

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 4, 2006 Session

JASON WAYNE MOUSER v. BUCKHEAD CONSTRUCTION CO., ET AL.

**Appeal from the Circuit Court for Knox County
No. 1-391-02 Dale C. Workman, Judge**

No. E2005-00967-COA-R3-CV - FILED JUNE 28, 2006

Jason Wayne Mouser (“the Employee”) worked for CDE Electrical Contracting Company (“the Subcontractor”). He was injured while engaged in the work of his employer’s subcontract with Buckhead Construction Co. (“the Principal Contractor”). The Employee sued the Principal Contractor in tort, alleging that the latter had negligently maintained the piece of equipment that allegedly caused the Employee’s injury. In addition, the Employee sued Knox-Tenn Rental & Sales Co. (“Knox-Tenn Rental”), the lessor of the equipment, alleging that it, too, had negligently maintained the subject equipment. The trial court granted summary judgment to the Principal Contractor, finding that, under the workers’ compensation statutory scheme, the Principal Contractor was the statutory employer of the Employee and, hence, could not be sued by him in tort. The trial court also dismissed the Employee’s claim against Knox-Tenn Rental, holding that, as the lessor of the equipment, Knox-Tenn Rental could not be held liable to the Employee for a claim under the rubric of a product liability action. The Employee appeals. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Eugene B. Dixon, Maryville, Tennessee, for the appellant, Jason Wayne Mouser.

Stephen E. Yeager and Chris D. Tucker, Knoxville, Tennessee, for the appellee, Buckhead Construction Co.

Trevor L. Sharpe, Knoxville, Tennessee, for the appellee, Knox-Tenn Rental & Sales Co.

OPINION

I.

The Principal Contractor agreed to build an addition to a building in Knoxville owned by SEC Development Company, LLC. The Principal Contractor entered into a subcontract with the

Subcontractor for the electrical work on the project. The Employee worked as an apprentice electrician for the Subcontractor and was engaged in work at the construction project on the occasion of the injury that prompted the filing of this suit.

The Employee, while acting within the course and scope of his employment with the Subcontractor, was unloading freight from the back of a tractor-trailer into the bucket of a Bobcat loader at the construction site. The Bobcat loader had been leased to the Principal Contractor by Knox-Tenn Rental. While unloading the freight, the loader bucket on the Bobcat suddenly collapsed, causing the Employee to fall to the ground. He suffered injuries as a result of the fall. The Employee later filed suit under the workers' compensation statutes and was awarded benefits against the Subcontractor or its insurer.¹

The Employee filed a complaint against the Principal Contractor, alleging that the hydraulic system on the Bobcat was defective and that the Principal Contractor knew or, in the exercise of ordinary care, should have known, of this defective condition and should have taken the necessary precautions to correct it.

The Principal Contractor filed a motion for summary judgment, asserting that, as the Employee's statutory employer, it could not be sued in tort because the Employee's exclusive remedy against it was a claim for workers' compensation benefits. It relied upon the provisions of Tenn. Code Ann. § 50-6-108 (2005). The trial court granted the Principal Contractor summary judgment, holding that it was the statutory employer of the Employee and was, therefore, immune from tort liability with respect to the Employee's injuries.

On November 16, 2004, the Employee sued Knox-Tenn Rental, alleging that it had negligently maintained the Bobcat. The trial court ultimately dismissed the Employee's claim against Knox-Tenn Rental, holding that, as the lessor of the Bobcat loader, Knox-Tenn Rental could not be held liable to the Employee under a theory of product liability. The Employee appeals.

II.

With respect to the Principal Contractor, the Employee contends that the trial court erred in its grant of summary judgment. It raises two issues on appeal:

- (1) Did the trial court err in its determination that the Principal Contractor is a statutory employer who cannot be sued in tort?
- (2) Does the contract between the Principal Contractor and the Subcontractor protect the former from liability for workers' compensation claims?

¹The order of the Blount County Circuit Court confirming the Employee's workers' compensation settlement recites that the settlement was with "Sisters Tool and Supply Co., Inc. or its insurer." Apparently this company is a subsidiary of the Subcontractor.

In deciding whether a grant of summary judgment is appropriate, courts are to determine “if the pleadings, depositions, answers to interrogatories, 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.” Tenn. R. Civ. P. 56.04. Summary judgment should be granted “when both the facts and the conclusions to be drawn from the facts permit a reasonable person to reach only one conclusion.” *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995) (citation omitted). Since a motion for summary judgment presents a pure question of law, our review is *de novo* with no presumption of correctness as to the trial court’s judgment. *Gonzales v. Alman Constr. Co.*, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993).

In support of the argument that it is the statutory employer of the Employee, the Principal Contractor relies upon Tenn. Code Ann. § 50-6-113 (2005), which states, in pertinent part, as follows:

(a) A principal or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor, or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

* * *

(d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or that are otherwise under the principal contractor’s control or management.

The Principal Contractor argues what is abundantly clear from the record – it was the “principal contractor” on the construction project. It further contends what is also clear – the Employee was “engaged upon the subject matter of the contract” and that his injury occurred on the premises of the construction project site, *i.e.*, where the Principal Contractor “has undertaken to execute work.” *Id.* Accordingly, the Principal Contractor argues that it was the Employee’s statutory employer and is, as a consequence, shielded from tort liability, pursuant to the exclusive remedy rule of the workers’ compensation statutory scheme:

The rights and remedies granted to an employee subject to the Workers’ Compensation Law, compiled in this chapter, on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, such employee’s personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Tenn. Code Ann. § 50-6-108(a).

In an effort to create a genuine issue of material fact as to whether the Principal Contractor was, in fact, a principal contractor within the meaning of the statute, the Employee first argues that the work he was performing under the contract, *i.e.*, electrical work, was not the type of work usually performed by the Principal Contractor. He contends that this fact exposes the Principal Contractor to tort liability under the facts of this case. In addition, the Employee argues that the Principal Contractor did not have the right to control his work. In support of his position, the Employee relies upon *Barber v. Ralston Purina*, 825 S.W.2d 96, 99 (Tenn. Ct. App. 1991). The rationale and holding of that case are not implicated by the facts of the instant case. In *Barber*, we were asked to determine whether the employer of the plaintiff was an independent contractor of the owner of the premises, the defendant, Ralston-Purina. That case was decided in the context of those very different facts and involved a statute, Tenn. Code Ann. § 50-6-112 (2005),² which is not implicated by the facts of the instant case. *Barber* involved an attempt by an injured party to sue the owner of the premises. That scenario is not before us in the case at bar.

As to the Employee's "control" argument, a finding of a right to control is not a prerequisite to a finding that one is a statutory employer under Tenn. Code Ann. § 50-6-113. It is clear beyond any doubt that the Employee was injured while engaged in the subject matter of the contract, and that the injury occurred on the premises of the construction site. Thus, the facts and the conclusions to be drawn from those facts lead us to a single, inevitable conclusion – that the Principal Contractor was indeed a principal contractor, as contemplated by Tenn. Code Ann. § 50-6-113, and that, as a statutory employer, it is immune from suit in tort by the Employee.

The Employee next contends that the trial court erred in granting summary judgment to the Principal Contractor because the contract between the Principal Contractor and the Subcontractor protects the former from liability for workers' compensation claims and, as a consequence – so the argument goes – exposes it to tort liability. The Employee points out that the contract requires the Subcontractor to maintain workers' compensation insurance and to indemnify the Principal Contractor from any and all claims made by employees of the Subcontractor against the Principal Contractor. This, the Employee argues, proves that the Principal Contractor "cannot be sued for workers' compensation," which, according to the Employee, can only mean that the Principal Contractor is subject to liability in tort.

As stated by our Supreme Court, the purpose of Tenn. Code Ann. § 50-6-113 is "to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on the presumably responsible principal contractor, who has it within [its] power, in choosing

²Tenn. Code Ann. § 50-6-112(a) provides as follows:

When the injury or death for which compensation is payable under the Workers' Compensation Law, compiled in this chapter, was caused under circumstances creating a legal liability against some person other than the employer to pay damages, the injured worker, or such injured worker's dependents, shall have the right to take compensation under such law, and such injured worker, or those to whom such injured worker's right of action survives at law, may pursue such injured worker's or their remedy by proper action in a court of competent jurisdiction against such other person.

subcontractors, to pass upon their responsibility and insist upon appropriate compensation for their workers.” *Brown v. Canterbury Corp.*, 844 S.W.2d 134, 136 (Tenn. 1992) (quoting Larson, *Workmen’s Compensation*, § 49.14 (1991)); see also *Adams v. Hercules Powder Co.*, 175 S.W.2d 319, 323 (Tenn. 1943). By requiring the Subcontractor to maintain workers’ compensation insurance and to indemnify it against claims of employees, the Principal Contractor is not thereby shielded from a workers’ compensation suit on behalf of the Employee. On the contrary, the Principal Contractor was subject to suit by the Employee under the workers’ compensation scheme. The fact that the Employee pursued a workers’ compensation claim against his employer and its insurer and not against the Principal Contractor is immaterial; it only matters that the Employee had the right to recover workers’ compensation benefits from the Principal Contractor under the statute. This potential liability entitled the Principal Contractor to the protection of the exclusive remedy rule and shields it from tort liability.

We find no error in the trial court’s grant of summary judgment to the Principal Contractor.

III.

As to Knox-Tenn Rental, the Employee asserts that the trial court erred in dismissing his claim against that defendant. We disagree.

The Employee filed a product liability action³ against Knox-Tenn Rental, asserting that the defendant “knew or in the exercise of ordinary care should have observed and known of the defective character of the hydraulic system,” and that it should, “in the exercise of ordinary care, have taken reasonable precautions to see that the loader bucket did not fall.” The law is well-settled that a “seller” of a product cannot be held responsible for an injury caused by a defective product “unless the seller is also the manufacturer of the product or the manufacturer of the part thereof claimed to be defective,” or unless the manufacturer of the product is not subject to service of process in Tennessee or has been judicially declared insolvent. Tenn. Code Ann. § 29-28-106(b) (2000). “Seller” is defined to include “a lessor . . . engaged in the business of leasing . . . a product.” Tenn. Code Ann. § 29-28-102(7) (2000). Thus, as Knox-Tenn Rental did not manufacture any part of the Bobcat loader, and as there is nothing in the record to indicate that the manufacturer is insolvent or not subject to service, the trial court was correct in dismissing the Employee’s claim against Knox-Tenn Rental. See *Shoemake v. Omniquip Int’l, Inc.*, 152 S.W.3d 567, 572 (Tenn. Ct. App. 2003).

³Tenn. Code Ann. § 29-28-102(6) (2000) defines a “product liability action” as follows:

“Product liability action” for purposes of this chapter includes all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. “Product liability action” includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever;

The Employee advances other arguments in an attempt to salvage its claim against Knox-Tenn Rental. The correctness of these other arguments is rendered moot by our holding set forth in the preceding paragraph of this opinion.

IV.

The judgment of the trial court is affirmed. This case is remanded to the trial court for the collection of costs assessed below, pursuant to applicable law. Costs on appeal are taxed to the appellant, Jason Wayne Mouser.

CHARLES D. SUSANO, JR., JUDGE