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DISTRICT IV

September 28, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2351

Russell Smith v. Kraus-Anderson Construction Company
(L.C. # 2013CV655)

Before Lundsten, Higginbotham and Sherman, JJ.

McHugh Excavating and Plumbing, Inc., and State Automobile Mutual Insurance Company (collectively, McHugh) appeal from an order granting summary judgment to Carl Bolander & Sons Company and Zurich American Insurance Company (collectively, Bolander), and dismissing McHugh's cross-claims against Bolander. Based upon our review of the briefs

and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

This matter concerns a construction worksite accident in which the plaintiff, Russell Smith, was allegedly injured when he was walking down a gravel ramp used by personnel, trucks, and equipment, and slipped and fell on the gravel surface of the ramp. At the time of the accident, Smith was employed by concrete subcontractor Market and Johnson. Smith sued McHugh and Bolander, among others. McHugh was a subcontractor for general contractor Kraus-Anderson Construction Company, while Bolander was a subcontractor for McHugh. Bolander obtained a liability policy from Zurich, which named McHugh as an “additional insured” and provided coverage to McHugh for liability “arising out of [Bolander’s] work.” Bolander installed the earth retention system on which the ramp was built, and had completed all of its work and was no longer onsite at the time Smith was injured. McHugh brought a cross-claim against Bolander seeking contribution and indemnification in the event McHugh was found liable to Smith. On summary judgment, the circuit court dismissed Smith’s negligence claim against Bolander.² The circuit court also granted Bolander’s motion for summary judgment and dismissed McHugh’s cross-claims against Bolander.

We review the circuit court’s grant of summary judgment *de novo*.³ *See Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58. When

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² Smith did not oppose Bolander’s motion for summary judgment seeking dismissal of Smith’s negligence claims against Bolander.

³ Neither party on appeal addresses the issues within the context of the summary judgment methodology.

conducting our review, we apply the same methodology⁴ as does the circuit court, but benefit from the circuit court's analysis. *Id.*

The issue on appeal is whether the undisputed facts establish that Russell Smith's claim "[arose] out of [Bolander's] work," within the meaning of Bolander's Zurich third-party liability policy. The parties agree that the relevant policy language governing this dispute provides:

WHO IS AN INSURED (section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you.

If the undisputed facts fail to establish that Smith's claim arose out of Bolander's work for McHugh, then the Zurich policy does not provide coverage to McHugh with respect to Smith's personal injury claim.⁵ We conclude that the undisputed facts show that Smith's injuries from his slip and fall did not arise out of Bolander's work.

The following undisputed facts, also relied upon by the circuit court, establish that Smith's injuries did not arise out of Bolander's work: (1) Kraus-Anderson and McHugh established the specifications for the retention wall Bolander was contracted to build and also determined the slope and length of the ramp on which Smith fell; (2) Bolander's design function was limited to designing the sheet piling system to hold dirt for the ramp in place; (3) there is no

⁴ We will not repeat the summary judgment methodology here. "Suffice it to say ... that the purpose of summary judgment is to obviate the need for a trial where there is no genuine issue as to any material fact." *Backhaus v. Krueger*, 126 Wis. 2d 178, 180, 376 N.W.2d 377 (Ct. App. 1985).

⁵ Although McHugh's statement of the issue for appeal raises a duty to defend issue, the issue is not addressed in its briefs. We need not discuss the duty to defend issue that is raised but not argued, and consider it abandoned. See *Reiman Assocs., Inc. v. R/A Advert., Inc.*, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981).

evidence that the retention wall Bolander built failed in any respect; (4) Bolander built the retention wall to the Kraus-Anderson's and McHugh's required specifications, and the wall performed its function as intended; (5) Bolander's work on the project ended upon completion of the retention wall; (6) Bolander had not been onsite for weeks when Smith was injured, and did not return again for more than two months afterward for purposes of removing the wall; and (7) Bolander had no involvement with Smith's injuries.

McHugh attempts to establish a factual dispute that would preclude summary judgment by alleging in its reply brief that the facts establish that Bolander, through its subcontractor, "designed the ramp." However, not every alleged factual dispute precludes summary judgment. *See Strasser v. Transtech Mobile Fleet Serv., Inc.*, 2000 WI 87, ¶32, 236 Wis. 2d 435, 613 N.W.2d 142. "A factual issue is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A 'material fact' is one that impacts the resolution of the controversy." *Id.* (citations omitted). The fact that Bolander was responsible for the design of the structural support system⁶ for the ramp that would meet the project specifications provided to it by McHugh and Kraus-Anderson is not a "material" fact in the absence of any evidence that the structural support system either failed to meet specifications or failed to meet its support objectives. On the record before us, Bolander's "design" function does not affect the resolution of the controversy. Thus, McHugh fails to establish that a genuine issue of material fact remains in dispute.

⁶ Reviewing the record citations McHugh provides in support of its argument, we note that a witness described the support system for the ramp as "a sheet pile wall," and explained that Bolander had "to provide the design of the stability of the retention wall...."

The undisputed facts establish that Smith has no connection whatsoever to Bolander and its work on behalf of McHugh, and further, that there is no causal relationship between Smith's injuries and Bolander's work. McHugh acknowledges that coverage depends "on whether McHugh's liability 'arises out of' Bolander's work," but fails to persuade us that any genuine issue of material fact remains in dispute on this topic.

Coverage under the Zurich policy requires that the liability, here Smith's injury, arise out of Bolander's work for McHugh. Because there is no connection, causal or otherwise, between Smith's injury and Bolander's work on behalf of McHugh, there is no coverage under the Zurich policy. For this reason, the circuit court properly dismissed McHugh's cross-claim against Bolander and Zurich.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals