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TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001471-MR

KEVIN OAKLEY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 04-CI-00237

CRAWFORD ELECTRIC, INC.
AND
GREG BEAVER, D/B/A
BEAVER CONSTRUCTION COMPANY

APPELLEES

NO. 2005-CA-001487-MR

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OPINION
REVERSING
AND
REMANDING

** ** * * * * *

BEFORE: VANMETER, JUDGE; BUCKINGHAM AND PAISLEY, SENIOR JUDGES.¹
BUCKINGHAM, SENIOR JUDGE: Kevin Oakley and his employer, Crawford Electric, Inc., appeal from a summary judgment of the McCracken Circuit Court in favor of Greg Beaver, d/b/a Beaver Construction Company. The case involves whether Beaver has "up the ladder" immunity from liability in a civil suit brought by Oakley against him due to the exclusive remedy provision of KRS² 342.690(1). We conclude that he does not and that the trial court erroneously awarded summary judgment to him. Thus, we reverse and remand for further proceedings.

On March 27, 2003, Oakley was employed by Crawford Electric at a hotel construction site owned by Sunrise Hospitality in McCracken County, Kentucky. He was injured when he fell off a forklift being operated by Beaver. Oakley was awarded workers' compensation benefits through Crawford Electric's workers' compensation insurance carrier.

Thereafter, Oakley filed a civil suit in the McCracken Circuit Court against Beaver, seeking damages due to negligence.

¹ Senior Judges David C. Buckingham and Lewis G. Paisley, sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Revised Statutes.

In an order entered on June 29, 2005, the trial court awarded summary judgment to Beaver based on "up the ladder" immunity. Appeals herein by Oakley and Crawford Electric followed.³

The facts indicate that Sunrise paid Whitaker Construction Manager \$200,000 to be its construction manager for the project. Whitaker then hired Beaver to be its job site superintendent.

The contract between Sunrise and Whitaker was entitled "STANDARD FORM OF AGREEMENT BETWEEN OWNER AND CONSTRUCTION MANAGER where the Construction Manager is NOT a Constructor". The contract provided that Whitaker "shall receive bids, prepare bid analysis and make recommendations to the Owner for the Owner's award of Contracts or rejection of bids." The contract also provided that Whitaker "shall assist the Owner in preparing Construction Contracts and advise the Owner on the acceptability of Subcontractors and material suppliers proposed by Contractors."

However, neither Whitaker nor Beaver hired Crawford Electric or other entities as subcontractors. Rather, pursuant to the terms of its contract with Sunrise, Whitaker (and Beaver) only made recommendations to Sunrise as to the contractors that

³ Crawford Electric was an intervening plaintiff in this case. Because its workers' compensation insurance carrier paid benefits to Oakley, Crawford Electric intervened to assert its subrogation/reimbursement claim against Beaver pursuant to KRS 342.700(1). In an order of this court entered January 3, 2006, we allowed Crawford Electric to adopt the brief of Oakley as its brief in these two appeals.

should be hired to work on the project. The contract here was between Sunrise and Crawford Electric. There was no contract between Whitaker and Crawford Electric or Beaver and Crawford Electric.

In awarding summary judgment to Beaver, the trial court first stated that KRS 342.690(1) provides "up the ladder" immunity to a contractor for a personal injury claim by a subcontractor's employees. It then held that "Whitaker was in fact the general contractor for purposes of this action, and that Greg Beaver was a representative of Whitaker, therefore Beaver is also entitled to immunity."

KRS 342.610(2) provides in part that "[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." KRS 342.700(2) provides in part that "[a] principal contractor, intermediate, or subcontractor shall be liable for compensation to any employee injured while in the employ of any one (1) of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer."

KRS 342.690(1), the exclusive remedy provision, provides in part that "[i]f 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....on account of such injury or death." Further, KRS 342.690(1) provides that "[f]or purposes of this section, the term 'employer' shall include a 'contractor' covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation." KRS 342.610(1) states that "[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."

Applying the aforementioned statutes to the facts in this case, it is apparent that there was no contractor/subcontractor relationship between Whitaker/ Beaver and Crawford Electric since neither Whitaker nor Beaver contracted with Crawford Electric. Rather, Crawford Electric contracted directly with Sunrise. Whitaker was the construction manager, and Beaver was its job site supervisor. While Whitaker/Beaver may have directed the activities of Crawford

Electric as Sunrise's construction manager, it was not classified as the "contractor" as that term is set forth in KRS 342.610(1). Thus, Beaver had no "up the ladder" immunity since he was not "in the ladder."⁴

Beaver further relies on United Eng'rs and Constructors, Inc. v. Branham, 550 S.W.2d 540 (Ky. 1977), to support his argument. We believe the facts therein are distinguishable from those here, however, because the party who stood to benefit from the "up the ladder" doctrine was a "constructor," whereas Whitaker/Beaver was not a "constructor" in this case. Further, in Branham the party who stood to benefit from the "up the ladder" doctrine contracted with the subcontractor; whereas, neither Whitaker nor Beaver did so in this case. Likewise, we conclude that Beaver's reliance on Wright v. Dolgencorp, Inc., 161 S.W.3d 341 (Ky.App. 2004), is misplaced.

The judgment of the McCracken Circuit Court is reversed and remanded for further proceedings.

⁴ Beaver argued in his reply memorandum to the trial court that "the only salient inquiry is whether Whitaker could have been held liable for workers' compensation benefits if the Plaintiff's employer, Crawford Electric, had failed to provide workers' compensation coverage." Beaver then asserts that if he could have been held so liable, then he was entitled to "up the ladder" immunity. While we will not quarrel with these statements, we do not believe Beaver could have been held liable for workers' compensation benefits because he was not a "contractor" as the term is used in the applicable statutes.

ALL CONCUR.

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