137 Wash.App. 1002

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

David R. TOWNSEND and Judy Townsend, husband and wife, Appellants,
v.
MUCKLESHOOT INDIAN TRIBE, Respondent.

No. 57369–1–I.
|
Feb. 5, 2007.

Appeal from King County Superior Court; Honorable Gain Brian D., J.

Attorneys and Law Firms

David Andrews Williams, Attorney at Law, Bellevue, WA, for Appellants.

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UNPUBLISHED OPINION

GROSSE, J.

***1** An employer is not liable for injuries to the employees of an independent contractor unless the employer retains the right to control and direct the manner in which the independent contractor's employees perform their work. Because David and Judy Townsend failed to present evidence creating a genuine issue of material fact as to the Muckleshoot Indian Tribe's (Tribe) retained control over the manner in which the independent contractor's employees were to perform their work, the trial court did not err in granting summary judgment to the Tribe. We affirm.

FACTS

The Muckleshoot Indian Tribe (Tribe) hired W.G. Clark, a general contractor to build an office building on Tribe property. David Townsend worked for W.G. Clark as a carpenter and was working on the second floor of the project when he stumbled against a safety railing and the railing gave way. Townsend fell to the ground below and suffered multiple injuries.

David and Judy Townsend filed suit against the Tribe alleging the Tribe was liable for his injuries. The Tribe moved for summary judgment on two grounds. First, that state law does not apply to the Tribe within the bounds of the Muckleshoot Indian Reservation. Therefore, the Townsends' state law claim does not apply to the Tribe's conduct on the reservation. Second, even if state law applied, the Tribe did not retain control over the job site and therefore had no duty of care to the employees of the independent contractor, W.G. Clark. The trial court granted the Tribe's motion for summary judgment and the Townsends appeal.

ANALYSIS

The Townsends seek recovery from the Tribe on grounds that his injuries were caused by the Tribe's failure to comply with the Washington Industrial Health and Safety Act (WISHA). The threshold issue in this case is whether the Tribe consented to be sued in Washington state court and to have Washington state law applied to the resolution of the Townsends' personal injury claim—a claim that arose on tribal land. The Townsends argue the Tribe so consented when it stated in its answer:

> Unless the Tribe has waived its sovereign immunity from suit, no forum has jurisdiction over plaintiffs' claims, regardless of where jurisdiction may otherwise lie. As a matter of policy, the Tribe has determined not to assert its immunity to bar resolution of

> personal injury or property damage claims that are covered by and are within the coverage limits of its liability insurance.

The Tribe argues that this statement does not constitute its consent to have Washington state law apply to resolve this case.

In *Humes v. Fritz Companies,* [1] we recently addressed the applicability of the Washington Industrial Health and Safety Act (WISHA) to a crane operator who was injured while working on the Tulalip Indian Reservation. In holding WISHA did not apply, we stated:

> The Fritz defendants do not dispute the first part of Humes' argument—that the Tribe enjoys sovereign immunity and that the State lacks jurisdiction over the Tribe to enforce a common law duty of care. State laws generally are not applicable to tribal Indians on Indian lands except where Congress has expressly provided that state laws shall apply. *McClanahan v. Ariz. State Tax Comm'n,* 411 U.S. 164, 170–71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). In Washington, state jurisdiction over Indians is exercised within the limits of the federal act of Public Law No. 280. RCW 37.12.010. The legislative history of section 4(a) of Public Law No. 280 does not demonstrate an intent to confer general state civil regulatory control over Indian reservations. *Bryan v. Itasca County,* 426 U .S. 373, 384–85, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976). Under this doctrine, the State lacks the jurisdiction to enforce a standard of care on the Tribe for conditions at the worksite outside the casino on the day of the accident. [2]

***2** In addition, federal case law states that tribes may waive immunity from suit, if it is done so unequivocally. [3]

In its answer the Tribe states: "As a matter of policy, the Tribe has determined not to assert its immunity to bar resolution of personal injury or property damage claims that are covered by and are within the coverage and limits of its liability insurance." It then goes on to list a variety of other affirmative defenses that implicate the merits of the Townsends' personal injury claims under Washington law. If the Tribe had intended to assert its immunity from the application of Washington law, it is unclear how the Tribe's answer serves that purpose, as it states the Tribe is asserting its immunity up to the limit of its insurance policy and then engages the plaintiffs' claims on the merits.

However, we need not resolve this case on the jurisdictional issue, because even if Washington law applied in this case, the Townsends' claims do not survive summary judgment. [4] This is because the Townsends have failed to raise a genuine issue of material fact as to the Tribe's retained control over the manner in which the independent contractor's employees were to perform their work.

Generally, an employer is not liable for injuries to the employees of an independent contractor unless the employer retains the right to control and direct the manner in which the independent contractor's employees perform their work. [5] "The test of control is not the actual interference with the work of the subcontractor, but the right to exercise such control." [6] As our Supreme Court stated in *Hennig v. Crosby Group, Inc.:* [7]

> It is one thing to retain a right to oversee compliance with contract provisions and a different matter to so involve oneself in the *performance* of the work as to undertake responsibility for the safety of the independent contractor's employees. "The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship." [8]

Furthermore, quoting a Restatement (Second) of Torts comment the Washington Supreme Court has said:

> [T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions

> or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There 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. [9]

The Townsends point to several general contractual provisions that they claim create an issue of material fact as to the Tribe's retained control over the manner in which the work was to be done. These general provisions authorized the Tribe, through their representative URS Corporation, to direct changes in the work to be performed, require additional inspections, suspend work on the project, and to require coordination of the work when the Tribe occupied the building. As seen above, the general rights to "prescribe alterations and deviations," "inspect and supervise to insure the proper completion of the contract" and "to order the work stopped or resumed" is not enough by itself to constitute control over the manner in which the work is to be done.

***3** As the Tribe points out, more specific contract provisions place the contractor in charge of the methods of work and workplace safety. For example, section 3.3.1 of the General Conditions of the Contract for Construction states:

> The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters.

Furthermore, with regards to workplace safety, section 10.1.1 of the General Conditions states:

> The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract.

Finally, section 10.2.1 states:

> The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to
>
> (1) employees on the Work and other persons who may be affected thereby....

These more specific contract provisions place the contractor in charge of the methods of work and workplace safety. Moreover, the fact that the contractor actually retained control over the methods of work and workplace safety is supported by witness declarations in the record.

Because the Townsends failed to present evidence creating a genuine issue of material fact as to the Tribe's retained control over the manner in which the independent contractor's employees were to perform their work, the trial court did not err in granting summary judgment to the Tribe. We affirm.

WE CONCUR: DWYER and COLEMAN, JJ.

All Citations

Not Reported in P.3d, 137 Wash.App. 1002, 2007 WL 316504

Footnotes

1 *Humes,* 125 Wn.App. 477, 105 P.3d 1000 (2005).

2 *Humes,* 125 Wn.App. at 490.

3 *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.,* 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456 (9th Cir.1994); *Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir.1983). *See also Wright v. Colville Tribal Enter. Corp.,* No. 77558–3 (Wash. Dec. 7, 2006).

4 The usual standard of review for summary judgment applies. Summary judgment under CR 56(c) is proper if the pleadings, affidavits, depositions, and admissions on file, viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. *Iwai v. State,* 129 Wn.2d 84, 95–96, 915 P.2d 1089 (1996); *Wilson v. Steinbach,* 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

5 *Kamla v. Space Needle Corp.,* 147 Wn.2d 114, 119–22, 52 P.3d 472 (2002).

6 *Kelley v. Howard S. Wright Constr. Co.,* 90 Wn.2d 323, 330–31, 582 P.2d 500 (1978).

7 *Hennig,* 116 Wn.2d 131, 134, 802 P.2d 790 (1991).

8 *Hennig,* 116 Wn.2d at 134 (quoting *Epperly v. Seattle,* 65 Wn.2d 777, 785, 399 P.2d 591 (1965)) (emphasis in original).

9 *Kamla,* 147 Wn.2d at 119–22 (quoting *Restatement (Second) of Torts* § 414 cmt. c (1965)).