STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2447

James Erickson,
Appellant,

vs.

Adolfson and Peterson, Inc.,
Respondent,

Wenzel Plumbing and Heating, Inc.,
Respondent,

General Sheet Metal, LLC,
Respondent,

AAF McQuay, Inc.
d/b/a McQuay International,
Respondent,

and

General Sheet Metal, LLC,
Defendant and Third Party Plaintiff,

vs.

K.W. Insul, Inc., d/b/a K.W. Insulation,
third party defendant,
Respondent.

Filed January 29, 2008
Affirmed
Worke, Judge

Dakota County District Court
File No. C9-06-6051

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Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant challenges the district court's grant of summary judgment on his claims arising from an injury he sustained after falling through an opening in an air-handling unit (AHU). Appellant argues that the district court erred by ruling that (1) his claim against subcontractors was barred by the two-year statute of limitations for actions involving improvements to real property and his claim against one subcontractor was also

barred by the workers'-compensation law; (2) the general contractor had no duty of care because it did not retain the right to control or supervise the work of its subcontractor, appellant's employer; and (3) the AHU manufacturer had no duty to warn of an open and obvious duct opening. We affirm.

FACTS

On July 3, 2003, appellant James Erickson was injured when he fell through an opening in an air-handling unit (AHU) during the construction of a school. The school hired respondent Adolfson and Peterson, Inc. (Adolfson) as the general contractor for the project. Adolfson hired respondent Wenzel Plumbing and Heating, Inc. (Wenzel) as a subcontractor. Wenzel subcontracted portions of the work to respondents General Sheet Metal, LLC (General), a supplier and installer of AHUs, and third-party defendant K.W. Insulation (K.W.), appellant's employer. Respondent AAF-McQuay, Inc. (McQuay) manufactured the AHU.

Immediately before he was injured, appellant was insulating an overhead rain leader, working from a ladder that he positioned on top of the AHU. The AHU, which measured approximately 20 feet long, 80 inches wide, and 4.5 feet high, had been lifted by a crane and was permanently placed where the building would be constructed around it. In order to connect the duct work, the top surface of the AHU contained two large openings, each measuring approximately 6.5 feet in diameter. Appellant testified that he knew that AHUs sometimes contained more than one opening and that he saw the opening on the left side of the AHU. He did not, however, see the opening on the right side of the AHU because that opening was covered with plastic and cardboard. While

moving the ladder, appellant tried to "kick the junk out of the way" that covered the opening; his foot went through the cardboard, he lost his balance and he fell through the opening.

Appellant collected workers'-compensation benefits from K.W. More than two years after the accident, appellant filed initial and amended complaints, asserting claims in negligence against Adolfson, Wenzel, General, and McQuay for failure to warn of the opening in the AHU; failure to place or replace a cover on the AHU; and failure to inspect or maintain the AHU. Appellant also alleged that Adolfson breached a nondelegable duty of safety and asserted negligent hiring claims against Adolfson and Wenzel. Finally, appellant claimed that McQuay was negligent by providing improper packaging or failing to remove the packaging on the AHU and asserted a claim in strict liability against McQuay for a defective product.

Respondents moved for summary judgment. The district court granted the motions, concluding that (1) the two-year statute of limitations for actions relating to improvements to real property, Minn. Stat. § 541.051 (2006),[1] barred appellant's claims against Wenzel and General; (2) the claim against Wenzel was additionally barred, under Minn. Stat. § 176.061 (2006), because appellant received workers'-compensation benefits and K.W. and Wenzel were engaged in a common enterprise; (3) Adolfson did not owe appellant a duty of care because it retained no right to supervise or control the time,

[1] In 2007, the Minnesota Legislature amended Minn. Stat. § 541.05. *See* 2007 Minn. Laws ch. 105, § 4 at 625; ch. 140, art. 8, § 29 at 1535. We apply the 2006 version of the statute because appellant's claims were filed before the effective date of the amended statute. But the changes made to the statute would not affect the outcome here.

place, or manner of appellant's work; and (4) McQuay had no duty to warn appellant because the AHU was not a dangerous product and appellant knew of the openings and the debris on top of the AHU. This appeal follows.

D E C I S I O N

On appeal from summary judgment, this court reviews the record to determine "whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law." *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We view the evidence in the light most favorable to the party against whom judgment was granted, but if the nonmoving party fails to raise a material factual issue on an element necessary to establish the case, summary judgment is appropriate. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). Issues of statutory construction are reviewed de novo. *Olmanson v. LeSueur County*, 693 N.W.2d 876, 879 (Minn. 2005).

Statute of limitations

Appellant argues that the district court erred by concluding that appellant's negligence claim against Wenzel and General was barred by the statute of limitations governing improvements to real property. Minn. Stat. § 541.051, subd. 1(a) (2006), provides, in relevant part:

> [N]o action by any person in contract, tort, or otherwise to recover damages . . . for bodily injury . . . arising out of the defective and unsafe condition of an improvement to real property, . . . shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury.

Appellant concedes that he filed this action more than two years after he was injured, but argues that the statute of limitations does not bar his claim because the AHU is not "an improvement to real property" as defined by the statute.

The Minnesota Supreme Court has applied a "common-sense interpretation" to define an "improvement to real property" as used in section 541.051. *Lietz v. N. States Power Co.*, 718 N.W.2d 865, 869 (Minn. 2006) (quotation omitted). The supreme court has defined an improvement to real property as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Id*. (quotation omitted).

Appellant argues that the AHU is not an "improvement to real property" because it was not yet installed at the time of his injury. But the supreme court held in *Lietz* that "an object need not be completely installed in order to qualify as an 'improvement to real property' within the meaning of Minn. Stat. § 541.051." *Id*. at 871. Appellant asserts, however, that unlike in *Lietz*, an issue of material fact exists concerning whether the AHU was even partially installed, because the duct work, plumbing and electrical work necessary to make the AHU "permanent and functional" had not yet been made. "In common usage, 'install' means, '[t]o connect or set in position and prepare for use.'" *Harrison ex rel. Harrison v. Harrison*, 713 N.W.2d 74, 78 (Minn. App. 2006) (quoting *The American Heritage Dictionary of the English Language* 907 (4th ed. 2000), *aff'd*, 733 N.W.2d 451 (Minn. 2007). Although the record does not show that the AHU was

completely installed with all of the duct work connected when the accident occurred, the record does establish that the AHU had been lowered by a crane and set into place on a specially constructed concrete pad at its permanent location. We agree with the district court that this setting in position constitutes partial installation under *Lietz*.

Appellant also argues that the AHU was not an "improvement to real property" because it was not a permanent addition to the property and did not enhance its capital value and make it more useful or valuable. But Minnesota courts have consistently held that the installation of systems relating to electricity and heating of a building, such as the AHU, constitutes an "improvement to real property." *See, e.g., Johnson v. Steele-Waseca Coop. Elec.*, 469 N.W.2d 517, 519 (Minn. App. 1991) (installation of electrical equipment and wiring in a barn), *review denied* (Minn. July 24, 1991); *Citizens Sec. Mut. Ins. Co. v. Gen. Elec. Corp.*, 394 N.W.2d 167, 170 (Minn. App. 1986) (installation of light fixtures), *review denied* (Minn. Nov. 26, 1986). The AHU is a permanent part of the building that enhances its capital value, making it more useful, because air-handling systems are necessary for heating, cooling, and ventilation. Therefore, the district court did not err by concluding that section 541.051 applies to bar appellant's claims against Wenzel and General.

Because we conclude that appellant's claim against Wenzel was time-barred under section 541.051, we need not address the district court's alternate ground for summary judgment: that because appellant elected to receive workers'-compensation benefits from K.W., and because Wenzel and K.W. were engaged in a common enterprise, appellant

was precluded from bringing an action against Wenzel. *See* Minn. Stat. § 176.061 (2006).

General contractor's duty of care

Appellant challenges the district court's grant of summary judgment in favor of Adolfson, arguing that the court erred by determining that Adolfson did not owe appellant a duty of care. Whether a duty exists is a question of law, which this court reviews de novo. *Writers, Inc. v. W. Bend Mut. Ins. Co.*, 465 N.W.2d 419, 423 (Minn. App. 1991).

Generally, Minnesota courts have been "hesitant to apply either direct or vicarious liability to a company hiring an independent contractor for injuries to that contractor's employees." *Sutherland v. Barton*, 570 N.W.2d 1, 5 (Minn. 1997). A company hiring an independent contractor may be held directly liable for injuries to the independent contractor's employees if the company "retains detailed control over a project and then fails to exercise reasonably careful supervision over that project." *Id*. But that liability attaches only if the company "retain[s] control over the operative detail of the work." *Id*. (quotation omitted). In other words, "'[t]here must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.'" *Id*. at 5-6 (quoting Restatement (Second) of Torts, § 414 cmt. c (1965)).

We agree with the district court that Adolfson owed no duty to appellant because the record lacked evidence that Adolfson had the right to control the work of K.W. Appellant's affidavit states that he looked only to K.W. for direction in how to perform his work and that he never received safety training from Adolfson on how to handle his

responsibilities on the project. Therefore, the record does not show that Adolfson retained a right to control the "operative detail" of appellant's work so as to warrant the imposition of direct liability on Adolfson.

Appellant further asserts that Adolfson owed a duty of care to appellant arising "from its nondelegable duty under Minnesota and Federal OSHA regulations to provide a safe working environment at the construction site." But Minnesota appellate courts have not determined that OSHA regulations impose a nondelegable duty on a company that hires an independent contractor. Rather, the Minnesota Supreme Court has held that a company hiring an independent contractor may not be held vicariously liable, under a nondelegable-duty theory, for negligence of the independent contractor when that negligence causes injury to the independent contractor's employee. *Conover v. N. States Power Co.*, 313 N.W.2d 397, 407 (Minn. 1981). The court in *Conover* emphasized the independent contractor's nondelegable duty owed to its employees and noted that imposing an additional duty on the company hiring the independent contractor, absent personal liability on the part of that company, would "result[] in one nondelegable duty too many." *Id.* at 404. Thus, even if the evidence shows that job-site supervision by a general contractor is the custom of the industry, that supervision alone would not result in the assumption by the general contractor of a subcontractor's nondelegable duty to provide a safe workplace for its employees. *See id.; cf. Bastian V. Carlton County Highway Dep't*, 555 N.W.2d 312, 317 (Minn. App. 1996) (holding that in a regulatory action for an OSHA violation, a supervising county could not be held liable absent "active involvement . . . in directing other employers' workers at a construction site"),

review denied (Minn. Jan. 7, 1997). The record shows that K.W. was hired to perform insulation work and retained control over directing appellant how to perform that work, including appellant's use of a ladder he placed on top of the AHU. Therefore, Adolfson may not be held vicariously liable under a nondelegable-duty theory for any negligence on the part of K.W. Therefore, we conclude that the district court did not err by granting summary judgment to Adolfson on the basis that Adolfson did not owe appellant a duty of care.

Although appellant's memorandum of law in opposition to summary judgment also asserted that a violation of OSHA regulations by Adolfson constituted negligence per se, his attorney declined to pursue that argument at the summary-judgment hearing and did not raise it on appeal. Because he has not renewed or briefed this argument on appeal, we consider it waived. *See State Dep't of Labor & Indus. by Special Comp. Fund v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to consider issue in absence of adequate briefing on appeal).

Manufacturer's duty to warn

Appellant also argues that the district court erred by granting summary judgment to McQuay concluding that it had no duty to warn appellant of the opening on top of the AHU into which he fell. Whether a duty to warn exists is a legal question, which this court reviews de novo. *Huber v. Niagara Mach. & Tool Works*, 430 N.W.2d 465, 467 (Minn. 1988).

A manufacturer who has actual or constructive knowledge of dangers related to the use of its product has a duty to warn users of those dangers. *Westerberg v. School*

Dist. No. 792, 276 Minn. 1, 8, 148 N.W.2d 312, 316 (1967). But there is no duty to warn of dangers that do not exist or that are obvious. *Id.* In determining whether a manufacturer has a duty to warn, the court starts with the event that caused the damage and refers back to the alleged negligent act. *Huber*, 430 N.W.2d at 467. "[I]f the consequence is direct and is the type of occurrence that was or should have been reasonably foreseeable," a duty exists as a matter of law. *Id*. (quotation omitted). But "[i]f the connection is too remote to impose liability as a matter of public policy," there is no duty and no liability. *Id*. (quotation omitted).

Appellant argues that the opening on top of the AHU was a dangerous, latent condition because it was covered with cardboard when it left the factory and covered with debris when appellant fell through it. Appellant maintains that McQuay had a duty to warn appellant about the opening because it was reasonably foreseeable that, given the placement of the AHU's in a confined space, workers would stand on the AHU to perform their jobs. But the record shows that McQuay reasonably constructed the framework of the AHU to accommodate the weight of workers on that framework, not on the areas where openings were located. Further, appellant testified that he knew that sometimes the AHUs had more than one opening on top, and that he saw the other opening on top of the AHU he was working on. Therefore, because the record shows that the large openings on top of the AHUs were an open and obvious condition, McQuay had no duty to warn of their existence. We also conclude that McQuay had no duty to warn appellant of debris covering the opening because it was not reasonably foreseeable to

McQuay that packaging materials would be piled on top of the AHU three months after the AHU left McQuay's factory and McQuay had relinquished control over the AHU.

Finally, appellant alleges that McQuay shipped the AHU with improper packaging and failed to provide adequate coverings for the openings. But the record contains no evidence that McQuay's packaging of the AHU wrapped in plastic or covering the openings with cardboard for shipping was a product defect. Therefore, appellant has failed to raise a material factual issue on this claim. *See, e.g., Drager by Gutzman v. Aluminum Indus. Corp.*, 495 N.W.2d 879, 885-86 (Minn. App. 1993) (resolving identical failure-to-warn and defective-design claims in favor of manufacturer of a window screen), *review denied* (Minn. April 20, 1993). The district court did not err by granting summary judgment to McQuay.

Affirmed.