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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000022-MR

AUSLANDER PROPERTIES, LLC — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 10-CI-00688

JOSEPH HERMAN NALLEY; STEPHANIE NALLEY; MARY NALLEY; UNIVERSITY MEDICAL CENTER, INC. D/B/A UNIVERSITY OF LOUISVILLE HOSPITAL; AND JEWISH HOSPITAL & ST. MARY'S HEALTHCARE, INC. D/B/A FRAZIER REHAB INSTITUTE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Auslander Properties, LLC, appeals from a Judgment of the Nelson Circuit Court reflecting a jury verdict in favor of Plaintiffs-Appellees Joseph Herman Nalley, et al., in their premises liability and loss of consortium action. Auslander Properties, LLC, contends that the trial court erred in applying

OSHA/KOSHA to the facts of this case, by allowing an expert witness to improperly testify as to matters of law reserved for the court, and by allowing treating physicians and a nurse to offer improper testimony at trial. For the reasons stated below, we find no error and AFFIRM the Judgment on appeal.

Auslander Properties, LLC ("the LLC") is a corporate entity that owns several rental properties, including an office building located at 301 West Stephen Foster Avenue in Bardstown, Kentucky. On August 4, 2009, Steve Auslander ("Auslander") hired Appellee Joseph Herman Nalley ("Nalley") to assist Auslander in performing some maintenance work for the LLC. The work involved topping trees at the office building located on West Stephen Foster Avenue. On that date, Auslander met Nalley at the building, whereupon Nalley went to the roof of the building with a chainsaw in order to reach the adjacent tree tops. The parties dispute whether Auslander told Nalley to go to the roof, and further dispute the degree to which Auslander directed or otherwise supervised Nalley's actions. It is uncontroverted, however, that Nalley used no harness, hard hat or other safety equipment while on the roof. Auslander remained on the ground, where he guided the cut branches with a rope.

The roof at issue had an area of decorative lattice work consisting of what appeared to be exposed rafters and braces. These decorative beams, however, were not structural and could not support a person's weight. While Nalley was on the roof, he stepped back and fell through the open rafters. He landed on a

concrete floor, and suffered severe injuries including multiple spinal and rib fractures, a severely broken and separated shoulder, and a traumatic brain injury.

Nalley was hospitalized for 16 days at the University of Louisville Hospital, where he was on a ventilator for 8 days. A portion of Nalley's right frontal lobe was surgically removed. He subsequently spent about 3 weeks at Frazier Rehab Institute. Nalley accrued more than $350,000 in medical bills, with ongoing costs, and is now permanently and totally disabled.

Thereafter, Nalley filed the instant action against the LLC and other defendants in Nelson Circuit Court, in which he asserted a claim of negligence *per se*. Nalley's claim was based on *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), wherein the Kentucky Supreme Court applied the doctrine of negligence *per se* to workplace safety. Pursuant to *Hargis*, Nalley alleged that when an employee or independent contractor is injured because of a violation of the Kentucky Occupational Safety and Health Act ("KOSHA") and the federal Occupational Health and Safety Act ("OSHA"), the employer's negligence is to be decided as a matter of law.

Nalley went on to claim that Auslander was not merely a passive investor in the LLC, but took on the status of an employee in that he performed all of the day-to-day operations of the company from collecting rent, to cutting grass, to sealing roofs and pipes, and hiring subcontractors for jobs that he did not want to do. Because, in his view, Auslander was an employee, Nalley maintained that the LLC was an employer thus implicating the application of KOSHA and OSHA

as to Nalley. In response, the LLC argued that KOSHA was wholly inapplicable to the facts at bar, and no duty based on KOSHA could be found under the instant facts.

The matter proceeded to a jury trial, whereupon the Nelson Circuit Court found as a matter of law that the LLC owed certain duties to Nalley arising under KOSHA. The matter went to the jury, which returned a verdict in favor of Nalley for medical expenses, pain and suffering, and lost income, and in favor of intervening plaintiffs Mary and Stephanie Nalley for loss of spousal and parental consortium, respectively. This appeal followed.

The LLC now argues that the trial court erred in applying OSHA/KOSHA to the fact of this case. It maintains that KOSHA is not implicated because the LLC is not an "employer" as defined by the statute, and that the plaintiffs' claim for an alleged breach of the "general duty" clause has no merit. The LLC argues that it has no employees, and therefore cannot properly be characterized as an employer. It contends that Nalley was hired as an independent contractor and not an employee; therefore, the KOSHA claim must fail as a matter of law.[1]

[1] Prior to the oral argument, Auslander moved to submit for consideration the recent unpublished opinion of *McCarty v. Covol Fuels*, 2014-SC-000589-CL (Ky., October 29, 2015). The motion was granted at the oral argument. In *McCarty*, an independent contractor suffered fatal injuries when he fell from a ladder while installing an overhead commercial-grade door at a coal mine in Muhlenberg County, Kentucky. The Kentucky Supreme Court held in relevant part that the subcontractor's estate could not maintain a wrongful death action against a mine operator under a negligence *per se* theory for alleged violations of the Kentucky mining statutes. As it relates to the matter before us, we conclude that *McCarty* is distinguishable from the instant facts in that the core function of Auslander Properties, LLC includes landscaping and building maintenance, whereas the core function of Covol did not include garage door installation. Additionally, *McCarty* did not implicate KOSHA.

The LLC also argues that the court erred in allowing the plaintiff's OSHA/KOSHA expert, Randy Gray, to testify as to matters of law, and by allowing treating physicians and a nurse to offer improper testimony. The LLC seeks an Opinion reversing the Judgment on appeal, and remanding the matter for entry of a Judgment in favor of the LLC.

The focus of the LLC's claim of error is its contention that OSHA and KOSHA are inapplicable to the facts before us. Under OSHA and KOSHA, an employer's duty is two-fold:

> Each employer—
>
> (1) Shall 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;
>
> (2) Shall comply with occupational safety and health standards promulgated under this chapter.

29 U.S.C. Sec. 654(a); Kentucky Revised Statute (KRS) 338.031(1). The first duty is a "general duty" imposed on an employer to protect its employees from hazards that are likely to cause death or serious bodily injury. The second duty is a "specific duty" imposed on employers to comply with the OSHA regulations. *Hargis*, *supra.* The latter includes regulations regarding the usage of certain safety equipment and procedures. "Employer" is broadly defined to include "any entity for whom a person is employed[.]" KRS 338.015(1). Similarly, employee "shall mean any person employed[.]"[2] KRS 338.015(2).

[2] 803 KAR 2:050 defines the scope of KOSHA to include:

> all employers, employees, and places of employment throughout the Commonwealth except the following: (1) Employees of the

KRS 446.070 provides that, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." Such a statute "creates a private right of action in a person damaged by another person's violation of any statute that is penal in nature and provides no civil remedy, if the person damaged is within the class of persons the statute intended to be protected." *Hargis*, 168 S.W.3d at 40 (citing *State Farm Mut. Auto. Ins. Co. v. Reeder,* 763 S.W.2d 116, 118 (Ky. 1988)); *see also Grzyb v. Evans,* 700 S.W.2d 399, 401 (Ky. 1985); *Hackney v. Fordson Coal Co.,* 230 Ky. 362, 19 S.W.2d 989, 990 (1929). The *Hargi*s court went on to hold that KRS 338.031(1)(b), the statute under which the KOSHA regulations were promulgated, specifically provides that "[e]ach employer . . . [s]hall comply with occupational safety and health standards promulgated under this chapter." Since those standards are promulgated in the regulations adopted by the Kentucky Occupational Safety and Health Standards Board, KRS 338.051(3) and KRS 338.061(1), the violation of a KOSHA regulation would constitute a violation of KRS 338.031(1)(b), thus triggering the right of action created by KRS 446.070. *Hargis*, 168 S.W.3d at 41-42.

The LLC's argument on this issue largely centers on its contention that Nalley was an independent contractor and not an employee, and that as such,

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> United States Government [and] (2) Employers, employees, and places of employment over which federal agencies other than the United States Department of Labor exercise statutory authority to prescribe or enforce standards or administrative regulations affecting occupational safety and health.

KOSHA is inapplicable. It notes that unlike the *Hargis* defendant, the LLC had no employees. Rather, it contends that its regular business entails renting properties, and topping trees is not part of that regular business. The LLC also points out that the accident did not take place at the LLC's regular workplace, which is Auslander's home. Instead, the accident took place at one of the rental properties owned by the LLC. The substance of this contention is that KOSHA is inapplicable to independent contractors, that Nalley is such an independent contractor, and that the trial court erred in failing to so rule.

The clear language of *Hargis* refutes the LLC's argument on this issue. Prior to the *Hargis* decision, *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799 (6th Cir. 1984), stood for the proposition that OSHA (and by implication KOSHA) applied not only to direct employees, but also to employees of independent contractors. On appeal, the *Hargis* defendant argued that the plaintiff was himself an independent contractor and not the employee of an independent contractor, and that accordingly, KOSHA was not implicated. In rejecting this argument, the *Hargis* court stated,

> Baize asserts that even if *Teal* would apply to Hargis if he were an employee of an independent contractor, it does not apply to him because Hargis was, in fact, the independent contractor. As illustrated by the analysis in *Teal,* to draw such a distinction would be ludicrous. Except for providing his own truck, Hargis was performing the same work duties and was exposed to the same work hazards as Baize's own truck-driver employees. As noted by Appellants, if Hargis had incorporated himself and paid himself a salary, as do many independent truckers, he would have been an

> "employee of an independent contractor." He is no less entitled to KOSHA's protections because, technically, he was self-employed[.]

Hargis, 168 S.W.3d at 44.

In sum, *Hargis* held that the general duties of employers arising under KOSHA inure to the benefit of direct employees, the employees of independent contractors, and to the independent contractors themselves. Accordingly, even if Nalley is properly characterized as an independent contractor of the LLC, KOSHA's general and specific duties are nevertheless implicated.

The LLC goes on to argue that *Pennington v. MeadWestvaco Corp.*, 238 S.W.3d 667 (Ky. App. 2007), is the latest statement from Kentucky's appellate courts regarding the applicability of KOSHA regulations to property owners, and that its holdings supplant those of *Hargis*. In *Pennington*, a commercial property owner hired a contractor to oversee up-fitting and renovation of the property. The contractor then hired a subcontractor to paint the facility, who in turn hired the plaintiff. When the plaintiff was injured and sought relief under KOSHA, the Hardin Circuit Court rendered summary judgment in favor of the defendant land owner. This holding was affirmed by a panel of the Court of Appeals largely because the landowner contractually delegated the responsibility for safety standards to the contractor.

We find no basis for concluding that *Pennington* operates to relieve the LLC from liability. Unlike *Pennington*, the LLC in the matter before us never delegated control or safety compliance to Nalley. And unlike the landowner in *Pennington*,

Auslander actively oversaw the maintenance of the rental properties, and directly participated in the maintenance activity which resulted in Nalley's injuries. The matter before us is factually distinguishable from *Pennington*, and we find no basis to apply *Pennington* herein to relieve the LLC of its duties under KOSHA.

The LLC goes on to argue that the trial court erred in allowing Nalley's OSHA/KOSHA expert, Randy Gray, to testify as to matters of law reserved for the court. It contends that the entirety of Gray's opinions and proposed testimony should have been excluded because they constituted matters of law and legal conclusions which improperly usurped the role of the trial court. The LLC maintains that Gray's opinions concerning alleged duties owned to Nalley, as well as his interpretation of statutes, should have been excluded because such conclusions are properly reserved for the trial court.

KRE 702 codified a broad approach to the admissibility of expert testimony, that is, "to receive the opinion testimony where it appears that the trier of fact would be assisted rather than impeded in the solution of the ultimate problem." *Werner Enterprises, Inc. v. Northland Ins. Co.*, 437 S.W.3d 730, 735 (Ky. App. 2014) (internal citation omitted). In *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385 (Ky. 2010), for example, and to which Nalley directs our attention, a trained paramedic tripped over a curb and suffered injuries while transporting a patient into a hospital entrance. In examining at trial whether the hospital violated certain OSHA duties related to the safety of the entrance, the plaintiff's expert witness "testified that to make the entrance safe, the Hospital

should have leveled it, installed guardrails to prevent tripping, or used paint to mark the area. He also testified that the entrance violated OSHA regulations." *Id.* at 396.

On appeal, the Kentucky Supreme Court determined this testimony was properly admitted. It noted that

> [t]he real question should not be whether the expert has rendered an opinion as to the ultimate issue, but whether the opinion will assist the trier of fact to understand the evidence or to determine a fact in issue. Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, . . . and when the subject matter is outside the common knowledge of jurors.

Id. (citations and quotation marks omitted).

We review the trial court's rulings on the admission of expert testimony under an abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577-78 (Ky. 2000). Abuse of discretion is found where the trial court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999). In the matter at bar, Gray testified as to matters outside the common knowledge of the jurors, and assisted rather than impeded them in the solution of the ultimate problem. *Werner*, *supra.* We cannot conclude that the admission of Gray's testimony was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. As such, we find no error on this issue.

Lastly, the LLC contends that the trial court erred in allowing Nalley's treating physicians and a registered nurse to offer improper testimony. It argues that the treating physicians testified beyond the opinions disclosed within their reports despite not being identified as expert witnesses under Kentucky Rule of Civil Procedure (CR) 26.02, and that the nurse improperly testified as to Nalley's future medical needs when only a medical doctor is qualified to make such determinations. We have closely examined the record and the law on this issue, and find no error. Treating physicians may testify as "to the facts they had learned and the opinions they had formed based on first-hand knowledge and observation." *Charash v. Johnson*, 43 S.W.3d 274, 280 (Ky. App. 2000). This is true though the physicians are not certified as experts. *Id*. The decision to allow such testimony is left to the sound discretion of the trial court. *Goodyear Tire and Rubber Co.*, *supra.* The nurse at issue, Linda Dierking, testified as an expert life care planner at trial. We find no basis in the law for concluding that her opinion regarding Nalley's future life care needs improperly supplanted the opinions of medical doctors, nor otherwise ran afoul of the law or the civil rules. We cannot conclude that the trial court abused its discretion in allowing her testimony, and find no error on this issue.

For the foregoing reason, we AFFIRM the Judgment of the Nelson Circuit Court.

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