RENDERED: October 18, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002246-MR

DONNA HARGIS, INDIVIDUALLY AND
DONNA HARGIS AS ADMINISTRATRIX OF
THE ESTATE OF DARRELL RUBEN HARGIS, DECEASED;
ZACHARY HARGIS, A MINOR, AND
CHRISTIAN HARGIS, A MINOR, THROUGH
DONNA HARGIS AS NEXT FRIEND — APPELLANTS

APPEAL FROM MUHLENBERG COUNTY CIRCUIT COURT
v. HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 99-CI-00515

ALLEN R. BAIZE,
D/B/A GREENVILLE LOG AND LUMBER;
AND BAIZE FOREST PRODUCTS, INC. — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, HUDDLESTON AND MILLER, JUDGES.

BARBER, JUDGE: The Appellants, Donna Hargis, individually and as Administratrix of the Estate of Darrell Ruben Hargis, deceased; Zachary Hargis, a minor and Christian Hargis, a minor, through Donna Hargis, as Next Friend ("Appellants"), seek review of an order of the Muhlenberg Circuit Court granting summary judgment in favor of the Appellees, Allen R. Baize d/b/a Greenville Log and Lumber and Baize Forest Products ("Appellees"). Finding no error, we affirm.

The essential facts are not in dispute. On November 24, 1998, the decedent, Darrell Hargis, ("Hargis") a truck driver, was struck and killed by a log which fell from a trailer he was unloading on Appellees' premises. On November 19, 1999, Appellants filed a complaint in the Muhlenberg Circuit Court alleging that on the date of his death, Hargis "was acting as an independent contractor delivering raw wood product to the Defendants, Greenville Log and Lumber and/or Baize Forest Products, Inc., and as an independent contractor had permission to be on the property." Appellants alleged, *inter alia,* that Hargis's "injuries and death were the proximate result of Defendants' negligence" and that "Defendants failed to comply with certain administrative regulations"[1] constituting negligence *per se.*

On May 24, 2001, Appellees moved for summary judgment, asserting that Hargis had signed a release absolving them from any liability; that Appellants' acts or omissions were not the proximate cause of Hargis's death; and that Appellants' claim of statutory negligence must fail, because OSHA and KOSHA apply to employers and employees, and Hargis was an independent contractor. Appellants filed a cross-motion for summary judgment on the issue of negligence per se.

On October 9, 2001, the trial court entered an order granting summary judgment in the Appellees' favor:

[1] Specifically, the Kentucky Occupational Safety and Health Act (KOSHA), 803 KAR 2:317; and the federal Occupational Safety and Health Act (OSHA), 29 C.F.R. § 1910.265.

> Plaintiffs' decedent, Darrell Hargis, was an independent contractor working for Defendant, Greenville Log and Lumber. On the date of his death, Darrell Hargis, was hauling lumber from a business in Campbellsville, Kentucky, to Greenville Log and Lumber . . . . When he arrived at Greenville Log and Lumber, Hargis unstrapped his load of lumber. As he unstrapped his load [sic], Hargis was hit and killed by a falling log. Hargis had overloaded his haul, meaning that when his truck was loaded the logs exceeded the height of the standards on the truck.
>
> The owner of premises, such as Greenville Log and Lumber, owes a duty to an independent contractor, such as Darrell Hargis. That duty is set forth in Ralston Purina Co. v. Farley, Ky. 759 S.W.2d 588 [589] (1988):
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> > The owner of premises is not responsible to an independent contractor for injury from defects or dangers which the contractor knows of, or ought to know of. But if the defect or danger is hidden or known to the owner, and neither known to the contractor, nor such as he ought to know, it is the duty of the owner to warn the contractor.
>
> Accordingly, Greenville Log and Lumber was under no duty to warn Hargis of the danger which Hargis knew, or ought to know. The danger was created by Hargis as it was Hargis who caused the truck to be overloaded. Additionally, Hargis had been advised by Greenville Log and Lumber personnel that it was dangerous. Further, as a matter of law, the alleged negligence on the part of the Defendants as stated by the Plaintiffs was not a substantial factor in causing the accident. The approximate [sic] cause of the accident was Hargis overloading his truck and unstrapping the binders.

The trial court considered two remaining issues, noting that their resolution was not necessary to dispose of the motion for summary judgment. The court considered the release Hargis had signed to be an enforceable contract, supported by

consideration and not against public policy; further, that Hargis was an independent contractor, not an employee, thus a negligence *per se* argument for violation of OSHA/KOSHA did not apply.

On October 17, 2001, Appellants filed a notice of appeal to this Court. On appeal, Appellants assert:

> (1) That they are entitled to summary judgment on the issue of negligence per se;
>
> (2) That it was error to grant summary judgment, because Appellees failed in their duty to warn Hargis; or that "at the very least" it was for the jury to decide whether a warning had been provided.
>
> (3) That it was error to grant summary judgment, because violation of OSHA and KOSHA establishes proximate cause.
>
> (4) That it was error to conclude that the document signed by Hargis was a valid contract and release; in the alternative, that it was void.

The standard of review 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. There is no requirement that we defer to the trial court, because factual findings are not at issue.[2]

We shall address the second issue first. Appellants argue that Appellees failed to establish that they had warned Hargis about the log loads or that -- at the very least -- the sufficiency of the warning was for a jury to decide. Appellants

[2] Scrifes v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

appear to have misperceived the basis for the trial court's ruling. The trial court entered summary judgment for Appellees on the ground that they had ***no duty to warn,*** citing Ralston Purina, supra. Appellants do not contend that Hargis was unaware of the danger; to the contrary, Appellants acknowledge that Robbie Baize testified that he had talked to Hargis about his log loads. The trial court correctly determined that Appellees had no duty to warn Hargis of a danger which he knew, or ought to have known, under the undisputed facts of this case.

Appellants also assert that proximate cause was established "as a matter of law," because OSHA and KOSHA violations must be considered as the proximate cause of the injury, where the injury complained of is one intended to be prevented by the statute. The trial court rejected this argument because Hargis was not a member of the protected class, citing Carman v. Dunaway Timber Co.[3]

Louis Carman was a logger, who purchased standing timber from property owners, cut it and sold the logs to timber mills. On the date of the accident, he was delivering a load of logs to Dunaway's mill. Carman's son, Doug Carman, had loaded the logs onto Carman's truck, which were secured by chains fastened to the truck by chain binders. The chains and binders were applied to the load by Doug Carman's employees. One of those employees, a man named Woods, rode with Louis Carman to

[3] Ky., 949 S.W.2d 569 (1997).

Dunaway's place of business so that Carman could give him a ride home after the logs were delivered and sold.

Dunaway's policy required all loggers to unchain their own loads before Dunaway would accept ownership of the logs. Once unchained, Dunaway would unload the logs with a front-end loader. Pursuant to this policy, Carman and Woods proceeded to remove the binders and unchain the logs. Woods loosened the binders and Carman removed the chains by pulling them. When the middle chain was released, a log fell from the truck and struck Carman, severely injuring him.

Carman premised his action on Dunaway's failure to comply with certain administrative regulations promulgated pursuant to KOSHA, specifically 803 KAR 2:317. This regulation is an incorporation by reference of a federal regulation promulgated pursuant to the federal OSHA, 29 C.F.R. § 1910.265(d)(1)(i)(b).[4] The regulation provides that binders shall not be released prior to securing the logs with unloading lines or other unloading device. The Appellant argued that the regulation established Dunaway's standard of care and that the violation of this regulation constituted negligence per se.

The Supreme Court explained that in order for a violation of a regulation to constitute negligence per se, the plaintiff must be a member of the class of persons intended to be protected by the regulation, ***and*** the injury suffered must be an event which the regulation was designed to prevent. If both

[4] The same regulations which Appellants maintain apply in this case.

elements are present, negligence per se is established and the applicable regulation defines the relevant standard of care. However, Louis Carman was not a member of the class of persons intended to be protected, because he was not an employee of Dunaway. The Court explained that:

> KRS 338.011 clarifies that the purpose of the Kentucky Occupational Safety and Health Act is the prevention of "any detriment to the safety and health of all *employees,* both public and private, covered by this chapter . . . ." (Emphasis added.) KRS 338.031(1)(a) requires each employer to "furnish to each of his *employees* employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his *employees.*" (Emphasis added.) KRS 338.015(2) defines an "employee" as "any person employed . . . ", and KRS 338.015(1) defines an "employer" as "any entity for whom a person is employed . . . ." Louis Carman was not an employee, and certainly not Dunaway's employee; thus, he was not within the class of persons which the KOSHA regulations were designed to protect.[5]

The Supreme Court also explained that Teal v. E.I. DuPont de Nemours and Company,[6] did not apply. Teal would extend the coverage of the federal OSHA to *employees* of independent contractors who work at another employer's workplace; however, Carman, was not an employee of an independent contractor. Neither was Hargis.

We fully agree with Appellees that Carman is "directly on point and controls the outcome in this case." Therefore, we

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[5] Carman at 570.
[6] 728 F.2d 799 (6th Cir. 1984); Teal is also relied upon by Appellants.

do not find it necessary to reach the remaining issues Appellants have raised. We affirm the Order of the Muhlenberg Circuit Court granting summary judgment for Appellees.

HUDDLESTON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS BY SEPARATE OPINION:

MILLER, JUDGE, CONCURRING: I concur in the majority opinion, but wish to make an observation.

It seems reasonable to me that OSHA/KOSHA protection should be extended to both subcontractors and employees of subcontractors in order to further the intent of the acts. I liken this to an employer's responsibility, under the Workers' Compensation Act, to employees of an uninsured subcontractor.

Nevertheless, the Supreme Court has addressed the issue in the case of Carman v. Dunaway Timber Company, Inc., Ky., 949 S.W.2d 569 (1997). I perceive that case to be indistinguishable. We are bound under the authority of SCR 1.030(8)(a).

BRIEFS FOR APPELLANT:

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ORAL ARGUMENT FOR APPELLANT:

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BRIEF FOR APPELLEE:

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ORAL ARGUMENT FOR APPELLEE:

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