

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001427-MR

RONNIE LEE SIZEMORE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 00-CI-00444

D.W. WILBURN, INC.,
AND DIAMOND ELECTRICAL INC.

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, COMBS, AND JOHNSON, JUDGES.

BARBER, JUDGE: The Appellant, Ronnie Lee Sizemore ("Sizemore"), seeks review of a summary judgment entered in favor of the Appellees, D.W. Wilburn, Inc. ("Wilburn"), and Diamond Electrical, Inc., ("Diamond"). Finding no error, we affirm.

On May 12, 1999, Sizemore, an employee of Simplex Time Recorder, was injured in the course and scope of his employment while installing a fire alarm component. Sizemore pursued workers' compensation benefits for these injuries. He also filed a complaint in the Pulaski Circuit Court against Wilburn and Diamond for negligence. Wilburn and Diamond filed answers

raising the exclusive remedy provision of the Kentucky Workers' Compensation Act, KRS 342.690, as a bar to Sizemore's claims.

On March 29, 2000, Wilburn filed a motion for summary judgment on the ground that it was immune from tort liability under the Kentucky Workers' Compensation Act, KRS Chapter 342. Wilburn maintained that it was the general contractor on a project at Hopkins Elementary School in Somerset, Kentucky, that Diamond was the electrical subcontractor, and Diamond subcontracted part of its electrical work to Simplex. Sizemore's particular job included installing conduit lines at the elementary school. Wilburn contended that the electrical lines necessary to provide power to the school and the addition/renovation thereto had to be enclosed by conduit lines, as a matter of safety, as a regular and recurrent part of Wilburn's business as a general contractor. Diamond filed a motion for summary judgment, adopting the memorandum of law filed by Wilburn.

On May 4, 2001, Sizemore filed a response, stating that he had "no reason to dispute" that Wilburn was the general contractor and that Diamond was the electrical subcontractor of Wilburn; however, Sizemore asserted that he had no information that Simplex was the subcontractor of Diamond, or that the installation of fire alarm systems was a regular or recurrent part of Diamond's business. Sizemore contended that this constituted a question of fact making summary judgment improper.

On June 1, 2001, the trial court granted summary judgment in favor of Wilburn and Diamond:

Both Defendants urged the Court to grant summary judgment on the basis of KRS 342.610(2)(b), and KRS 342.690(1). The former statute provides that the employer liable for workers' compensation benefits to an injured employee includes a contractor who has contracted with another person, or firm, 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' the contractor. KRS 342.700(2) makes it clear that a principal contractor, such as D.W. Wilburn, Inc., is liable for workers' compensation benefits to an employee (such as Sizemore) injured while in the employment of any intermediate or subcontractors engaged upon the subject matter of the contract. Thus, D.W. Wilburn, Inc. and Diamond Electrical, Inc. would be liable to Sizemore for workers' compensation benefits if he was injured while engaged in the subject matter of the contract, and if the work he was performing is 'of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of D.W. Wilburn, Inc. or Diamond Electrical, Inc. KRS 342.690(1) provides that liability of' any such contractor or subcontractor covered by KRS 342.610(2) is limited to the recovery of workers' compensation benefits under KRS chapter 342.

In support of their demand for summary judgment, the Defendants claim, obviously, that there is no genuine issue as to any material fact relevant to the claim that the Plaintiff cannot seek tort recovery against the contractor and subcontractor, the so-called 'up the ladder' theory of immunity from tort liability. There is no genuine issue as to the fact that Ronnie Lee Sizemore was an employee of Simplex Time Recorder, that he was injured on the job, and that he was awarded workers' compensation benefits. There is no genuine issues to the fact that Simplex Time Recorders was the subcontractor of Diamond Electric, Inc., who in turn was a subcontractor of D. W. Wilburn, Inc. There is no genuine issue as to the fact that all of the parties were engaged in the construction of an addition to a school building in Somerset, Kentucky, and that D. W. Wilburn, Inc. was the general contractor for that job. It is the Plaintiff's

contention that summary judgment is not appropriate because there is a genuine issue of fact about whether or not the work being done by the Plaintiff (the installation of a fire alarm system) is 'of a kind which is a regular or recurrent part of the work of the business of' either Defendant, Diamond Electric, Inc. or D. W. Wilburn, Inc.

To constitute a genuine issue of material fact, one of two circumstances must exist. One circumstance occurs when conflicting evidence as to a material issue of fact exists. The fact cannot be determined until the conflict [sic] in the evidence is resolved, ordinarily through trial. The other circumstance is when the evidence which exists, though not in conflict, reasonably gives rise to two competing inferences. Neither situation seems to exist here. There is no suggestion in the pleadings that conflicting evidence exists on the question of what work the Plaintiff was doing when he was injured. There is no suggestion in the record that any evidence can be established which places into controversy the issue of what the business of D. W. Wilburn, Inc. and Diamond Electric, Inc. is. It also appears to the Court that there is [sic] no competing inferences which arise from the known facts. The question is whether or not the installation of a fire alarm system is a regular or recurrent part of the work of constructing an addition to a school building and supplying and installing the electrical systems and components of such an addition. One could not reasonably infer that the installation of a fire alarm system is not a regular part of the work of constructing a school addition. . . . That is, without dispute, the kind of work that is a regular part of the construction of any building, but especially a school building because the law requires alarm systems in school buildings. The Court concludes that there is no reasonable grounds for dispute,

. . . .

The case of Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378 (1992) . . . heavily relied upon by the Plaintiff [involves] . . . circumstances . . . [which are] substantially different.

. . . .

. . . . There is no ambiguity about the business of D. W. Wilburn, Inc., Diamond Electric, Inc. or the work being performed by Ronnie Lee Sizemore from which a genuine issue of fact can arise.

The Court concludes that the Defendants are entitled to summary judgment as a matter of law.

Sizemore filed a notice of appeal to this Court on June 28, 2001. On appeal, Sizemore argues that he was not, "as a matter of law," performing a regular or recurrent part of the appellees' business or trade; that "regular or recurrent" is a question of fact; and that summary judgment was improper because there was a material issue of fact in regard to the regular or recurrent business of the appellees. The trial court thoroughly analyzed the issues and correctly applied the law. We cannot improve upon the trial court's reasoning and adopt it as our own.

Hence, we affirm the judgment of the Pulaski Circuit Court entered June 1, 2001.

ALL CONCUR.

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