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Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001261-MR

DONNIE THACKER — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CI-00321

CITY OF CRITTENDEN; RANDY RUBY; COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET; HICKS AND MANN, INC.; AND EATON ASPHALT — APPELLEES

AND: NO. 2005-CA-001302-MR

EATON ASPHALT — CROSS-APPELLANT

v.

CROSS-APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CI-00321

DONNIE THACKER AND MELISSA THACKER — CROSS-APPELLEES

AND: NO. 2005-CA-001393-MR

KENTUCKY AGC/SIF APPELLANT

v. APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 02-CI-00321

CITY OF CRITTENDEN; RANDY RUBY; COMMONWEALTH OF KENTUCKY, TRANSPORTATION CABINET, DISTRICT 6; HICKS & MANN, INC.; AND EATON ASPHALT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

STUMBO, JUDGE: This appeal comes from an order of the Grant Circuit Court granting Summary Judgment to all Defendants in this case. Appellant claims the summary judgment was granted in error based on the evidence of this case. After reviewing the facts, record, and the law, this Court affirms the judgment of the trial court in all respects.

[1] Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

This matter stems from an incident which occurred on July 12, 2001, at a construction site located on KY 491 in Crittenden, Kentucky. The construction was to widen a section of road from I-75 to the KY 491 interchange. Part of this construction involved relocating the City of Crittenden's sewer lines. Donnie Thacker (Appellant) was injured when the sewer trench he was working in collapsed, trapping him inside, and resulting in trauma and the amputation of one of his lower extremities.

The project was initiated by the Commonwealth of Kentucky Transportation Cabinet (hereinafter Cabinet). The Cabinet reached an agreement with the City of Crittenden (hereinafter City) whereby the City was required to secure an engineering firm, Hicks & Mann, Inc. (hereinafter H&M), to provide plans for the sewer relocation. The Cabinet engaged a general contractor, Eaton Asphalt Paving Co. (hereinafter Eaton), who in turn subcontracted the actual work on the sewer relocation to Music Construction (hereinafter Music).

Appellant was an employee of Music at the time of the accident. Music had obtained workers' compensation coverage at the beginning of the job and Appellant collected benefits from this after the accident.

In July 2002, Appellant brought suit against the Cabinet, the City, H&M, and Randy Ruby (hereinafter Ruby), who was an inspector for the Cabinet, claiming they acted negligently and recklessly and failed to insure proper safety precautions were being used. Later, in August 2004, Appellant amended his complaint and added Eaton. In

2005, each of the Appellee/Defendants submitted motions for Summary Judgment, which were all granted. This appeal followed.

Appellant argues that the circuit court committed reversible error in granting summary judgment, claiming that there are genuine issues of material fact, that the court committed abuse of discretion in granting the summary judgment, and that summary judgment should not have been granted because discovery had not been completed. After a brief discussion of Kentucky's summary judgment rules and the standard of review, the Court will tackle each of Appellant's arguments.

Summary judgment is authorized under Kentucky Civil Rule 56 and its subparts. We are concerned with CR 56.03, which states as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The case of *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991), which is the current incarnation of summary judgment law, reiterates and adopts the rule as first posited by *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). In *Steelvest*, the court states that:

> the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor. We further declared that such a judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances . . . . The record must be viewed in a light most favorable to

> the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. . . . The trial judge must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists. . . . Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted. . . . [A] party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.

Steelvest at 480- 482. The standard of review on appeal of a summary judgment is whether "the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Upon a careful review of the record, we found no evidence that would put into question any of the material facts of this case. We will address the arguments of each Appellee in turn.

Eaton contends that Appellant failed to bring suit against it within the statute of limitations, that it is entitled to up-the-ladder workers' compensation immunity, and that Appellant has not developed any evidence to the contrary. We need only address the first argument. KRS 413.140(1)(a) requires all actions for personal injury be brought within one year of the date of the injury. In response, Appellant argues that Civil Rule 15.03(2), the "relation back" rule, saves his action against Eaton. That rule states:

> An amendment changing the party against whom a claim is asserted relates back if the condition of paragraph (1) is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (a) has received such notice of the institution

> of the action that he will not be prejudiced in maintaining his defense on the merits, and (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The initial suit in this case was brought in 2002, but Eaton was not added as a party until 2004. This is clearly more than one year after the injury occurred and the statute of limitations had run. CR 15.03(2) does not apply in this case because neither subsection of that rule was met. There was no mistake of identity regarding this Appellee as required by subsection (b), and more significantly, the requirement that notice sufficient to support a finding that the new party not be "prejudiced in maintaining his defense on the merits" was not given Eaton. In fact, one of Appellant's attorneys wrote to Eaton in 2002 seeking information about the circumstances that gave rise to the lawsuit and in doing so, specifically stated that Appellant would not be suing Eaton. Logically, an entity told that it will not be a party to an action would take few steps to "maintain [its] defense on the merits." Appellant knew who Eaton was and evaluated whether to bring action against it within the limitations period. There was no mistake of identity and Appellant clearly indicated that he did not intend to assert a claim. Summary judgment was proper for this Appellee due to the running of the statute of limitations.

The City contended, and the trial court agreed, that Appellant failed to show any evidence that the City had a duty to him or a responsibility for carrying out the work involved, that it was entitled to "up-the-ladder" immunity, and that Appellant failed to provide notice to the City of his injury as is required by KRS 411.110.

Appellant argues that the City was negligent and reckless in failing to design, inspect, supervise, or direct the parties hired to relocate sewer lines and failed to require adequate safety measures be taken. In order to defeat the City's original motion for summary judgment, the Appellant needed to "present at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Steelvest* at 482. Appellant claims that the City retained a degree of supervision over the project because a city worker was present on the construction site. The City employee was discovered to be J. D. Dezarn, a City maintenance worker. Appellant contends that this worker supervised the construction. Unfortunately for the Appellant, he does not cite any evidence to support this contention. Appellant claims witnesses can corroborate this, but this Court has read the voluminous record, including the deposition of J. D. Dezarn himself. Nowhere did any witness testify that Mr. Dezarn was there on behalf of the City in order to supervise them. In fact, most of the testimony in the depositions state that Mr. Dezarn visited the work site because he was "nosy." Mr. Dezarn confirmed that in his own deposition. The mayor of Crittenden and Mr. Dezarn both testified that he had no official role or any authority to direct activities on the job site..

Other than the contention in regard to Mr. Dezarn, Appellant cites no other evidence. In other words, Appellant has not, and this Court believes cannot, present any evidence suggesting that the City retained supervision over the construction that would give rise to liability. The City was not linked to Appellant through any contract and it did not have any control over the mode, manner, and method of the performance of

construction to rise to the level of negligence. *See King v. Shelby Rural Elec. Co-op. Corp*., 502 S.W.2d 659 (Ky. 1973). According to every deposition taken wherein the issue of safety measures was broached, including that of James Music (owner of Music Construction), it was Music Construction's responsibility to provide adequate safety measures for its employees. In fact, the only entity cited by the Kentucky Occupational Safety and Health Administration because of this accident was Music Construction. There is no doubt that from the evidence in the record that no one but Music Construction was responsible for the safety of Appellant.

In the lower court, H&M argued that it had no duty toward Appellant and could therefore not be negligent. Appellant claims that H&M should have factored in previous digging around the construction site as well as the site's proximity to the highway when making the plans. Appellant, however, cites no evidence that suggests the proximity to the highway or that previous digging played any role in the accident. As mentioned previously, the opponent to the motion for summary judgment must provide the court with some affirmative evidence showing a genuine issue of material fact. In this instance, Appellant did not and we can find none in the record.

Appellant also argued H&M had a duty to inspect the site and make sure the plans were being followed properly. The only evidence Appellant notes, but does not cite specifically, to support this contention is that the contract between the City and H&M provided that H&M had a duty to inspect the job site. While H&M does not dispute it had a duty to inspect, the duty did not extend to safety measures. H&M's inspection

obligation was limited to ensuring that the proper materials (the ones specified in the plans) were being used and that the completed sewer project was constructed properly and functioned as designed. The engineer was concerned with the finished product. Safety precautions are not a part of the category of "proper materials" that H&M was inspecting for. As stated above, it was Music Construction's responsibility to ensure the proper safety protocols were followed. Since Appellant provided no further evidence other than unsupported allegations in opposition to this summary judgment, we hold that summary judgment for H&M was properly granted.

The final Appellee is the Cabinet, along with Ruby as its employee. Before the trial court, the Cabinet argued that it, along with Mr. Ruby, is immune from this suit due to the "up-the-ladder" immunity provided by the Workers' Compensation Act. This is the only defense the Cabinet and Ruby raised. "Up-the-ladder" immunity is derived from the Workers' Compensation statutes, specifically KRS 342.610, which provides in pertinent part:

> (1) Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.
> (2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:

> (a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or
> (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

When this statute is read in conjunction with KRS 342.690(1), the "up-the-ladder" immunity is created. KRS 342.690(1) states:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

In summary, these two statutes make it clear that when a general contractor employs a subcontractor and said subcontractor secures workers' compensation insurance, the general contractor cannot be sued by an injured employee of the subcontractor. There is a caveat that the subcontractor must be performing work that is "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of [the general contractor]..." KRS 342.610(2)(b).

The Cabinet argues that it, and its employee, should be immune from this action because they are a contractor under the above statutes. To be immune, the subcontractor, here Music Construction, must be engaged in work that is "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of [the general contractor]..." KRS 342.610(2)(b). If Music Construction was involved in such work, then the Cabinet could be held to be a general contractor and thereby qualify for "up-the-ladder" immunity. This immunity would then encompass all the employees of the Cabinet, including Mr. Ruby, assuming he was acting within the scope of his employment.

The initial determination that must be made in regards to whether the Cabinet is entitled to this immunity is to determine whether it is a "contractor" as defined by the worker's compensation statutes. KRS 342.610(2) states in pertinent part:

> A person who contracts with another:
> (a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or

> (b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person;
> shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

During the hearing on the motions for summary judgment, the trial court noted that the relocation of electric, water and sewer lines are "part and [parcel] of any construction job." As the Cabinet argued, the contract with Music Construction required Music to preform work that is a regular and recurrent part of the work of the Kentucky Transportation Cabinet when it builds highways for the Commonwealth. Even if such work is always preformed by a subcontractor, as part of the Cabinet's regular work, the up-the-ladder defense protects the contractor. *Fireman's Fund Insurance Company v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1989); *Goldsmith v. Allied Bldg. Components, Inc.,* 833 S.W.2d 378 (Ky. 1992).

The only exception to this immunity is provided by KRS 342.690(1), wherein it states that the immunity shall not apply to an employee of an immune employer where "the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee." Appellant points to testimony which he interprets as the acceptance of a bribe by Mr. Ruby. Even if this testimony tended to establish that a bribe was tendered and accepted, which is disputed by the Cabinet and Mr. Ruby, it does not establish evidence of physical aggression resulting in the injuries

suffered by the Appellant. The summary judgment granted to the Cabinet and Mr. Ruby is hereby affirmed.

Appellant's final two arguments can be easily dismissed. Appellant claims the Circuit Court committed an abuse of discretion in granting summary judgment. The abuse of discretion standard is not applicable when reviewing an order of summary judgment on appeal. As stated *infra*, on review, an appellate court determines whether "the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres* at 781.

Appellant also argues that summary judgment should not be granted before the non-moving party has an opportunity to complete discovery. *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628 (Ky. App. 1979). While this is a correct statement of the law, it does not serve Appellant's argument. This case has been pending since 2002. The trial court granted summary judgment in 2005. The *Hartford* case does not state that discovery must be completed before summary judgment can be granted, it says there must only be the opportunity to complete it. In *Hartford*, summary judgment was allowed six months after the filing of the case. The record in this case is extensive. Appellant has taken many depositions and propounded interrogatories to all parties. While Appellant does state in his brief that further discovery was needed, he does not disclose precisely what steps needed to be taken to complete preparation for trial. We cannot reverse the trial court's decision without information that would permit

this Court to determine whether there was further discovery needed before the motions could be considered.

For the foregoing reasons, we affirm the judgment of the trial court in all respects.

ALL CONCUR.

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