

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
APRIL 24, 2003 Session

**NARVIN TUNSTALL, SR., ET AL. v. MEMPHIS PUBLISHING COMPANY,
ET AL.**

**Direct Appeal from the Circuit Court for Shelby County
No. 305669 T.D. John R. McCarroll, Jr., Judge**

No. W2002-01687-COA-R3-CV - Filed July 7, 2003

This appeal arises from a personal injury action. One of the defendants filed a motion for summary judgment, which motion was granted by the trial court. This appeal ensued. For the following reasons, we reverse.

Tenn. R. App. P. 3.; Appeal as of Right; Judgment of the Circuit Court Reversed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY KIRBY LILLARD, J., joined.

Carl Wyatt, David Riley, Memphis, TN, for Appellants

William M. Larsha, Jr., Memphis, TN, for Appellee

OPINION

Facts and Procedural History

On September 18, 1999, Narvin Tunstall (“Mr. Tunstall”), a pedestrian, was allegedly injured on the property of Memphis Publishing Company (“Memphis Publishing”) when a truck rented by Chris Hill and driven by Steven Sidney (“Mr. Sidney”) backed into him. At the time of the accident, Mr. Sidney was an employee of Memphis Publishing. Mr. Hill had an independent contract with Memphis Publishing whereby he would pick up and deliver newspapers to various street vendors. Apparently, Mr. Hill would rent a Ryder truck, drop the truck off at Memphis Publishing on Saturday morning, where Memphis Publishing employees would load the truck with newspapers, then Mr. Hill would pick the truck up early Sunday morning.

On November 22, 1999, the Tunstalls brought suit seeking to recover damages against Memphis Publishing and Mr. Sidney. Thereafter, the Tunstalls amended their complaint to add Ryder TRS, Inc. and Mr. Hill. On April 9, 1999, Mr. Hill filed a motion for summary judgment

seeking to be dismissed from the case. Mr. Hill claimed that there were no disputed facts that would create an agency relationship between himself and Mr. Sidney. In addition, Mr. Hill filed a statement of undisputed facts. The trial court granted this motion, finding that Hill was not vicariously liable for alleged injuries caused to Mr. Tunstall. Memphis Publishing and Mr. Sidney timely filed their notice of appeal and raise the following issues for our review.

Issues

1. Whether the trial court erred in granting the motion for summary judgment in favor of Chris Hill.
2. Whether the trial court erred in relying upon a contract between Memphis Publishing Company and Chris Hill in granting the motion for summary judgment.

Standard of Review

The standard of review to be applied when assessing a motion for summary judgment was set forth by our Supreme Court in Staples v. CBL & Assocs., Inc., 15 S.W.3d 83 (Tenn. 2000):

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. See Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn.1997); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn.1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, see Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn.1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. See Anderson v. Standard Register Co., 857 S.W.2d 555, 559 (Tenn.1993). The moving party has the burden of proving that its motion satisfies these requirements. See Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn.1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. See Byrd v. Hall, 847 S.W.2d at 215.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. See McCarley v. West Quality Food Serv., 960 S.W.2d 585, 588 (Tenn.1998); Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn.1997). If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not

triggered and the motion for summary judgment must fail. See McCarley v. West Quality Food Serv., 960 S.W.2d at 588, *89; Robinson v. Omer, 952 S.W.2d at 426. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.¹

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. See Robinson v. Omer, 952 S.W.2d at 426; Byrd v. Hall, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. See McCall v. Wilder, 913 S.W.2d 150, 153 (Tenn.1995); Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn.1995).

Staples, 15 S.W.3d at *88 -89.

Law and Analysis

Agency has been defined as “the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act.” Jahn v. McKee Baking Co., 629 S.W.2d 689, 693 n.2 (Tenn. Ct. App. 1981) (citations omitted). The existence of an agency relationship “may be proved by circumstances and by evidence of the conduct of the parties, such as by showing that the alleged principal knew of the acts of the alleged agent and assented to them.” Heywood Feed Ingredients, Inc. v. State of Tennessee, 356 S.W.2d 605, 609 (Tenn. Ct. App. 1961) (citations omitted).

Of great significance is the right of the principal to control the conduct of the agent. Nidiffer v. Clinchfield Railroad Co., 600 S.W.2d 242, 245 (Tenn. Ct. App. 1980) (citations omitted); see also Franklin Distributing Co., Inc. v. Crush International (U.S.A.), Inc., 726 S.W.2d 926, 930 (Tenn. Ct. App. 1986) (citations omitted). “It is said this right of control is the primary or essential test of an agency relationship without which no agency exists.” Nidiffer, 600 S.W.2d at 245. In determining whether an agency relationship exists, many factors must be considered, such as the right or duty of the alleged principal to control or direct “the time, place and methods and means by which the work is to be done.” See Howell v. Shepherd, 196 S.W.2d 849, 852 (Tenn. Ct. App. 1945).

In the case *sub judice*, Mr. Hill filed a motion for summary judgment asserting that there were no genuine issues of material fact and that he was therefore entitled to judgment as a matter of law. In his statement of undisputed facts, Mr. Hill asserted that he was not present when the truck

¹ A non-moving party may satisfy his or her burden by (1) pointing to evidence overlooked or ignored by the moving party that establishes a material factual dispute, (2) by rehabilitating the evidence attacked in the moving party's papers, (3) by producing additional evidence showing the existence of a genuine issue for trial, or (4) submitting an affidavit explaining why further discovery is necessary as provided for in Tenn. R. Civ. P. 56.06. See McCarley v. West Quality Food Serv., 960 S.W.2d at 588; Byrd v. Hall, 847 S.W.2d at 215, n. 6.

was loaded by Memphis Publishing, that he was instructed by Memphis Publishing to drop off his keys with the dock foreman in case the truck need to be moved in the event of an emergency, and that he was never told by Memphis Publishing that his truck would be moved for any other purpose than an emergency. Mr. Hill further asserted that he did not know that Memphis Publishing was going to move his truck to load it with papers, he did not have a business relationship with Mr. Sidney, and that Mr. Sidney did not have his permission to drive the truck. Mr. Hill also offered his deposition in support of his motion for summary judgment. Mr. Hill stated that Dave Gooden, an employee of Memphis Publishing, told him to leave the keys to the truck in case of an emergency. Mr. Hill also testified that he never told Memphis Publishing that they could move his truck.

We find that Mr. Hill's motion for summary judgment was properly supported because he was able to negate an element necessary to show the existence of an agency relationship. Mr. Hill stated that he did not give Mr. Sidney his permission or consent to move his truck and that he had no knowledge that his truck would be moved by a Memphis Publishing employee. This was sufficient to trigger the nonmoving party's, Memphis Publishing, burden to "offer proof to establish the existence of the essential elements of the claim." See Staples, 15 S.W.3d at *88-89.

In response to Mr. Hill's motion for summary judgment, Memphis Publishing filed the affidavit of Chris Oxford ("Mr. Oxford"), the Assistant Transportation Manager for Memphis Publishing. In his affidavit, Mr. Oxford stated that Mr. Hill as well as other hawkers "were well aware that their rental vehicles were being operated by Memphis Publishing Company employees so as to load their rental vehicles with the newspapers." Mr. Oxford further stated that Mr. Hill was informed by Memphis Publishing that his truck would be operated by Memphis Publishing's employees. Mr. Oxford also stated that Mr. Hill clearly "knew that his rental vehicle would be operated by a Memphis Publishing Company employee as evidenced by the fact that the key [he] left with the company employee only fit the ignition switch of the vehicle and not the bed (box) of the vehicle." Memphis Publishing claims that, at the very least, there is a dispute between the parties as to whether Mr. Hill gave permission to Memphis Publishing employees to move his truck. We agree.

Our Supreme Court has stated that:

The summary judgment procedure was designed to provide a quick, inexpensive means of concluding cases, in whole or in part, upon issues as to which there is no dispute regarding the material facts. Where there does exist a dispute as to facts which are deemed material by the trial court, however, or where there is uncertainty as to whether there may be such a dispute, the duty of the trial court is clear. He is to overrule any motion for summary judgment in such cases, because summary judgment proceedings are not in any sense to be viewed as a substitute for a trial of disputed factual issues.

Evco Corp. v. Ross, 528 S.W.2d 20, 24-25 (Tenn. 1975). Granting all reasonable inferences in the nonmoving party's favor, this Court cannot say that Mr. Hill was entitled to summary judgment as

a matter of law. We must therefore reverse the trial court and remand for further proceedings consistent with this opinion. Due to our disposition of the first issue, we find it unnecessary to address Memphis Publishing's remaining issue.

Mr. Hill also asserts on appeal that he did not have the right to control Mr. Sidney's actions. If Mr. Hill had made these arguments in his motion for summary judgment and properly supported them, then he may have negated a crucial element of agency. There is no indication in the record, however, that Mr. Hill negated this element. There is no mention of the element of control anywhere in Mr. Hill's motion for summary judgment, his statement of undisputed facts or in his deposition. As such, the nonmoving party's "burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail." Staples, 15 S.W.3d at *88 -89 (citations omitted).

Conclusion

Accordingly, we reverse the trial court's grant of Mr. Hill's motion for summary judgment. Costs on appeal taxed to the Appellee, Chris Hill, for which execution may issue if necessary.

ALAN E. HIGHERS, JUDGE