons who are liable under the safe place statute: "(1) employers; (2) owners of places of employment; and (3) owners of public buildings." ***Rizzuto v. Cincinnati Ins. Co.***, 2003 WI App 59, ¶11, 261 Wis. 2d 581, 659 N.W.2d 476 (citing ***Naaj v. Aetna Ins. Co.***, 218 Wis. 2d 121, 126, 579 N.W.2d 815 (Ct. App. 1998)).

¶12 Under the safe place statute, employers and owners of places of employment and public buildings have the duty to construct, repair, and maintain a safe place of employment or public building. *See* ***Rizzuto***, 245 Wis. 2d 560, ¶11. An employer's duty to an employee, however, is broader than the duty of an owner of a place of employment. Under the safe place statute, an employer has a duty to provide both a safe place of employment, as does an owner of a place of employment, and safe employment, unlike an owner of a place of employment. ***Naaj***, 218 Wis. 2d at 127. An owner's duty to provide a safe place of employment may extend to a frequenter when an unsafe condition is created, "but only if the owner … has reserved a right of supervision and control." ***Barth***, 71 Wis. 2d at 778-79.

¶13 It is undisputed that Alsum is an owner of a place of employment. *See* WIS. STAT. § 101.01(5), (10), (11). It is also undisputed that Alsum is not Villanueva's employer within the meaning of § 101.01(4) and (5). Rather, at the

time of the accident, Villanueva was a frequenter of Alsum, within the meaning of § 101.01(6). As we indicated, Villanueva was employed by Bobek and was Bobek's employee at the time of the accident.

¶14 The determinative question therefore is whether Villanueva's allegations concerning the unguarded dangerous equipment Bobek brought onto a "place of employment" with the advance knowledge and consent of Alsum falls into the category of "safe place of employment" or "safe employment." *See* ***Naaj***, 218 Wis. 2d at 127. If the unsafe condition relates to a "safe place of employment," then under Wisconsin case law both the employer and the owner are responsible. ***Id.*** If, on the other hand, the unsafe condition is in connection with employment and is unassociated with the structure, the condition relates only to "safe employment" and only the employer is responsible. ***Id.*** Accordingly, our inquiry must focus on whether the unsafe condition at issue here was a condition associated or not associated with the structure (i.e, the construction, maintenance and repair of Alsum's building) and which arose in connection with employment.

¶15 It is undisputed that the unsafe condition at issue here is the defective machinery on which Villanueva was working at the time of her accident. According to the undisputed facts, the machinery was brought onto Alsum's premises by Bobek, it was owned by Bobek, and it was provided to Villanueva by Bobek so that she could perform her duties as Bobek's employee. As we have indicated, it is undisputed that Villanueva's injuries were caused by alterations made to the machinery by Bobek's employee that rendered it unsafe for use.

¶16 We conclude that the defective machinery is a condition that is not associated with the structure of the building and is in connection with Villanueva's employment. Thus, the unsafe condition at issue here resulted from Bobek's

failure to provide Villanueva "safe employment." *See* ***Rizzuto***, 261 Wis. 2d 581, ¶11 n.3.[5] "Conditions unassociated with the structure, over which the safe-place law takes cognizance, are those which would result in 'unsafe employment.'"[6] Because it is undisputed that the unsafe condition was not associated with the construction, maintenance or repair of Alsum's "structure," i.e., Alsum's building, we conclude Alsum had no duty under the safe place statute to provide safe equipment or machinery to Villanueva to perform her tasks as Bobek's employee. The record is devoid of any evidence that Alsum abrogated its duty under the safe place statute to provide Villanueva a "safe place of employment."

¶17 Villanueva contends that the "'Safe Place Statute' applies to unguarded dangerous equipment brought onto a 'place of employment' with the advance knowledge and consent of the owner." She claims that this duty is not delegable. However, Villanueva fails to develop any argument in support of this contention. Instead, she cites to a number of cases that clearly do not apply and briefly states the main holding of each case. We choose to not discuss each case in detail because their inapplicability to this case is so clear.[7] In any event, as we

[5] *See also Boyle's Wisconsin Safe Place Law*, 2001 online version, available at http://terrenceberres.com/boyle4c.html, ch. 4 (last visited May 21, 2012) (citing cases).

[6] Examples of unsafe conditions unassociated with the structure pertinent to this case include unsafe machinery, such as when a flywheel is exposed or a pulley belt was unguarded, and "appliances or other instruments for work provided or permitted by the employer in connection with employment." ***Id.***

[7] The following three cases are examples of cases that Villanueva relies on that do not apply to this case. *See, e.g.*, ***Wasley v. Kosmatka***, 50 Wis. 2d 738, 744, 184 N.W.2d 821 (1971) (**employer's** duty to provide safe working environment not delegable); ***Schwenn v. Loraine Hotel Co.***, 14 Wis. 2d 601, 608, 111 N.W.2d 495 (1961) (**employer** has duty to inspect premises to ensure safety of employees and frequenters); ***Jahn v. Northwestern Lithographing Co.***, 157 Wis. 195, 198, 146 N.W. 1131 (1914) (**employer's** responsibility for maintaining safe working conditions not delegable).

have explained, the unsafe condition at issue here was not associated with Alsum's building and therefore, for the reasons we have explained, Alsum has no duty to Villanueva to ensure the safety of the equipment she used.

¶18 Villanueva next contends that Alsum "had a non-delegable duty to inspect for safety any machinery it knew or had 'constructive notice' of having been put into operation by third parties on its premises." In support, she quotes language from ***Karis v. Kroger Co.***, 26 Wis. 2d 277, 284, 132 N.W.2d 595 (1965), to the effect that in circumstances where the safe place statute applies to a place of employment, the employer has the duty "to make timely and adequate periodic inspections of any safety devices to ascertain whether they are properly functioning." As with other cases that Villanueva cites to and relies on in her brief, ***Karis*** does not apply under the facts of this case. In ***Karis***, the supreme court was speaking to the duty of employers to maintain a safe place of employment; the court was not referring to the duty of an *owner* of a place of employment. We therefore do not address this argument any further.

¶19 Villanueva next challenges the circuit court's ruling that Alsum had no duty to provide a safe place of employment to Villanueva because it did not control the activities and/or unguarded machinery brought onto its premises by Bobek. In making this ruling, the court relied on ***Potter v. City of Kenosha***, 268 Wis. 361, 68 N.W.2d 4 (1955), and ***Barth***. Turning first to how the circuit court construed and applied ***Potter***, Villanueva asserts that the focus in that case is "whether **complete** control of the premises has been transferred or surrendered by the owner of a place of employment to a subcontractor." She keys into the following passage from ***Potter*** and argues that the facts of this case do not indicate that Alsum had turned over control of its "business premises" to Bobek.

> We are constrained to hold that when an owner turns over to an independent contractor **the complete control and custody of a safe place**, whereon or whereunder the contractor creates a place of employment for the purpose of fulfilling the terms of the contract, the owner reserving no right of supervision or control of the work excepting that of inspection or to change the plan with reference to the construction to be furnished, if thereafter in the performance of the work under the contract the premises are changed by the contractor and as a result a hazardous condition is created, the owner does not become liable to the contractor's employee injured as a consequence of such hazardous condition while acting within the scope of his employment.

Potter, 268 Wis. at 372 (emphasis added). We understand Villanueva to argue that an owner of a place of employment is liable under the safe place statute to an employee of an independent contractor to provide safe machinery unless the owner turns over "complete control and custody of a safe place," to the subcontractor and that "complete control" refers to the entire premises rather than limited to the area where the unsafe condition exists or was created. Assuming this is her argument, we disagree.

¶20 In ***Potter***, the City hired a contractor to replace a sanitary sewer upon one of its streets. ***Id.*** at 363. The street area was safe at the time the City gave control to the contractor. ***Id.*** at 374. The contractor created an unsafe condition when it failed to shore up a trench its employees dug for the new sewer and the trench collapsed, killing the plaintiff. ***Id.*** at 363-64. The court concluded that, because no other contractor was engaged on the project, the contractor was given complete control over the street, and it was the contractor, not the City, that made the street unsafe, and therefore the City was not liable for the injury to the plaintiff. ***Id.*** at 376-77.

¶21 We read the ***Potter*** court as saying that where a contractor has been given complete control by the owner over the area of work where the unsafe condition was created, it is the contractor and not the owner who is liable to the plaintiff for injuries suffered as a result of the unsafe condition. Applying this reading of ***Potter*** to the facts of this case, the only reasonable inference from the undisputed facts of record is that Alsum had conveyed complete control and supervision over the loading dock and the machinery that Bobek owned and brought onto Alsum's property. Alsum provided no employees to work with Bobek, and took on no supervisory or other control of Bobek's employees or equipment. Villanueva worked at the direction of Bobek; Alsum had no control over how Villanueva performed her work. In other words, there is no evidence that Alsum reserved any control or supervision over the loading dock or the storage bin, which was the work area where Bobek's defective equipment was located at the time Villanueva was injured while working on the equipment. As in ***Potter***, control over the work area (there a street in the City, here a storage bin and loading area) was given exclusively to Bobek. This is the complete surrender of working conditions contemplated in ***Potter***.

¶22 Turning next to ***Barth***, Villanueva challenges the circuit court's reliance on this case in concluding that Alsum was not liable under the safe place statute for Villanueva's injuries. She points out that the issue in ***Barth*** related to an unsafe "activity" of a subcontractor rather than an unsafe condition of the owner's premises. She also distinguishes ***Barth*** from this case on the grounds that ***Barth*** involved a jury trial, not a summary judgment motion as in this case, and that, unlike in ***Barth***, there were no allegations here of misjudgment, misconduct, or any inappropriate activity attributed to Villanueva in discharging her duties. Assuming for the sake of argument these distinctions between ***Barth*** and this case

exist, Villanueva fails to explain the significance of these distinctions to the issue at hand. The issue here, as we have explained, concerns an unsafe condition, not associated with the structure, created by a Bobek employee who altered machinery over which Bobek exercised complete control, that rendered Villanueva's employment unsafe. We fail to see any connection between the distinctions Villanueva points out between ***Barth*** and this case and why these distinctions matter.

¶23 In sum, we conclude that Alsum owed no duty under Wisconsin's Safe Place Statute to Villanueva to provide "safe employment" by way of ensuring the safety of the machinery and equipment she worked on while on Alsum's premises. Because we have concluded that Villanueva's claim against Alsum is barred under the safe place statute for the reasons set forth above, we do not address Alsum's claim that it also falls within the farming exclusion to the statute. *See* ***Hofflander v. St. Catherine's Hosp.***, 2003 WI 77, ¶102, 262 Wis. 2d 539, 664 N.W.2d 545 (we need only address dispositive issues).

B. Common Law Negligence Claim

¶24 Villanueva argues that the circuit court improperly concluded that her negligence claim should also be dismissed because Villanueva failed to establish that Alsum had a duty under the safe place statute to inspect or safeguard Villanueva from defective work equipment or machinery. She also argues that the facts of this case present a question of negligence that should be decided by a jury, namely, whether Alsum's failure to ensure that the equipment on which Villanueva worked was safe constituted negligence.

¶25 We agree with Villanueva that a common-law negligence claim may survive the dismissal of the safe place statute claim. *See* ***Megal v. Green Bay***

Area Visitor & Convention Bureau, 2004 WI 98, ¶23, 274 Wis. 2d 162, 682 N.W.2d 857. But this is as far as Villanueva's argument goes. She fails to develop any argument explaining why her negligence claim should not be dismissed. Villanueva does not analyze the undisputed facts under the four-element negligence analysis to determine whether the facts present a claim for negligence against Alsum. To survive summary judgment, Villanueva must present facts that establish the following four elements: "(1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury, and (4) actual loss or damage resulting from the injury." ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906.

¶26 With respect to Villanueva's common law negligence claim, the key issue in this case, in our view, is whether Alsum had a duty of care to Villanueva under the circumstances of this case. Villanueva fails to develop an argument that establishes the existence of a duty of ordinary care on the part of Alsum and an assessment of what ordinary care requires under the circumstances of this case. *See* ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶27, 291 Wis. 2d 283, 717 N.W.2d 17 (the duty element of the four-element analysis for an actionable claim of negligence has two aspects: "(1) the existence of a duty of ordinary care; and, (2) an assessment of what ordinary care requires under the circumstances."). Moreover, Villanueva does not contend there are any material facts in dispute, requiring resolution at trial, as to whether Alsum was negligent in failing to ensure that the equipment on which Villanueva was working was safe.

¶27 Because Villanueva does not develop any argument as to why her negligence claim against Alsum should not be dismissed, we are not persuaded that the circuit court erred in dismissing Villanueva's negligence claim.[8]

Conclusion

¶28 We conclude that under the facts of this case, Alsum did not owe a duty to Villanueva to provide safe equipment for her use as Bobek's employee under the safe place statute, WIS. STAT. § 101.11. While we agree with Villanueva that under Wisconsin case law a common law negligence claim may survive the dismissal of a companion safe place statute claim, we do not address her common law negligence claim against Alsum because she fails to develop any argument as to why her claim should not be dismissed.[9] We therefore affirm the circuit court's summary judgment order in favor of Alsum.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[8] In her reply brief, Villanueva does present an argument in support of her contention that Alsum owed a duty of ordinary care to her to inspect and/or protect her from dangerous machinery on its premises. In support, she relies heavily on ***Allen v. Wisconsin Public Service Corporation***, 2005 WI App 40, 279 Wis. 2d 488, 694 N.W.2d 420, a stray-voltage case. In ***Allen***, in addressing a statute of limitations argument, we referred to language in a jury instruction related to the failure to exercise ordinary care to discover an unsafe electrical condition on a farm involving equipment the farmer does not own . Villanueva does not explain what relevance a jury instruction in the context of a stray-voltage case might have in a case such as this one implicating the safe place statute.

[9] Because we affirm the circuit court's summary judgment in favor of Alsum on the above-stated grounds, we do not address the parties' arguments related to public policy considerations.