IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

MICHAEL MARTIN,	)	
	)	
Plaintiff/Appellant,	)	**Shelby Circuit No. 45850 T.D.**
	)	
VS.	)	**Appeal No. 02A01-9404-CV-00077**
	)	
STEVE OWENS, d/b/a BLUFF CITY WINDOW-CLEANING and MEMPHIS PUBLISHING CO.,	)	
	)	
Defendants/Appellees.	)	

APPEAL FROM THE CIRCUIT COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE D'ARMY BAILEY, JUDGE

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AFFIRMED

ALAN E. HIGHERS, JUDGE

CONCUR:

W. FRANK CRAWFORD, JUDGE

DAVID R. FARMER, JUDGE

This suit arises out of injuries sustained by the plaintiff, who fell five stories to the ground when his window-washing equipment failed. This appeal challenges the decision of the circuit judge in granting defendant Memphis Publishing Company's motion for summary judgment.

In 1991, Memphis Publishing Company (hereinafter "MPC") contracted with Steve Owens d/b/a/ Bluff City Window Cleaning to perform exterior window cleaning of the MPC building at 495 Union Avenue in Memphis, Tennessee. Plaintiff, Michael Martin, was an employee of Owens. On May 1, 1991, as he was cleaning the windows of the MPC building, the support equipment that he was using failed. Plaintiff fell approximately five floors to the ground, sustaining several injuries. Owens, who did not carry workers' compensation for plaintiff, owned and maintained all of the support equipment used by plaintiff. Plaintiff originally brought this suit against both Owens and MPC, but Owens subsequently was discharged in bankruptcy and dismissed prior to this appeal.

The plaintiff contended in his complaint that MPC was negligent in several respects, including (1) failing to verify the credentials of defendant Owens, (2) failing to recognize Owens' inexperience, (3) negligent entrustment of an inherently dangerous activity, and (4) failing to verify Owens' insurance coverage.

Defendant MPC moved for summary judgment, simply relying on the record to establish that there existed no genuine issue of material fact. The trial court granted MPC's motion for summary judgment and this appeal followed.

Plaintiff has raised two issues for our consideration. First, plaintiff claims that the trial court erred in granting summary judgment in favor of MPC because MPC breached a nondelegable duty to plaintiff, as plaintiff was hired to perform inherently dangerous and hazardous work. Next, plaintiff asserts that the court erred in granting summary judgment because MPC is a statutory employer of plaintiff, and thereby is subject to the Tennessee Workers' Compensation Act.

When a party moves for summary judgment, a court must take the strongest

legitimate view of the evidence in favor of the nonmoving party and allow all reasonable inferences in favor of the opponent of the motion. Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993). Where there is no disputed issue of material fact, summary judgment should be granted by the lower court and sustained by the Court of Appeals. Graves v. Anchor Wire Co., 692 S.W.2d 420, 421 (Tenn. App. 1985). Moreover, summary judgment is proper where the nonmoving party cannot establish an essential element of his or her case. Byrd, 847 S.W.2d at 215. For instance, a defendant in an action for negligence would be entitled to succeed on a motion for summary judgment if the evidence shows that he owes no duty to the plaintiff. Id. at 215, n. 5.

The general rule in Tennessee is that an owner of land is required to use reasonable care to provide a safe place in which an independent contractor and his employees can work. Johnson v. Empe, Inc., 837 S.W.2d 62, 65 (Tenn. App. 1992); Jones v. City of Dyersburg, 440 S.W.2d 809, 825 (Tenn. App. 1968). There are, however, several exceptions to this general rule. One such exception is where the risks involved are intimately connected with or arise from a condition on the premises that the contractor has undertaken to repair. Shell Oil Company v. Blanks, 46 Tenn. App. 539, 541, 330 S.W.2d 569, 571 (1959); Womble v. J.C. Penny Co., 431 F.2d 985, 988 (6th Cir. 1970); Cincinnati, N.O. & T.P. Ry. v. Hall, 243 F. 76, 83 (6th Cir. 1917).

Perhaps the leading Tennessee case delineating this exception to the duty of reasonable care owed by the owner of premises to employees of independent contractors is Shell Oil Company v. Blanks. In Shell Oil, the Court stated:

> An exception to the general rule [of reasonable care] is recognized where the risks arise from, or are intimately connected with, defects of the premises or of machinery or appliances located thereon which the contractor has undertaken to repair. As to contracts for such repair work, it is reasoned that the contract is sufficient in itself to impart notice of a defect, the extent of which the repairman must discover for himself . . . This is merely to say that *one assumes the risk of a known danger or of an undertaking which is inherently dangerous.* Id. at 571 (emphasis added).

Similarly, the court in Jones v. City of Dyersburg, 440 S.W.2d 809 (Tenn.

App. 1968), reached the same result as did the court in Shell Oil, in holding that the owner of the premises, the city of Dyersburg, owed plaintiff no legal duty. Id. at 826. The plaintiff in Jones was an employee of a company that had subcontracted with the city to work on the city's electric system. Id. at 811. The plaintiff was injured during the course of his work and sued the city in negligence. Id. The court held that the plaintiff assumed the risk of injury when he voluntarily undertook to perform the inherently dangerous activity of working on electric lines. Id. at 826.

Prior to McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992), and its progeny, primary implied assumption of the risk operated as a complete bar to recovery by relieving a defendant of any legal duty to a plaintiff. Perez v. McConkey, 872 S.W.2d 897, 902 (Tenn. 1994). Since the decision of the Tennessee Supreme Court in Perez, however, primary implied assumption of the risk no longer serves as an alternate expression of the duty concept. Id. at 905. Rather, the common-law concept of duty should now be employed in those cases that would have previously been resolved under a primary implied assumption of the risk analysis. Id. The Court in Perez explained that if a plaintiff was formerly precluded from recovery based on primary implied assumption of the risk, the plaintiff will still be precluded from recovery under a common-law duty analysis. Id.

Although Shell Oil and subsequent decisions adhering to its principles speak in terms of primary implied assumption of the risk, which is now obsolete, these decisions retain vitality in that they continue to preclude recovery in cases where a plaintiff voluntarily undertakes a dangerous activity.

In the instant case, plaintiff voluntarily encountered the known dangers of washing the exterior windows of a building rising several stories high. We hold that, as a matter of law, MPC owed no legal duty to the plaintiff under these facts.

Plaintiff strives to bring this case within the purview of those decisions that heighten a landowner's duty where the landowner either conducts an inherently dangerous activity on his premises or maintains highly dangerous instrumentalities

thereon. A nondelegable duty has arisen in situations such as where the owner failed to warn plaintiff of a propane gas line on his property, Hutchison v. Teeter, 687 S.W.2d 286 (Tenn. 1985), and where the owner maintained a high voltage electric wire on its property. International Harvester Co. v. Sartain, 32 Tenn. App. 425, 222 S.W.2d 854 (1948).

Plaintiff argues that this is the type of case in which MPC was under a nondelegable duty to use the highest degree of care to protect those on its property. This argument is unpersuasive. Although newspaper publishing might be considered by some to be inherently dangerous, it is clearly not the type of activity contemplated by previous Tennessee decisions addressing nondelegable duties. MPC did not conduct any dangerous activity on its premises, nor did it maintain any dangerous instrumentalities. Any such alleged danger was both created and encountered by the plaintiff and/or his employer, Owens.

The second issue facing the Court is whether MPC was a "statutory employer" subject to the Tennessee Workers' Compensation Act. While the sole basis for liability under the Tennessee Workers' Compensation Act is the employer-employee relationship, Stratton v. United Inter-Mountain Telephone, 695 S.W.2d 944, 950 (Tenn. 1985), an injured employee can recover workers' compensation benefits from an employer other than his own immediate employer pursuant to Tennessee Code Annotated § 50-6-113. This section provides in part:

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

The effect of the above section is to create a "statutory employer" who will be liable for workers' compensation benefits in the event that recovery against the immediate employer is unavailable. This statute is designed to insure payment of benefits to injured workers by preventing employers from contracting out routine work in order to avoid liability for workers' compensation. Stratton, 695 S.W.2d at

951. An owner will be considered a "principal contractor" under the above statute and, therefore, liable under workers' compensation law, when the owner satisfies certain criteria. Id. at 950. The Tennessee Supreme Court set forth six factors that should be evaluated in determining whether one is a "statutory employer:" (1) right to control the conduct of the work, (2) right of termination, (3) method of payment, (4) whether the alleged employee furnishes his own helpers, (5) whether the alleged employee furnishes his own tools, and (6) whether the alleged employee is doing "work for another." Id. 950.[1]

While no single factor is dispositive, whether one has the "right to control" the alleged employee is the most critical inquiry. Galloway v. Memphis Drum Service, 822 S.W.2d 584, 586 (Tenn. 1991).

The record in this case reveals that plaintiff has satisfied only one of the above factors in attempting to establish that MPC had the right to control plaintiff's work. MPC admitted that it had the right to remove employees of Owens from the job, which satisfies the "right of termination" factor.

The right to terminate an employee is but one of six factors, and it is by no means dispositive. Wright v. Knoxville Vinyl & Aluminum Co., 779 S.W.2d 371, 374 (Tenn. 1989). The record demonstrates that plaintiff has failed to meet any other of the remaining five factors. As to the first factor, the "right to control the conduct of the work," MPC maintains that it did not have the right to control the means or methods of the performance of the work by plaintiff and plaintiff has adduced no evidence to the contrary. Furthermore, plaintiff admits that MPC did not supply either the helpers or the equipment, thus failing to meet the fourth factor. Finally, window-washing is not the type of work that is ordinarily performed by MPC

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[1]These factors were later codified at *Tennessee Code Annotated* § 50-6-102, which contains language virtually identical to that espoused by the Court in Stratton. This section provides: In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:

(A) The right to control the conduct of the work;
(B) The right of termination;
(C) The method of payment;
(D) The freedom to select and hire helpers;
(E) The furnishing of tools and equipment;
(F) Self scheduling of working hours, and
(G) The freedom to offer services to other entities.

employees and is certainly not with in the scope of MPC's regular business, which is publishing.

When the facts are undisputed, the issue of whether one is a statutory employer is one of law. Barber v. Ralston Purina, 825 S.W.2d 96, 100 (Tenn. App. 1991); Stratton, 695 S.W.2d at 953. In the present case, there is no dispute as to any material fact. The record is replete with evidence proving that MPC was not a "statutory employer" of plaintiff.

We therefore affirm the trial court's order granting defendant's motion for summary judgment. Costs of this appeal are taxed to plaintiff.

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HIGHERS, J.

CONCUR:

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CRAWFORD, J.

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FARMER, J.