RENDERED: DECEMBER 5, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-000588-MR

JAMES D. CRIDER, SR., AND
SHARON MILLS, CO-EXECUTORS
OF THE ESTATE OF JAMES D. CRIDER, JR. APPELLANTS

v. APPEAL FROM LINCOLN CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 02-CI-00070

MONARCH ENGINEERING INC.;
DAVID M. BOWLES; DERON BYRNE;
ALLAN FARRIS; CALDWELL TANKS INC.;
RUSTY SPANGLER; BRYANT WILLIARD;
JOHN HAVRON; WESTERN ROCKCASTLE
WATER ASSOCIATION INC.; AND CHARLES
D. BURTON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND STUMBO, JUDGES; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

CLAYTON, JUDGE: The parents of decedent James D. Crider, Jr. bring this appeal from a decision of the Lincoln Circuit Court finding that the action brought by the appellants should be dismissed. We agree with the decision of the trial court.

FACTUAL SUMMARY

Mr. Crider was a 32-year-old painter who died as the result of a fall while he was working on a water tower. His parents brought a wrongful death action in the Lincoln Circuit Court arguing that one or all defendants were liable for negligence which caused his death. The defendants were Western Rockcastle Water Association Inc. ("Western") and its president, Charles Burton; Monarch Engineering ("Monarch") and its employees Allan Terry Farris, David Michael Bowles and Deron Byrne; Caldwell Tanks Inc. ("Caldwell") and its employees, John Havron, Rusty Spangler and Bryant Williard.

Western contracted to have the water tower erected on its property. It hired Monarch to develop the plans and specifications for the tower. Caldwell actually constructed the water tower. Mr. Crider was an employee of Select Coatings, Inc., which contracted with Caldwell to perform the painting on the water tower. The appellants filed a workers' compensation claim and received benefits from the insurer of Select, AmComp.

The Appellants brought an action asserting that their son was a business invitee at the worksite and that all the appellees owed him a duty to exercise reasonable care in making the premises safe for his use. They argue that

this duty included the duty to investigate and discover unsafe conditions on the premises and to make them safe or to warn Mr. Crider of any such conditions.

The trial court granted summary judgment to Caldwell and dismissed Monarch and Western. This appeal followed.

STANDARD OF REVIEW

An appellate court's role in reviewing a summary judgment is to determine whether the trial court erred in determining that no genuine issue of material fact exists and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). A summary judgment is reviewed *de novo* because factual findings are not at issue. *Pinkston v. Audubon Area Community Services, Inc.,* 210 S.W.3d 188 (Ky. App. 2006), *citing Blevins v. Moran,* 12 S.W.3d 698 (Ky. App. 2000). Summary judgment is proper where there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476 (Ky. 1991).

"In the context of a motion to dismiss for failure to state a claim upon which relief can be granted, the analysis is somewhat different. 'The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.' In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the

plaintiff be entitled to relief?" *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (quoting *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)).

A trial court should not grant a motion to dismiss "unless it appears that the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Id.* Allegations made in the pleadings are taken as true and must be liberally construed in the light most favorable to the plaintiff. *Gall v. Scroggy*, 725 S.W.2d 867 (Ky. App. 1987). The granting of a motion to dismiss is subject to *de novo* review. *James*, *supra*; *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717 (Ky. 2000).

DISCUSSION

In granting Caldwell's motion for summary judgment, the trial court held that:

> [T]here is no genuine issue as to the material facts that establish as a matter of law that Caldwell Tanks, Inc. is a contractor within the meaning of the provisions of KRS Chapter 342, that workers' compensation benefits to which the decedent and his estate are entitled were in fact provided, that the work being performed by James Crider, Jr. at the time of his death is a regular or recurrent part of the work of the trade of constructing water storage facilities, and that therefore, as a matter of law, Caldwell Tanks, Inc. and its employees are entitled to invoke the immunity from tort liability which is afforded to them under the provisions of KRS Chapter 342.

Order at p. 6.

KRS 342.690 provides that:

> (1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his . . . parents . . . and anyone otherwise entitled to recover damages from such employer at law . . . on account of such injury or death.

Under this provision, an employee or his representative's only remedy in an accident while he was performing his duties as an employee against his employer is through workers' compensation. Select was a sub-contractor on the water tower project and, consequently, KRS 342.610 applies. It provides that:

> (2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:
>
> . . . .
>
> (b) 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 such person
>
> shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

In this action, Select was the subcontractor for Caldwell. Caldwell's business is the fabricating and construction of water tanks. The appellants contend that the trial court erred in determining that the painting of the water tanks would

be a regular or recurring part of Caldwell's business. Also, they assert that such is a question of fact for a jury to decide rather than a legal question for the court.

In *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986), the Supreme Court of Kentucky held that a job could be regular or recurring even if the contractor never used his own employees to fill the job. The painting of a water tank would be work which would be a recurrent part of the business of constructing water tanks. Select was hired by Caldwell to perform the job and Select had workers' compensation coverage. Thus, the Lincoln Circuit Court was correct in holding that Caldwell and its employees were immune from suit based upon the exclusive remedy provisions of the Kentucky Workers' Compensation Statutes.

The trial court also held that KRS Chapter 342 workers' compensation provisions precluded the appellants' suit in tort against Monarch.

The trial court dismissed Western and Charles Burton as defendants in its order dated April 18, 2002. The court found that Western could not legally be held responsible for actions of its subcontractors. The appellants assert that the trial court should not have dismissed Western and Mr. Burton due to the agency relationship between Western and Monarch which imposed vicarious liability on Western. In support of this argument, they point first to the contract between Western and Monarch. Appellants contend that Western had constructive notice of the water tower's dangerous conditions because Monarch was aware of them.

Agency is a fiduciary relationship which results from the manifestation of consent by the principal to the agent that the agent may act on behalf of the principal subject to control and consent by the agent to act. *Thomas v. Hodge*, 897 F. Supp. 980 (W.D.Ky. 1995). The existence of a principal/agent relationship is a legal issue with the burden of proving the agency relationship placed upon the party asserting that it exists. *Wright v. Sullivan Payne Co.,* 839 S.W.2d 250 (Ky. 1992).

The appellants point to the contract between Western and Monarch as an indication of agency; however, they do not allege specific facts and have failed to sustain their burden of proof. Thus, the trial court correctly concluded that Western and Monarch had no agency relationship and that Western could not be held vicariously liable.

Finally, appellants contend that Western was liable as Mr. Crider was a business invitee on the premises. They argue that Western had a duty to make the premises safe for his use during his time there. Specifically, appellants argue that Western knew of the danger of the lack of grate in the water tower, but did nothing to protect Mr. Crider.

"An invitee enters upon the premises at the express or implied invitation of the owner or occupant on business of mutual interest to them both, or in connection with business of the owner or occupant." *Scuddy Coal Co. v. Couch,* 274 S.W.2d 388, 390 (Ky. 1955). Mr. Crider was an employee of a subcontractor working on the construction project of Western.

In *Ralston Purina Co. v. Farley*, 759 S.W.2d 588-89 (Ky. 1988), the Court found that an owner was under a duty to advise a contractor of any hidden dangers on the property of which are known or should be known to the owner. The lack of a grate in the water tower project was not a hidden danger, thus, the trial court was correct in granting summary judgment on the issue of premises liability.

We find the appellant's argument regarding the unconstitutionality of the Workers' Compensation Law to be without merit.

We affirm the trial court's decision in its entirety.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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BRIEF FOR APPELLEES MONARCH ENGINEERING INC., DAVID M. BOWLES, DERON BYRNE, ALLAN FARRIS, WESTERN ROCKCASTLE WATER ASSOCIATION INC., CHARLES D. BURTON:

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BRIEF FOR APPELLEES CALDWELL TANKS INC., RUSTY SPANGLER, BRYANT WILLIARD, JOHN HAVRON:

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