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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NOS. 2002-CA-000124-MR and 2002-CA-000193-MR

COMMONWEALTH ALUMINUM CORPORATION — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 97-CI-00004

LEWIS F. KRAHWINKEL, JR. — APPELLEE/CROSS APPELLANT

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal and a cross-appeal from a judgment pursuant to a jury verdict in a personal injury action filed by an employee of an independent contractor against a company which hired the independent contractor to move and install a tank in the basement of the company's plant. On appeal, the company insists that it was the independent contractor's responsibility to provide for the safety of its employee at the job site and that the dangerous condition which

caused the injuries was open and obvious, thus, the company hiring the property owner had no duty to the plaintiff regarding this condition. It also argues that it is entitled to be reimbursed for the workmen's compensation benefits paid to the plaintiff to preclude double recovery, since the employer agreed to not seek reimbursement for the same. On cross-appeal, the plaintiff argues that it should have gotten a negligence per se jury instruction. Upon review of the record and the applicable law, we agree with appellant that the company hiring the independent contractor had no duty to the employee of the independent contractor. Hence, the appellant had no liability in the accident. Accordingly, we reverse the judgment and remand the matter for further proceedings consistent with this opinion.

In 1996, appellee/cross-appellant, Lewis Krahwinkel, was employed by Industrial Technology ("Intec"), a mechanical contractor. In 1996, Intec was hired by Commonwealth Aluminum Corporation ("Commonwealth") to install and move a tank from the first floor of their plant through a large hole (approximately eighteen feet by eighteen feet) into the basement. In order to get the tank into the room with the hole, Intec workers had to guide the tank with lead lines across the motor room into the room with the hole. On January 24, 1996, Krahwinkel was one of the Intec workers helping to move the tank into the basement.

Krahwinkel testified that after guiding the tank across the motor room and successfully lowering it into the basement, he began cleaning up the area around the hole. As Krahwinkel was walking around the outside of the hole, he slipped and fell into the hole, falling some fifteen to twenty feet onto a catwalk and then onto the concrete floor below. As a result of the fall, Krahwinkel sustained severe injuries to his right foot and knee.

Krahwinkel testified that there was no caution tape or barrels around the hole. According to Krahwinkel, he had no safety belt or harness on at the time because there was no place on which to tie off. He further testified that there was oil on the floor of the motor room which he stepped in when he was guiding the tank through that room.

On January 16, 1997, Krahwinkel filed the personal injury action herein against Commonwealth alleging that as a result of Commonwealth's negligent failure to maintain a safe workplace for Intec's installation of the tank, he suffered damages including lost wages, loss of earning capacity, medical expenses, and pain and suffering. Thereafter, an intervening complaint was filed by Intec on behalf of their workers' compensation carrier seeking to recover workers' compensation benefits paid to Krahwinkel pursuant to KRS 342.700. On

March 21, 2001, Intec moved to be dismissed as a party to the litigation, citing a settlement agreement with Krahwinkel. In September of 2001, the motion was granted.

On August 6, 2001, the case was tried to a jury which ultimately entered a verdict in favor of Krahwinkel, apportioning 75% liability against Commonwealth and 25% liability against Krahwinkel. Damages were awarded as follows (not including the 25% reduction for Krahwinkel's comparative negligence): $10,000 for permanent impairment of earning capacity; $7,300 for pain and suffering; $17,671.02 for medical expenses; and $10,000 for lost wages. Commonwealth then filed a motion for a new trial which was denied. This appeal by Commonwealth and protective cross-appeal by Krahwinkel followed.

Commonwealth first argues that the trial court erred in refusing to direct a verdict in its favor because it had no duty to Krahwinkel under the circumstances of the case. Specifically, Commonwealth maintains that it owed no duty to Krahwinkel because Commonwealth had no duty to warn of known and obvious dangers on its property (the hole) and because it was Intec's responsibility, as the independent contractor, to provide for the safety of its employees.

It was undisputed that the hole which Krahwinkel fell through was constructed by Commonwealth at the time the plant was built and usually had a hatch covering it. At trial,

Krahwinkel presented the testimony of Herbert Bogart, an occupational safety expert, who testified that the hole should have had a temporary guardrail constructed around it to prevent any falls. He testified that this guardrail would provide fall prevention rather than simply fall restraint of a safety belt/harness. He cited OSHA regulations which would have required Commonwealth to have guardrails placed around the hole whenever the hatch was removed.

Gene Holtzman, safety administrator for Commonwealth, testified that Commonwealth requires contractors to provide their own safety equipment when performing work as independent contractors. He stated that it was the responsibility of Intec to protect its employees and see that they were provided a safe work environment, including any necessary safety equipment to prevent falls. Holtzman did admit that there was grease and oil on the floor in areas around the hole.

Trent Meyers, project manager for Commonwealth, testified that a safety manual was provided to all contractors which requires that contractors shall furnish the necessary safety equipment for the particular job. It further provides that it is the contractor’s responsibility to follow safety rules and OSHA regulations. According to Meyers, Commonwealth required Intec to sign a paper indicating that it understood

that it was to abide by certain safety procedures and utilize safety equipment when working at Commonwealth.

Commonwealth first cites to general premises liability law holding that the owner of property does not have a duty to warn against open and obvious dangers. Foley v. Michel Tire Co., 183 F. Supp.2d 934 (W.D.Ky. 2002); Rogers v. Professional Golfers Ass'n of Am., Ky. App., 28 S.W.3d 869 (2000). While we agree that the hole in the instant case was an open and obvious danger, according to other evidence offered by Krahwinkel, the oil on the floor, which was not open and obvious, was another contributing factor to the accident. Hence, the above-stated law would not merit a directed verdict in Commonwealth's favor.

As to Commonwealth's argument that Intec, as independent contractor, had the responsibility to provide for its own employee's safety, it has been held in Kentucky that "where an employee of an independent contractor is injured, the owner is liable only when the work done by the independent contractor is a nuisance or inherently dangerous." Grogan v. United States, 225 F. Supp. 821, 825 (W.D.Ky. 1963), affirmed in part and modified in part, 341 F.2d 39 (6th Cir. 1965); see also Clemons v. Browning, Ky. App., 715 S.W.2d 245 (1986); Olds v. Pennsalt Chemicals Corp., 432 F.2d 1033 (6th Cir. 1970), cert. denied, 401 U.S. 1010, 915 S. Ct. 1257, 28 L. Ed. 2d 546 (1971); Jennings v. Vincent's Administratrix, 284 Ky. 614, 145 S.W.2d

537 (1940); and Simmons v. Clark Constr. Co., Ky., 426 S.W.2d 930 (1968). In King v. Shelby Rural Electric Cooperative Corp., Ky., 502 S.W.2d 659 (1973), cert. denied, 417 U.S. 932, 94 S. Ct. 2644, 41 L. Ed. 2d 235 (1974), which was not cited by the Court in Clemons v. Browning, the Court went further and held that even if the work was inherently dangerous, liability of the employer of the independent contractor would not extend to employees of the independent contractor. The Court reasoned as follows:

> We can see no reason why appellant, simply because he was an employee of an independent contractor, should be placed in a better position than if he had been an employee of the [company which hired the independent contractor], in which case his recovery would be limited without question to the benefits provided by the Workmen's Compensation Act. Conversely, we see no valid reason why [the company which hired the independent contractor] should be subjected to more liability simply because it engaged the services of a qualified independent contractor. Employers frequently farm out work which requires some special skill to an independent contractor skilled in that particular work. The imposition of additional tort liability upon the employer because of the selection of an independent contractor would have a tendency to discourage the practice of selecting skilled independent contractors and cause employers to do the work with their own, sometimes less skilled, work force.

King, 502 S.W.2d at 663. See Cochran v. International Harvester Co., 408 F. Supp. 598 (W.D.Ky. 1975) (for further discussion of King).

It is not disputed that Intec was performing the work for Commonwealth as an independent contractor. Hence, under King, Commonwealth would have no liability to Krahwinkel. However, even if we allow that liability of Commonwealth could extend to Krahwinkel under the former cited line of cases, we believe no liability would attach.

Since the activity in question was clearly not a nuisance, the only remaining issue to be resolved is whether the moving and installation of the tank at issue was an inherently dangerous activity. The tank in question was ultimately to be used by Commonwealth as a PCB containment tank; although there was no evidence that Intec employees would come in contact with PCBs in the performance of this job. The tank was to be lifted, moved, and lowered into the hole via a crane, with Intec employees guiding it with lead wires. Thereafter, the tank was to be installed in the basement by Intec employees. In Miles Farm Supply v. Ellis, Ky. App., 878 S.W.2d 803, 805 (1994) (quoting *Restatement 2d of Torts §* 427, comment b at 416 (1965)), our Court recognized that an activity is inherently dangerous if it:

> involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done.

Our Court also recognized the standard set out in Jennings v. Vincent's Administratrix, 284 Ky. 614, 145 S.W.2d 537, 541 (1940), "[I]f the work can be accomplished without probable injury except in the event of negligence, no liability attaches." Miles Farm Supply, 878 S.W.2d at 805. The use of scaffolding has been held to not be an inherently dangerous activity in Kentucky. Nashville Bridge Co. v. Marsh, 212 Ky. 728, 279 S.W. 1099 (1926); Grogan v. United States, 225 F. Supp. 821 (W.D.Ky. 1963). The use of gasoline has also been held to not be inherently dangerous. Jennings, 145 S.W.2d 537. Conversely, the use of explosives has been considered to be an inherently dangerous activity. City of Hazard Municipal Housing Commission v. Hinch, Ky., 411 S.W.2d 686 (1967). In our view, the moving and installation of the tank in the case at bar was not inherently dangerous. We believe the task did not pose an inherent risk of harm to others and could be performed without probable injury absent negligence. Accordingly, we reverse the judgment against Commonwealth.

Given our adjudication of the above issue, the remaining issues raised on appeal and cross-appeal are rendered moot. For the reasons stated above, the judgment of the Hancock Circuit Court is reversed and the matter remanded for proceedings consistent with this opinion.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. The Majority Opinion reverses a jury verdict of $33,728.27 based on an issue not preserved by the appellant, not briefed to this Court, and not argued at oral argument. The judicial activism displayed by the Majority by sua sponte raising an issue that it holds to be dispositive without even allowing Krahwinkel the opportunity to address the issue is unfair and unjustificiable.

It is hoped that our Supreme Court will correct this injustice by granting discretionary review for the purpose of reversing this Court for its failure to follow clearly established appellate procedures and precedents. If this Majority Opinion is allowed to stand, then future litigants will be left only to guess as to how this Court will rule. With no limitations on the scope of this Court’s review and without the parties being required to follow appellate procedures, any semblance of predictability from this Court can be forgotten.

BRIEF AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

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