

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002364-MR

JAMES MIDDLETON

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 04-CI-00686

DANNY HACKER AND DEBORAH
HACKER, HIS WIFE

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: James Middleton (“Middleton”) appeals from a summary judgment entered by the Laurel Circuit Court dismissing his negligence claims against Danny and Deborah Hacker (“Hackers”). He asserts that there were genuine issues of material fact under which the Hackers could be vicariously liable for the negligence of the roofing contractor which they employed. We agree with the circuit court that the roofer, Tim Hays (“Hays”), was an independent contractor and that there were no facts supporting the theory that the roofer was acting as the Hackers’ actual or ostensible agent. Hence, we affirm.

The underlying facts of this action are not in dispute. The Hackers hired Tim Hays (“Hays”) to install a new roof on their home. Under the terms of their oral agreement, the Hackers paid Hays \$4,650.00 to perform the work. This amount included the cost of materials and labor. The Hackers had no input in the choice of materials except for the color of the shingles. Hays hired Middleton and another person to assist with the work. While working on the roof, Middleton slipped on felt roofing material and fell from the roof, sustaining injuries.

Thereafter, Middleton filed this action, alleging that the Hackers were negligent in failing to provide him with a reasonably safe workplace. Following a period of discovery, the Hackers moved for summary judgment, arguing that there was no evidence that they had breached any duty which they owed to Middleton. The trial court agreed, granting the Hackers’ motion and dismissing Middleton’s complaint. This appeal followed.

In reviewing a motion for summary judgment, a trial court must consider all stipulations and admissions on file. CR 56.03. Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991), *citing Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). “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).

There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992).

The parties agree that Middleton, doing business at the Hackers' residence, was an invitee. A landowner owes a duty to exercise "reasonable care" to protect invitees against physical harm caused by a dangerous condition located on the premises. *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528-29 (Ky. 1969). However, reasonable care does not require a landowner to protect a business invitee against dangers that are open and obvious. *Id.* See also *Wal-Mart Stores, Inc. v. Lawson*, 984 S.W.2d 485, 489 (Ky.App. 1998). The dangers of working on a roof are open and obvious.

Middleton contends that Hays's decision to use substandard felt created an additional danger which was not open and obvious. He further alleges that the Hackers were negligent in hiring Hays to perform the work without first determining his qualifications. And finally, Middleton contends that the Hackers are liable for Hays's negligence because he was acting as their actual or ostensible agent.

As a general rule, a person is liable for the negligent acts of an employee or agent, but is not liable for the negligence of an independent contractor. *Shedd Brown Manufacturing Co. v. Tichenor*, 257 S.W.2d 894, 895-96 (Ky. 1953). The trial court concluded that Hays was an independent contractor and consequently, the Hackers were not liable for his negligence. We agree.

In determining whether a person was an independent contractor or an employee, the courts must focus on the degree of control reserved or exercised by the employer. In particular, the courts will consider the extent of control that the master may exercise over the details of the work, whether the one employed is engaged in a distinct occupation, the skill required in the particular occupation, whether the employer or the workman supplies the tools of the trade and the place of work, the method of payment, and whether the parties believe they are creating an employer/employee relationship. *Id.* at 896-97. *See also* *RESTATEMENT (SECOND) OF AGENCY*, § 220(2) (1958). In this case, there is no factual dispute as to any of these factors. The Hackers paid Hays a flat fee to cover all labor and materials. Except for choosing the color of the shingles, Hays controlled all aspects of the work. He selected all the materials, provided all the tools and equipment, hired all the assistants, and determined the method of performing the work. Therefore, the trial court correctly found as a matter of law that Hays was an independent contractor.

Nevertheless, Middleton argues that the Hackers may be liable for Hays's negligence if he was the Hackers' ostensible agent. The Supreme Court of Kentucky has defined "ostensible agency" as follows:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Roethke v. Sanger, 68 S.W.3d 352, 363 (Ky. 2001), *quoting* *RESTATEMENT (SECOND) OF AGENCY*, § 267. *See also* *Paintsville Hospital Co. v. Rose*, 683 S.W.2d at 257.

Middleton contends that the existence of an ostensible agency is always an issue of fact for the jury to determine. But while ostensible agency may be inferred from the circumstances, the party asserting ostensible agency must still identify facts showing that he reasonably relied upon the ostensible agency relationship to his detriment.

Roethke v. Sanger, 68 S.W.3d at 363-64. In this case, Middleton does not identify any conduct which suggested that Hays was acting as the Hackers' agent. In fact, Middleton does not allege that he had any dealings with the Hackers, either directly or through Hays. A party opposing summary judgment must present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001). In the absence of such evidence, the trial court correctly found that the Hackers could not be vicariously liable for Hays's negligence. Therefore, summary judgment was appropriate.

Accordingly, the summary judgment entered by the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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