

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-001875-MR

MICHAEL L. MITCHELL  
AND MARY MITCHELL

APPELLANTS

v. APPEAL FROM NELSON CIRCUIT COURT  
HONORABLE CHARLES C. SIMMS, III, JUDGE  
ACTION NO. 14-CI-00050

HOWARD'S HARDWARE  
& FARM SUPPLY, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: J. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michael L. Mitchell and Mary Mitchell (collectively referred to as the Mitchells) bring this appeal from a November 5, 2015, Summary Judgment of the Nelson Circuit Court in favor of Howard's Hardware & Farm Supply, Inc., and dismissing the Mitchells' claims. We affirm.

In early July 2013, a windstorm caused damage to the roof of an equipment shed located upon the farm of Jeffrey Goff and Sarita Goff (collectively referred to as the Goffs). Following the storm, Jeffrey Goff (Goff) contacted his brother-in-law, Charles Howard (Howard), regarding the damage to the roof. Howard owns and operates Howard's Hardware & Farm Supply, Inc. (Howard's Hardware), a local hardware store that sells a variety of building supplies. Goff intended to purchase the materials for repairing the roof from Howard and asked Howard to get estimates for the cost of labor.<sup>1</sup>

Shortly after Goff contacted Howard, Howard spoke with Michael Mitchell, a local carpenter and roofer. Howard explained to Mitchell that the roof of the Goffs' shed had been damaged by the windstorm and needed repair. Howard told Mitchell if he was interested in the job to provide a list of the necessary materials and submit his estimate for the cost of labor. Mitchell provided the list of materials and labor estimate to Howard's Hardware. Howard subsequently contacted Mitchell and told Mitchell he had the job repairing the Goffs' shed.

Shortly thereafter, Goff called Mitchell and informed him that the materials for repairing the roof had arrived at the farm. Mitchell replied that he could begin the repair on the following Monday. Mitchell began the repair as

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<sup>1</sup> Charles Howard frequently supplied his hardware store customers with the names of local contractors. Howard testified that upon request he would routinely supply his customers with the names of three local contractors capable of performing the particular work. All payments for services rendered by Michael L. Mitchell (Mitchell) were made directly by Jeffrey Goff to Mitchell.

planned. During Mitchell's second day on the job, part of the roof support structure failed causing Mitchell to fall through the roof and onto the shed floor. Mitchell suffered a spinal fracture, a pelvic fracture, and a shoulder injury as a result of the fall.

The Mitchells subsequently filed a complaint and amended complaint against the Goffs and Howard's Hardware. Therein, the Mitchells alleged that Howard's Hardware was negligent and breached a duty of care by failing to provide a reasonably safe work environment for Mitchell. The Mitchells further asserted that Mitchell was an independent contractor working under the supervision of a general contractor, Howard's Hardware.

The Mitchells eventually settled with the Goffs, and the Goffs were dismissed from the circuit court action by order entered September 14, 2015. Howard's Hardware subsequently filed a motion for summary judgment arguing that it was not a general contractor and did not owe a duty of care to Mitchell. By order entered November 5, 2015, the circuit court granted summary judgment in favor of Howard's Hardware. The circuit court concluded as a matter of law Howard's Hardware was not a general contractor and, thus, dismissed the Mitchells' claims. This appeal follows.

Summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure 56; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). All facts and inferences therefrom are to be viewed in a light most

favorable to the nonmoving party. *Steelvest, Inc.*, 807 S.W.2d 476. However, it is well-established that the question of the existence of a duty presents an issue of law for the court. *Mason v. City of Mt. Sterling*, 122 S.W.3d 500 (Ky. 2003). Our review proceeds accordingly.

The Mitchells contend the circuit court erred by granting the motion for summary judgment in favor of Howard's Hardware. The Mitchells assert that Howard's Hardware was the general contractor on the job and, thus, was liable to Mitchell, the subcontractor, for his injury.<sup>2</sup> In particular, the Mitchells assert that Howard's Hardware violated certain provisions of the Occupational Safety & Health Administration (OSHA) and the Kentucky Occupational Safety and Health Administration (KOSHA), which require an employer to provide a fall protection system to an employee if the work surface is more than six feet from the ground or next lower surface. For the following reasons, we hold that Howard's Hardware owed no duty to Mitchell under OSHA or KOSHA.

In Kentucky, KRS Chapter 338, Occupational Safety, and Health of Employees, was enacted with the intended purpose of promoting:

[T]he safety, health and general welfare of its people by preventing any detriment to the safety and health of all employees, both public and private, covered by this chapter, arising out of exposure to harmful conditions and practices at places of work . . . .

KRS 338.011. *See Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005). To carry out the purpose of Chapter 338, the Kentucky Occupational Safety and Health Standards

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<sup>2</sup> There were no written contractual agreements entered into by Mitchell and Jeffrey Goff and Sarita Goff or Mitchell and Howard's Hardware & Farm Supply, Inc.

Board is directed to “adopt and promulgate occupational safety and health rules, regulations, and standards.” KRS 338.051(3). More specifically, KRS 338.061 provides that the Board may adopt the established federal standards as set forth in OSHA. Thus, KOSHA is “substantially identical” to OSHA. *Dept. of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131, 135 (Ky. App. 2011).<sup>3</sup>

Under KOSHA and OSHA, the Kentucky Court of Appeals has recognized that an employer must comply with a “general duty” and a “special duty”:

[O]bligations are imposed on employers to comply with a “general duty clause” requiring that the employer free the workplace of all recognized hazards, 29 U.S.C. § 654(a)(1), and a “special duty clause” which requires compliance with mandatory occupational safety and health standards issued by the Secretary, 29 U.S.C. § 654(a)(2). *Brock v. L.E. Myers Co., High Voltage Div.*, 818 F.2d 1270, 1275 (6th Cir.1987). The general duty clause was enacted to cover serious hazards not otherwise covered by specific regulations. *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799 (6th Cir.1984). Because Hayes was cited for violating a specific duty under KOSHA, we are not concerned with the general duty clause.

*Hayes Drilling, Inc.*, 354 S.W.3d at 135. As in *Hayes*, Mitchell is asserting that Howard’s Hardware breached a “specific” or “special” duty provision of KOSHA, set forth in 803 Kentucky Administrative Regulations (KAR) 2:412; thus, our inquiry will focus upon such special duty. *See Hayes Drilling, Inc.*, 354 S.W.3d 131.

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<sup>3</sup> As the Kentucky Occupational Safety and Health Administration (KOSHA) and Occupational Safety and Health Administration (OSHA) are “substantially identical,” our courts have relied upon federal case law when interpreting KOSHA, and we will also do the same. *See Dept. of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131 (Ky. App. 2011).

The special duty provision contained in 803 KAR 2:412 requires an employer to provide a fall protection system to each employee who performs work on a surface of more than six feet from the ground or next lower surface. To resolve this appeal, the pivotal issue presented is whether Howard's Hardware is an employer within the meaning of 803 KAR 2:412 and, thus, was required to provide such fall protections system. For the following reasons, we do not believe Howard's Hardware is an employer within the meaning of 803 KAR 2:412.

Under KOSHA, it is firmly established that a general contractor may be deemed an employer<sup>4</sup> responsible for the safety of an independent contractor if such employer or general contractor is in control of the workplace area or creates a worksite safety hazard. *Hayes Drillings, Inc.*, 354 S.W.3d 131; *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005); *see also Universal Const. Co, Inc., v. Occupational Safety and Health Review Comm'n*, 182 F.3d 726 (10<sup>th</sup> Cir. 1999).

Viewing the facts most favorable to Mitchell, we do not believe that Howard's Hardware qualifies as a general contractor. It is clear from the record on appeal that Howard's Hardware is a retail business that sells building materials to customers, including construction contractors and laborers. Howard's Hardware does not engage in commercial or residential constructions. In this case, a member of the business simply made a referral to an experienced carpenter. At no time was

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<sup>4</sup> Pursuant to Kentucky Revised Statutes (KRS) 338.015(1) an employer is defined as "any entity for whom a person is employed except those excluded in KRS 338.021." KRS 338.021 essentially excludes from the definition of "employer" the United States government and any place of employment that another federal agency proscribes safety standards OSHA exercises authority to proscribe or enforce standards or regulations.

Howard's Hardware in control of the worksite at the Goffs' residence. The facts reflect that Howard's Hardware merely contacted Mitchell on behalf of Goff, requested an estimate, and delivered materials to the worksite. Howard's Hardware never possessed any control over the worksite, and most importantly in this case, did not create the hazard that caused the shed's roof to fail leading to Mitchell's injury. Howard's Hardware was not Mitchell's employer nor was it a general contractor for the Goffs' project as a matter of law. Accordingly, we hold that Howard's Hardware owed no duty to Mitchell under OSHA or KOSHA and that the circuit court properly rendered summary judgment.

For the foregoing reasons, the Summary Judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT  
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