No. 34494 - *Langley France, as the Parent and Next Friend of Robert France, a minor v. Southern Equipment Company, A West Virginia Corporation v. Dan Hensley, d/b/a Royalty Builder*

FILED
November 24, 2009
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting, joined by Workman, J.:

In this proceeding, the majority opinion has affirmed the trial court's order granting summary judgment in favor of the appellee, Southern Equipment Company (hereinafter referred to as "SEC"). In so doing, the majority of the Court has rejected the issues raised by the appellants, Langley and Inez France, individually and as the parents of Robert France (collectively referred to as "the Frances"), as to why summary judgment was inappropriate. I believe that one of the issues asserted by the Frances, the illegal employment of Robert, required reversal of the summary judgment order. Consequently, for the reasons set out below, I respectfully dissent.

SEC Could Not Rely on the Independent Contractor Defense

The record in this case shows that SEC contracted with Quality Metal Roof (hereinafter referred to as "QMR") to have its roof replaced. QMR supplied the metal roofing, however, without SEC's knowledge, QMR subcontracted the actual installation of the metal roofing to Royalty Builders. Royalty Builders employed Robert. It is undisputed that Robert was only sixteen years old at the time of his employment by Royalty Builders.

One of the theories advanced by the Frances to hold SEC liable involved the illegal use of Robert, as a minor, to work on its roofing project. The circuit court rejected this theory on the basis that Robert was an employee of Royalty Builders, not SEC. This conclusion completely ignores the legal argument raised by the Frances. That is, the Frances did not dispute that Royalty Builders employed Robert. The Frances' contention was that, under this Court's decision in *Shaffer v. Acme Limestone Co., Inc*., 206 W. Va. 333, 524 S.E.2d 688 (1999), SEC lost the independent contractor defense. In resolving this issue, the majority opinion appears to reject the trial court's reliance on the fact that SEC did not directly employ Royalty Builders. However, in considering the Frances' argument, the majority opinion uses tortured reasoning to conclude that the Frances did not satisfy the *Shaffer* requirements. I disagree.

In *Shaffer*, the plaintiff, administratrix of the estate of Virginia King, filed a wrongful death action against Acme Limestone Company, Inc. (hereinafter referred to as "Acme"), a stone quarry operator.[1] The decedent, Ms. King, was killed when the car she was driving collided with a truck that was owned by Spade Trucking and driven by one of its employees. At the time of the accident, Spade Trucking was hauling materials for Acme. Although Spade Trucking was an independent contractor, the plaintiff sought to hold Acme vicariously liable on the theory that Acme, in violation of a statute, routinely overloaded

[1]Other defendants also were sued.

trucks used by Spade Trucking.[2] The circuit court rejected this theory and granted summary judgment in favor of Acme on the grounds "that no material issue of fact existed on the issue of Spade Trucking's status as an independent contractor." *Shaffer*, 206 W. Va. at 339, 524 S.E.2d at 694.

On appeal to this Court, we found that it was error for the circuit court to reject the plaintiff's statutory violation theory. We noted in *Shaffer* that "[t]he evidence presented . . . revealed that Spade Trucking's trucks routinely carried stone loads greater than the 80,000 pound maximum established by statute. . . . Acme's own evidence suggests that it frequently loaded Spade Trucking's trucks in excess of 80,000 pounds." *Shaffer*, 206 W. Va. at 346, 524 S.E.2d at 701. The opinion in *Shaffer* cited to a longstanding principle of law contained in Syllabus point 5 of *Carrico v. West Virginia Central and Pacific Railway Co.*, 39 W. Va. 86, 19 S.E. 571 (1894):

> The doctrine of the nonliability of one for the negligence of another because the latter is an independent contractor does not apply to relieve the former from liability for the omission of a duty imposed upon him by law in behalf of the safety of the public.

Shaffer, 206 W. Va. at 345, 524 S.E.2d at 700. *Shaffer* explained the significance of the *Carrico* decision as follows:

> The obvious import of *Carrico* and its progeny is that, where the work or service to be performed in itself entails the

[2]The plaintiff advanced other theories that are not relevant to this case.

> commission of some illegal . . . act, the [independent contractor defense] obviously cannot apply, because in such instance the principal and the independent contractor both play an integral part, are both proximate causes, of whatever harm ensues. The illegal work exception to nonliability requires the knowledge and sanctioning of the illegal act . . . by the owner.

Shaffer, 206 W. Va. at 345, 524 S.E.2d at 700 (internal quotations and citations omitted).

After *Shaffer* thoroughly analyzed and discussed other authorities, the Court set out the following principles of law in Syllabus points 6 and 7 of the opinion:

> 6. The independent contractor defense is unavailable to a party employing an independent contractor when the party (1) causes unlawful conduct or activity by the independent contractor, or (2) knows of and sanctions the illegal conduct or activity by the independent contractor, and (3) such unlawful conduct or activity is a proximate cause of an injury or harm.
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> 7. When a statute imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is prima facie evidence of negligence unless the statute says otherwise. A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant.

Ultimately, the *Shaffer* opinion reversed the trial court's summary judgment order in favor of Acme on the grounds "that summary judgment was inappropriate because [plaintiff] established an exception to the independent contractor defense. That exception is the illegal work exception to the independent contractor defense." *Shaffer*, 206 W. Va. at 349, 524 S.E.2d at 704.

Here, the Frances argued before the circuit court and this Court that the decision in *Shaffer* precluded summary judgment because SEC knowingly allowed Robert to work on its roofing project in violation of W. Va. Code § 21-6-2(a)(16) (2002) (Repl. Vol. 2008). As previously indicated, the sole basis for the circuit court's decision to reject *Shaffer* was that "Royalty Builders was the employer of Robert France, not Southern Equipment Company." The circuit court and the majority opinion were both wrong in rejecting the application of *Shaffer* to the instant case.

West Virginia Code § 21-6-2(a)(16) of the West Virginia Child Labor Act prohibits the employment of children under the following circumstances:

> (a) No child under eighteen years of age may be employed, permitted or suffered to work in, about, or in connection with any of the following occupations:
>
> . . . .
>
> (16) Roofing operations above ground level.

This Court previously has interpreted this provision and has indicated that "[t]he purpose of the statute . . . is to prohibit and regulate the employment of minors." *Jackson v. Monitor Coal & Coke Co.*, 98 W. Va. 58, 65, 126 S.E. 492, 495 (1925). We also have indicated that "[t]he employment of a child in violation of provisions of [the Child Labor Act] . . . is actionable negligence . . . when such violation is the natural and proximate cause of an injury." Syl. pt. 1, in part, *Harper v. Cook*, 139 W. Va. 917, 82 S.E.2d 427 (1954).

In resolving this issue, the majority opinion erroneously concludes that Robert's age played *no* role in causing him to fall. I reject this conclusion for two reasons. First, this conclusion resolves a jury issue. That is, it was for the jury to decide whether Robert's age and inexperience contributed to his fall. Second, and most importantly, the majority's conclusion on this issue insults one of the critical purposes of our Child Labor Act. The Child Labor Act takes into account that children are more susceptible to injury in the work place precisely because of the inexperience that is inherent in youthfulness. Indeed one court has correctly observed that "[i]t cannot be disputed that a primary legislative purpose of the Child Labor Law is to protect minors in employment relationships from excessive risk of personal injury. A blanket prohibition against employment in such activities as [roofing] operations fosters that purpose." *Patterson v. Martin Forest Prods., Inc*., 774 So. 2d 1148, 1151 (La. Ct. App. 2000).

Under the facts of the case *sub judice*, the second *Shaffer* ground for losing the independent contractor defense is applicable. That is, under *Shaffer*, a material issue of fact exists as to whether SEC knew of and sanctioned the illegal employment of Robert. On this point, the majority opinion erroneously concludes that the Frances could not show that SEC "sanctioned" Robert's illegal employment. The majority contends that "[t]o sanction an activity requires some active approval or encouragement." However, the majority "defines the word 'sanction' far too narrowly." *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc*., 188 W. Va. 468, 473, 425 S.E.2d 144, 149 (1992). The majority's definition *completely*

overrules our line of cases that hold that a person's silence can be deemed to be a ratification or sanctioning of conduct when that person has a duty to affirmatively disapprove of such conduct. "The authorities almost uniformly say that acquiescence after knowledge of an unauthorized act is evidence of ratification[.]" *Thompson v. Murphy*, 60 W. Va. 42, 48-49, 53 S.E. 908, 910 (1906). It is black letter law that,

> [i]f the principal, either by his conduct, by his words, or by his silence, has led others to believe that he has sanctioned an unauthorized act, performed in his behalf by his agent or by an assumed agent, he will be held to have ratified such act, whether it was his actual intention to do so or not.

Payne Realty Co. v. Lindsey, 91 W. Va. 127, 131, 112 S.E. 306, 308 (1922) (internal quotations and citation omitted). *Accord In re Uwimana*, 274 F.3d 806, 812 (4th Cir. 2001) ("An intention to ratify may be inferred by words, conduct or silence on the part of the principal that reasonably indicates its desire to affirm the unauthorized act." (internal quotations and citation omitted)).

In support of their argument, the Frances' brief set out the following deposition testimony of SEC's vice-president on the issue of Robert's age:

> Q. Did you recognize [Robert] from any of the previous days?
>
> A. No. I seen all of them, but, you know, as far as picking him out from any of the other people, no, I did not.
>
> Q. He didn't stand out that way?
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> A. Well, he was young. Younger than the other people that was working, yes.

Q. Was that apparent to you?

A. It was pretty apparent, yes.

. . . .

Q. You knew [Robert] was a kid, though, didn't you.

A. Yes.

Q. Everybody knew he was a kid?

A. Yeah.

It is crystal clear from the deposition testimony of SEC's vice-president that he knew Robert was a "kid." This admission was sufficient to preclude SEC's reliance on the independent contractor defense. *See Felder v. Old Falls Sanitation Co., Inc*., 359 N.Y.S.2d 166, 170 (1974) ("'Thus when one engages an independent contractor to perform certain work and the contractor employs infants in violation of the statute, the one engaging the contractor will be held to have violated the law in permitting the infant to do the work.'" (quoting *Bernal v. Baptist Fresh Air Home Soc'y*, 87 N.Y.S.2d 458, 464 (1949))). Ultimately, it is a jury question as to whether the vice-president's use of the word "kid" referred to Robert appearing younger than eighteen years of age. *See Styles v. Mobil Oil Corp*., 459 S.E.2d 578, 580 (Ga. Ct. App. 1995) ("[A] material issue of fact exists as to whether Mobil ratified the allegedly un[lawful] conduct of its contractors, and the grant of summary judgment to Mobil was error."). That is to say that the issue of whether the vice-president had knowledge that Robert was not of the age of majority, *i.e.*, eighteen, was a jury

question.

In addition to the application of the second *Shaffer* factor, SEC could not rely on the independent contractor defense because of specific caselaw by this Court construing the meaning of "permitting or suffering" under W. Va. Code § 21-6-2(a). This is so because the statute does not require that a child be an actual employee of a business to find that a business has violated this State's Child Labor Act. In addition to prohibiting actual "employment" in certain circumstances, the statute also prohibits a business from "permitting or suffering" a child to work under the prohibited conditions.[3] *See Ewert v. Georgia Cas. & Sur. Co.*, 548 So. 2d 358, 364 (La. Ct. App. 1989) (Doucet, J., dissenting) ("The wording of the statute makes 'employed,' 'permitted,' and 'suffered' equal, so that violations of the statute by any of the three enumerated means are all equal violations of the statute."); *Gabin v. Skyline Cabana Club*, 258 A.2d 6, 9 (N.J. 1969) ("If the Legislature intended to limit this section to cases where a minor was 'employed,' it would not have included the phrase

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[3]In this regard,

> Webster's International Dictionary, 2d ed., states that "suffer" as a verb means "to allow; to permit; not to forbid or hinder; also to tolerate; to put up with." The same authority defines the verb "permit" to mean "to allow the act or existence of; to consent to expressly or formally; to grant (one) license or liberty; to authorize; to give leave." . . . The words "suffer" and "permit" necessarily imply knowledge.

Nolde Bros., Inc. v. Chalkley, 35 S.E.2d 827, 833 (Va. 1945).

'permitted or suffered to work.'"); *Ludwig v. Kirby*, 80 A.2d 239, 242 (N.J. Super. Ct. App. Div. 1951) ("It is to be observed that not only employment of a minor . . . is prohibited, but also permitting or suffering him to do such work."); *Swift v. Wimberly*, 370 S.W.2d 500, 505 (Tenn. Ct. App. 1963) ("[T]he mere permitting or suffering of plaintiff to work . . . at the time he was injured, constitutes a violation of said child labor statutes, even though plaintiff was never formally employed."); *Milwaukee News Co. v. Industrial Comm'n*, 271 N.W. 78, 83 (Wis. 1937) ("It suffices to render an employer liable . . . under that statute that he suffered or permitted a minor . . . to work by assisting an employee of the employer with the latter's knowledge, actual or constructive."), *superseded by statute as stated in Beard v. Lee Enters., Inc.*, 591 N.W.2d 156 (Wis. 1999). This Court has explained that "[t]o have 'permitted' or 'suffered' [a minor] to work . . ., defendant would have had to have knowledge that he was working there." *Harper v. Cook*, 139 W. Va. 917, 925, 82 S.E.2d 427, 433 (1954). In other words, absent an actual employer-employee relationship, a business is still "liable for having permitted or suffered a child to continue [working when it] knew, or should have known, that the child was performing work for the [business]." Syl. pt. 2, in part, *Harper*, *id.*

A case that illustrates the meaning of "permitting or suffering" a child to work in violation of child labor laws is *Gorczynski v. Nugent*, 83 N.E.2d 495 (Ill. 1948). In *Gorczynski*, a thirteen-year-old boy was hired by a horse trainer, named Frank Nugent, to walk and cool off his horses after workouts or races at a race track. The boy was injured

when a horse kicked him. The boy's parents sued the horse's owner, Elizabeth Nugent; Frank Nugent; and the race track owners. A jury rendered a verdict in favor of the boy and his parents. The owners of the race track appealed. One of the issues raised by the race track owners was that they did not employ the boy. Therefore, the track owners argued that they could not be held liable for violating the child labor law, which prohibited employment of the boy because of his age. The appellate court in *Gorczynski* rejected the argument as follows:

> The facts in this case establish that plaintiff was illegally employed at a gainful occupation by the Nugents in connection with appellants' place of amusement, which would leave for determination the remaining or principal question whether appellants 'permitted or suffered' plaintiff to so work. Appellants urge they are not liable because the Nugents were not their employees and appellants had no control over plaintiff's employment by the Nugents. In the case of *Purtell v. Philadelphia & Reading Coal & Iron Co.*, . . . 99 N.E. 899, 902 . . . [(Ill. 1912)], the plaintiff, a minor under the statutory age, was employed as a water boy by coal pushers working in defendant's coal yard. While so employed he was injured and filed suit under the Child Labor Act. It was there held that the relation of master and servant is not necessary in applying the act. The court specifically said in that case, 'The coal pushers who hired appellee were servants of appellant and were entirely under its control. The latter had the right to order its employees to hire no boys under lawful age to carry water, and to enforce obedience to such order.' In the instant case the Nugents were not employees of appellant and to that extent this case is different from the *Purtell* case. However, an examination of the evidence shows that the right to control the Nugents' conduct on appellants' premises was as extensive as if they had been employees.
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> . . . .

> It is apparent from the evidence in this case that [appellants] could have caused a suspension of the Nugents for violation of the law, could have prevented the plaintiff from entering the stable area, and were under a positive duty to investigate both the Nugents and the plaintiff and require the plaintiff be either discharged or furnished with proper credentials. We hardly see how the power of control over the Nugents and plaintiff could have been more complete. We said in the *Purtell* case, 'It is the child's working that is forbidden by the statute, and not his hiring, and, while the statute does not require employers to police their premises in order to prevent chance violations of the act, they owe the duty of using reasonable care to see that boys under the forbidden age are not suffered or permitted to work there contrary to the statute.' We find here that appellants knew or could have known by the exercise of reasonable care, . . . that plaintiff was illegally employed on its premises and under such circumstances permitted or suffered plaintiff to work in violation of the statute.

Gorczynski, 83 N.E.2d at 498-99.

Under *Gorczynski* and this Court's precedent, it was and is irrelevant that SEC did not employ Robert. Pursuant to W. Va. Code § 21-6-2(a)(16), SEC could be held liable for "permitting or suffering" Robert to work on its roof if it knew or reasonably should have known that Robert was younger than eighteen years old. This issue, like the *Shaffer* analysis, presented a jury question.

In view of the foregoing, I respectfully dissent. I am authorized to state that Justice Workman joins me in this dissenting opinion.