

PLAINTIFF SUFFERED SERIOUS INJURIES WHILE PERFORMING CLEAN-UP DUTIES DURING THE FINAL STAGES OF CONSTRUCTION AT A SAM'S CLUB STORE LOCATED ON PROPERTY OWNED BY WAL-MART.

April 21, 2015 | Law Alerts, News

Lee v. M&H and Wal-Mart

Arizona Court of Appeals, April 21, 2015

Plaintiff Lee suffered serious injuries while performing clean-up duties during the final stages of construction at a Sam's Club store located on property owned by Wal-Mart. Lee was employed at the time by Able Body Labor, which supplied workers for M&H, the project's general contractor. After Lee successfully pursued a workers' compensation claim against Able Body, he sued Wal-Mart and M&H for negligence, claiming the worker's compensation award was insufficient to cover his injuries.

Lee sued Wal-Mart and M&H, alleging negligence and that both owed him a "non-delegable duty to . . . provide a safe place to work, free of hidden dangers." M&H moved for summary judgment, arguing that Lee had elected his remedy by seeking worker's compensation benefits. Wal-Mart moved for summary judgment, arguing that it did not owe Lee a non-delegable duty.

The trial court denied M&H's motion, and granted Wal-Mart's. It explained that because Wal-Mart had hired M&H to build the Sam's Club, Wal-Mart had relinquished control of the premises. Wal-Mart thus did not have a duty to keep the premises safe. Lee went to trial against M&H, at the end which the court granted M&H judgment as a matter of law. The evidence showed that M&H exercised control over Lee, and no reasonable jury could conclude otherwise. Therefore, M&H was Lee's employer, and Lee's exclusive remedy was worker's compensation. Lee appealed.

The court of appeals first affirmed the judgment for Wal-Mart. Wal-Mart did not have a non-delegable duty to provide Lee a safe place to work because Lee was working as an employee of an independent contractor at the time he was injured. The contract between Wal-Mart and M&H also provided that M&H had control of the construction site and Wal-Mart disclaimed all responsibility for the construction personnel of the contractor (M&H) and its subcontractors (Able Body). Further, Wal-Mart did not exercise actual control over the actual work performed.

The court then rejected Lee's appeal of the judgment in favor of M&H. Lee actually had two employers in this situation – Able Body, the general employer, and M&H, the special employer, because M&H had the right to supervise and control Lee's work. Of the 100-150 subcontractor employees at the site, Able Body was the only subcontractor that did not have an onsite foreman. Lee himself testified that M&H was his "boss" and he was required to follow its instructions each day. Lee's construction safety expert also admitted that M&H had control of the work site and Lee's work. When he arrived each morning, Lee would locate the M&H superintendents and receive his instructions for the day. On the morning of the accident, Lee followed this same procedure and was

directed by a superintendent for M&H to clean the tops of the freezers. Therefore, Lee was an employee of M&H under the lent employee doctrine. Both Able Body and M&H were liable for worker's compensation and both were immune from tort liability under Arizona's worker's compensation laws.

The court finally rejected Lee's argument that M&H was not his employer because M&H did not have worker's compensation coverage for him. No case in Arizona applying the lent employee doctrine mandates that a special employer must have had workers' compensation coverage in place to receive tort immunity. Instead, the special employer is liable to an injured employee for workers' compensation regardless of whether the special employer had coverage in place at the time of the employee's injury. Even if an employer does not carry workers' compensation insurance, the employee can still receive compensation through the Special Fund/No Insurance Section of the Industrial Commission of Arizona. The non-insured employer is then liable to the Commission for any payments made to the injured employee.

In short, the court of appeals affirmed the judgment against Lee.

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