IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01904-COA

EDWARD L. MONTEDONICO, TRUSTEE FOR THE BANKRUPTCY ESTATE OF MICHAEL JEFFERIES — **APPELLANT**

v.

MT. GILLION BAPTIST CHURCH — **APPELLEE**

DATE OF JUDGMENT:	11/10/2009
TRIAL JUDGE:	HON. JAMES MCCLURE III
COURT FROM WHICH APPEALED:	PANOLA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	D. REID WAMBLE
ATTORNEYS FOR APPELLEE:	GOODLOE TANKERSLEY LEWIS JOSIAH DENNIS COLEMAN
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT FOR DEFENDANT
DISPOSITION:	REVERSED AND REMANDED: 03/15/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, J., FOR THE COURT:

¶1. Edward Montedonico, trustee for Michael Jefferies's bankruptcy estate, filed suit against Mount Gillion Baptist Church in the Circuit Court of Panola County. He alleged that the church had negligently provided Jefferies, an independent contractor, with a defective ladder that caused Jefferies's injuries. The circuit court granted summary judgment in favor of the church, and the trustee now appeals. The trustee argues the circuit court erred when it found that the danger was inherent to Jefferies's work and that Jefferies had assumed the

risk. We agree; therefore, we reverse the judgment of the circuit court and remand this case for further proceedings consistent with this opinion.

FACTS

¶2. The church contracted with ADT for the provision of a security alarm in the church's gymnasium. ADT subcontracted with Eagle Security Systems, Inc. to install the alarm. Jefferies, an employee of Eagle Security, was sent to perform the installation.

¶3. The job required an extension ladder, but Jefferies did not have one. Jefferies testified in a deposition that he was initially going to turn down the job for that reason, but another employee for Eagle Security called the church and then told Jefferies there would be a ladder at the gym for him to use when he arrived. George Fondren, a deacon at the church, testified in an affidavit that he borrowed an extension ladder from another church member and provided it to Jefferies when Jefferies arrived at the gym. Jefferies stated that the ladder was lying on the gym floor when he arrived. Both Fondren and Jefferies said that they examined the ladder and found nothing wrong with it.

¶4. Jefferies proceeded with the installation, using the ladder. He went up and down the ladder approximately fifteen to twenty times without incident and had nearly completed the job. He went up the ladder again to finish running some wires. This time, on his way back down, something happened to cause the ladder to fall to the ground with Jefferies still clinging to it. Jefferies testified that the ladder "just went."

¶5. He testified that he looked around to figure out what had caused the fall and discovered that the ladder was missing a rubber grip on one of its legs. These grips are placed at the bottom of ladder legs to prevent them from slipping on smooth surfaces. He

alleges that the ladder slid along the gym floor because it was missing a grip. Jefferies testified that, as a result of the fall, he suffered a "severely shattered right wrist" and a dislocated elbow.

¶6. The trustee filed suit against the church. The church moved for summary judgment, which was granted. The trustee now appeals.

STANDARD OF REVIEW

¶7. The standard of review of an order granting summary judgment is de novo. *PPG Architectural Finishes, Inc. v. Lowery,* 909 So. 2d 47, 49 (¶8) (Miss. 2005) (citing *Hurdle v. Holloway*, 848 So. 2d 183, 185 (¶4) (Miss. 2003)). It is well settled that "[a] summary judgment motion is only properly granted when no genuine issue of material fact exists. . . . The moving party has the burden of demonstrating that no genuine issue of material fact exists within the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits.'" *Id*. (quoting M.R.C.P. 56(c)).

ANALYSIS

¶8. The circuit court found that Jefferies, an independent contractor, had no right to recover from the church. Specifically, the court found that the danger of falling while on a ladder was inherent Jefferies's work of installing security alarms. The court also found that Jefferies had assumed the risk of falling while on the ladder. We do not agree.

1. Whether the danger was inherent to Jefferies's work.

¶9. To support its holding that the danger was inherent to Jefferies's work, the circuit court cited *Vu v. Clayton*, 765 So. 2d 1253 (Miss. 2000). In that case, the Mississippi Supreme Court found that an air-conditioner repairman could not recover from the owners

of a restaurant who had hired him to fix their air conditioner. *Id*. at 1254 (¶2). The repairman had to go into the restaurant's attic to reach the air conditioner. *Id*. He fell through a hole in the attic's flooring, injured himself, and sued the restaurant owners. *Id.* The supreme court held that the danger of falling through the attic's flooring was inherent to the repairman's work; therefore, he could not recover from the restaurant owners. *Id.* at 1256-57 (¶15).

¶10. There is an important difference between *Vu* and this case. In *Vu*, the allegation was that the restaurant owners had breached their duties to provide the repairman with a safe workplace or to warn him of the danger. In other words, it was a premises-liability case. In this case, the allegation is that the church provided Jefferies with a defective instrumentality. The danger of being provided a defective instrumentality by the employer is not inherent to the work of an independent contractor.

¶11. "The duty to furnish a safe place of work is distinguishable from the duty to furnish safe appliances and instrumentalities for the purposes of the stipulated work." 31 A.L.R. 2d 1375 (1953). "Where an employer undertakes or agrees to furnish an independent contractor any of the instrumentalities with which the work is to be carried on, the employer owes to the contractor and the contractor's employees the duty of exercising reasonable care with respect to such instrumentalities." 41 Am. Jur. 2d *Independent Contractors* § 42 (2005).

¶12. The governing authority here is *Oden Construction Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969). In that case, a general contractor and a subcontractor were installing steel beams on a construction project. *Id.* at 586-87. The general contractor would bore holes in the walls, and the subcontractor would follow behind and install the beams into the holes.

Id. The general contractor erected the necessary scaffolding. *Id.* The scaffolding collapsed, killing an employee of the subcontractor. *Id*. The deceased employee's heirs sued the general contractor, and the supreme court upheld a jury verdict in the heirs' favor. *Id*. at 590-91. The supreme court quoted the Restatement (Second) of Torts section 392 (1965), stating:

> One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by the person for whose use the chattel is supplied[:]
>
> > (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or
> > (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

Oden Constr. Co., 228 So. 2d at 588. That section of the restatement includes the following illustration:

> A employs B, a painter, to repaint his residence. The contract provides that B be allowed to use the ladders which A has upon his premises. C, an employee of B, while using one of these ladders, is hurt by a defect which, although not readily observable, could have been discovered by the exercise of a reasonably careful inspection. A is subject to liability to C.

Restatement (Second) of Torts § 392 cmt. e, illus. 1 (1965).

¶13. The danger of being provided a defective ladder by the church was not inherent to Jefferies's work of installing security alarms. The *Vu* holding does not apply to this case. Therefore, summary judgment on this basis was improper.

2. Whether Jefferies had assumed the risk.

¶14. The doctrine of assumption of the risk has largely been subsumed into our

comparative-fault scheme and no longer operates as an absolute bar to recovery. *Churchill v. Pearl River Basin Dev. Dist.*, 757 So. 2d 940, 943-44 (¶12) (Miss. 1999). Rather, in the vast majority of cases, the actions that arguably constitute assumption of the risk on the part of the plaintiff should be considered contributory negligence and reduce recovery, as opposed to foreclosing recovery. *Id.* However, in some situations the doctrine still applies.

¶15. The defense is available to property owners/employers in suits by their hired independent contractors. "[T]he owner[/employer] is not liable for death or injury of an independent contractor or one of [the independent contractor's] employees resulting from dangers which the contractor, as an expert, has known, or as to which he and his employees 'assumed the risk.'" *Nofsinger v. Irby*, 961 So. 2d 778, 781 (¶10) (Miss. Ct. App. 2007) (citations omitted).

¶16. Where the doctrine is applicable, a plaintiff is said to have assumed the risk and is, therefore, barred from recovering when the defendant proves the following elements:

> (1) [K]nowledge on the part of the injured party of a condition inconsistent with his safety; (2) appreciation by the injured party of the danger in the condition; and (3) a deliberate and voluntary choice on the part of the injured party to expose his person to that danger in such a manner as to register assent on the continuance of the dangerous condition.

Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 179, 146 So. 2d 558, 561-62 (1962).

¶17. To support its holding that Jefferies had assumed the risk, the circuit court cited *Nofsinger*. In that case, the defendant hired the plaintiff, an independent contractor, to help in the construction of the defendant's duplex. *Nofsinger*, 961 So. 2d at 779 (¶3). The plaintiff used the defendant's table saw, which did not have a safety guard, without protective goggles. *Id.* at 779 (¶4). The saw threw a piece of wood into the plaintiff's eye, blinding

him in that eye, and he sued the defendant. *Id.* The plaintiff admitted that he understood the risks of using the saw without a protective guard and goggles. *Id.* He was an experienced carpenter who had used similar saws thousands of times. *Id.* This Court held that he had assumed the risk and, therefore, could not recover. *Id.* at 783 (¶13).

¶18. In this case, Jefferies testified that he did not notice the ladder was missing one of its rubber grips until after the fall. The church offered nothing to contradict that statement. There is a significant difference between knowingly using a table saw without a guard or goggles, as in *Nofsinger*, and climbing a ladder that, unbeknownst to the climber, is missing a rubber grip. As the proof currently stands, Jefferies did not assume the risk. "No person can assume a risk that he does not know exists." *Elias* 245 Miss. at 179, 146 So. 2d at 561. The church is free to argue and attempt to prove assumption of the risk at trial, but it was not a ground for summary judgment.

¶19. We reverse the circuit court's order granting summary judgment in favor of the church and remand this case to the circuit court for further proceedings consistent with this opinion.

¶20. **THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

LEE, C.J., MYERS, BARNES, ISHEE, ROBERTS, CARLTON AND MAXWELL, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION.

IRVING, J., DISSENTING:

¶21. The majority finds that the circuit court erred in granting summary judgment to Mt. Gillion Baptist Church after it was sued by the trustee of Michael Jefferies's bankruptcy

estate for injuries sustained by Jefferies while he was using an allegedly defective ladder to install a security-alarm system in the church's gymnasium.[1] The majority finds that the circuit court erred in relying upon premises-liability law and in concluding that Jefferies assumed the risk of using the allegedly defective ladder,[2] as the risk was inherent in Jefferies's work as an installer of security-alarm systems.

¶22. I agree with the majority that the law of premises liability is inapplicable to our factual scenario and, therefore, cannot undergird the circuit court's judgment. I also agree with the majority that the controlling authority is *Oden Construction Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969). However, the majority fails to properly apply the principle announced in *Oden* to the facts of our case. Therefore, I dissent. I would affirm the judgment of the circuit court.

¶23. I quote, as does the majority, the principle announced in *Oden*:

> One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied.
>
> (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or
>
> (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

Id. at 588.

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[1] The ladder was provided to Jefferies by a deacon of Mt. Gillion.

[2] Apparently, the circuit court also concluded that the risk of injury from using the ladder was inherent in Jefferies's work as an installer of security-alarm systems.

¶24. George Fondren, the deacon who provided the ladder, submitted an affidavit which stated in part:

> Because the installer did not have a 20-foot-extension ladder to use in the gymnasium, I borrowed a ladder from a member of the church. When Mr. Gilliam[3] arrived at the church, I provided him the ladder I had borrowed. I examined it briefly and did not see anything wrong with it. Since I knew Mr. Jefferies was more experienced than I was with ladders, I relied on him to let me know if the ladder was not suitable or was unsafe in any way.

¶25. Jefferies, by deposition, gave the following pertinent testimony:

> Q. Okay. So, you see the ladder laying [sic] there and what did it look like?
>
> A. It actually looked just like a ladder I had used before. It was about an 18-foot ladder, green, I believe, fiberglass ladder.
>
> Q. Okay.
>
> A. And I had one very similar to it a couple of years before back when I did satellite TV's.
>
> Q. And so before you used the ladder for the first time did you look at it?
>
> A. Of course, I had to look at it.
>
> Q. Did you examine it to see if it would be suitable for the job?
>
> A. I picked it up, looked at it. Everything looked fine to me. The guy [Fondren] even picked it up – helped me pick it up like, you know, I couldn't – he didn't know if I was able to do it by myself or not. But, you know, of course, I've done it before. He helped me pick it up off the floor and lean it up against the wall.
>
> Q. Okay. But I mean, you wouldn't have climbed on that ladder unless you inspected it and made sure you thought it was safe, correct?
>
> A. Right. Everything seemed to be fine with the ladder.

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[3] While Fondren stated Gilliam arrived at the church, it is clear that he meant Jefferies.

Q. You didn't notice anything unusual about it?

A. No.

Q. Was it broken in any way?

A. No.

¶26. It seems quite clear to me that the undisputed facts show that the supplier in this case, the church acting through its deacon, exercised reasonable care to discover any dangerous condition that might have existed in the ladder. In fact, the supplier and user inspected the ladder together after the supplier had first inspected it. Neither saw anything wrong with the ladder. In my judgment, the majority errs in finding that Jefferies's statement—that he did not notice the ladder was missing one of its rubber grips until after the fall—requires that this case be remanded for trial because the church did not refute the statement. The question is not whether the rubber grip was missing when the ladder was tendered to Jefferies, if indeed it was, but whether the church failed to use reasonable care to discover whether the grip was missing. It goes without saying that there can be no liability assessed against the church for failing to use reasonable care to make the ladder safe if, after reasonable inspection of the ladder, it discovered nothing that rendered it unsafe.

¶27. Since the church, acting by and through Fondren, used reasonable care to ensure that the ladder was safe for the intended use, I would affirm the judgment of the circuit court,[4] as I am unable to discern any negligence on the part of the church in furnishing the ladder to

[4] "An appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons." *Mason v. S. Mortg. Co.*, 828 So. 2d 735, 738 (¶15) (Miss. 2002) (citing *Puckett v. Stuckey,* 633 So.2d 978, 980 (Miss.1993)).

Jefferies.