

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

LANGLEY FRANCE, as the Parent and  
Next Friend of ROBERT FRANCE, a Minor,

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Plaintiff,

v.

Civil Action No. 06-C-244  
Honorable Roger L. Perry

SOUTHERN EQUIPMENT COMPANY,  
a West Virginia Corporation;

Defendant/Third-Party Plaintiff,

v.

DAN HENSLEY d/b/a ROYALTY BUILDER,

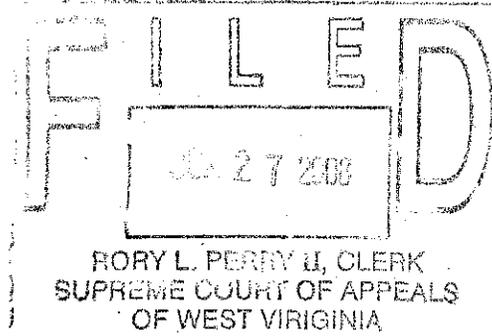
Third-Party Defendant.

**ORDER**

On July 23, 2007, came the defendant, Southern Equipment Company, Inc., by counsel, Molly K. Underwood and the plaintiff Langley France, as the Parent and Next Friend of Robert France, a Minor, by counsel Lee Javins and J. R. Carter, for hearing on the defendant's properly noticed Motion for Summary Judgment.

WHEREBY, following review of both parties Motions and Memorandums of Law in Support and after hearing argument of counsel for both parties, the Court makes the following findings of fact and conclusions of law.

1. SEC is a mining equipment refurbisher located at Peck's Mill in Logan County, West Virginia.



2. In or about March of 2006, it was determined that the metal roof on the SEC building needed to be replaced. Mr. Zigmond, vice-president of SEC called Quality Metal Roof and spoke with Kevin Akers, a contractor's sales representative at Quality Metal who agreed to come to the facility to take measurements and provide an estimate.

3. Mr. Akers and Jason Dempsey went to SEC in early March 2006 and took measurements. They had a brief conversation with Mr. Zigmond in which Mr. Zigmond told them which parts of the facility on which he wanted a new roof. In or about mid-March Mr. Akers faxed Mr. Zigmond a "proposal" or "estimate" on Quality's letterhead which stated the cost for material as \$17,271.64 and complete "installation and removal" as \$17,728.36 with a discount of \$2,000.00 for a total cost of \$33,000.

4. Mr. Zigmond agreed to the proposal and provided a \$7,000.00 check to Quality for down payment.

5. Without the knowledge of SEC, Kevin Akers asked Danny Hensley, owner of Royalty Builders (Quality's biggest contractor-customer) if he would be interested in the roofing job at SEC.

6. Akers and Hensley drove to SEC and Hensley went up on the roof to take a look for the purpose of providing an estimate for the labor. Ken Zigmond came out of the building and greeted Mr. Akers, but didn't meet Mr. Hensley because he was ascending the ladder. Mr. Akers did not introduce Mr. Hensley and did not tell Mr. Zigmond that Mr. Akers was from a separate company.

7. Mr. Hensley informed Mr. Akers that he would perform the labor for \$12,000.00. Neither Mr. Hensley nor Mr. Akers contacted Mr. Zigmond and told him of the \$12,000.00 estimate. Additionally, at no time did Mr. Akers tell Mr. Zigmond that

Quality Metal does not do installation of the roofs, it merely sells the manufactures and sells the material.

8. The roofing work commenced on or about April 10, 2006. Royalty Builders had a crew of eight employees, one of whom was sixteen year old Robert France. This was Robert's first job and he had never done roofing or construction work in the past.

9. Ken Zigmond met Danny Hensley of Royalty Builders for the first time on April 10<sup>th</sup>, 2006. Mr. Hensley introduced himself as being from Royalty Builders but at no time did Mr. Hensley tell Mr. Zigmond that Royalty Builders was an entirely separate company from Quality Metals.

10. On April 12, 2006, Robert France fell approximately twenty-five feet through the roof of the SEC building landing on the concrete floor. Robert was running across the roof and stepped on a piece of metal roof from which Thompson had just removed some of the bolts. The metal sheet gave way and Robert France fell through the roof.

11. On August 11, 2006, plaintiff filed this lawsuit against Southern Equipment Company and Quality Metal Roof. On October 27, 2006, Southern Equipment filed a third-party complaint against Danny Hensley d/b/a Royalty Builders.

12. Plaintiff alleges defendant failed to provide a reasonably safe work environment by negligently failing to provide or requiring Royalty Builders' employees to employ some means of fall protection; negligently allowing a portion of the roof to be removed without providing an alternative means of fall protection or warning; and negligently failing to guard against plaintiff tripping or falling through the roof. Plaintiff additionally asserts that SEC is vicariously liable for Robert France's injuries because it "hir[ed] a contractor to perform the inherently dangerous activity of removing and installing roofing

..." without requiring fall protection. Finally, plaintiff asserts that SEC is strictly liable to plaintiff for exposing him to the inherently and abnormally dangerous activity of removing and installing roofing.

13. Southern Equipment Company owed no duty to Robert France because Robert France was employed by Royalty Builders, an independent contractor, which was not hired by SEC.

14. The employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servant. Paxton v. Crabtree, 400 S. E. 2d (W. Va. 1990). In the case at bar, it clear that SEC neither engaged Royalty Builders to do the work nor had any power to control the work.

"The power of control 'factor refers to control over the means and method of performing the work." Paxton at 696 citing McDonald v. Hampton Training Sch. For Nurses, 486 S.E.2d 299 301 (Va. 1997). The Paxton Court elaborated on the meaning of "power of control," stating,

[W]e follow the lead of numerous other courts in holding that "an owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract—including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work—without changing the relationship from that of owner and independent contractor, or [changing] the duties arising from that relationship.

15. The Federal Occupational Safety and Health Act does not apply to the owner of a premises where the worker is an independent contractor and not an employee of the owner. Occupational Safety and Health Act of 1970 § 2 et seq. , 29 U.S.C.A. § 651 et. Seq.

16. Sufficient factual information exists in this case for the Court to determine that the roofing activity was not inherently dangerous. Therefore, SEC is not strictly liable for plaintiff's injuries. Under West Virginia law, work is inherently dangerous where the work is "dangerous in and of itself and not dangerous simply because of the negligent performance of the work, and that danger must be naturally apprehended by the parties when they contract." *Shaffer*, 524 S.E.2d at 698. The West Virginia Supreme Court in *Shaffer* defined inherently dangerous work this way:

It has been recognized that in defining "inherently dangerous," is it not necessary that the work should involve a major hazard. Rather, "[I]t is sufficient if there is a recognizable and substantial danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger." ... Courts have indicated that "[I]nherent danger will be found if an activity or the manner in which an activity is necessarily conducted, poses an unusual and high risk of harm to those involved in the activity or to other persons . . . Moreover, inherently dangerous activity must be "of such a nature that in the ordinary course of events its performance would probably and not merely possibly, cause injury if proper precautions were not taken . . .

Shaffer at 699.

17. The Restatement (Second) of Torts, § 519 (1976) sets forth six factors to be balanced in determining whether an activity falls within the "abnormally dangerous" category, triggering strict liability:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

When applying these six factors to the case at bar, one must reach the conclusion

the activity of roofing there does not appear to be a high degree of harm. While the harm to a person may be great, such as in this case, that harm can be eliminated by using reasonable care. In other words, the risk could have been eliminated had Danny Hensley, owner of Royalty Builders, required his employees to use fall protection. Roofing is clearly a common activity. Every building has a roof and more often than not, that roof has to be replaced at some point. Clearly, in the case at bar, the roofing was taking place in an appropriate place. Finally, roofing has great value to the community in that almost everybody "has a roof over their heads" and at some point, that roof will likely need to be repaired replaced.

Activities that have been recognized as "inherently dangerous activities" in West Virginia are activities such as blasting. Although West Virginia Courts have not addressed the issue of whether roofing a building is an inherently dangerous activity, other jurisdictions, including North Carolina have held that it, like other construction activities, and is not an inherently dangerous activity. See Olympic Products Co. v. Roof Systems, Inc., 363 S.E.2d 367 (N.C. 1988); Canady v. McCleod 446 S.E.2d 879 (N.C. 1994); Brown v. Friday Services, Inc. 460 S.E. 2d 356 (N.C. 1995).

18. Robertson v. Morris, 209 W. Va. 288, 546 S.E.2d 770 (2001) is directly on point. The Robertson Court's holding addresses both the independent contractor issue and the inherently dangerous issue. In Robertson, a homeowner, Susan Morris, the defendant/appellee, contacted a Herbert Clifton Adkins about removing a tree from her property. Mr. Adkins did not want to do the work, but, after speaking with Ms. Morris, he contacted the plaintiff/appellant, James Lawrence Robertson, to see if he might be interested in removing the tree for Ms. Morris. Mr. Adkins and Mr. Robertson went to

Ms. Morris' home to look at the tree and determine what needed to be done to remove the tree.

Subsequent to that visit, Mr. Adkins told Mr. Robertson to cut the tree, and Mr. Robertson and his son subsequently went to Ms. Morris' home to cut the tree. As they were cutting the tree, the wind blew a limb against Mr. Robertson, who was in the tree, and knocked him to the ground. Mr. Robertson was not wearing a safety harness or any type of safety equipment, and as a consequence, when he hit the ground he suffered severe injuries.

Mr. Robertson then sued Ms. Morris and Mr. Adkins for the injuries he sustained. With regard to the claims against Ms. Morris, the plaintiff claimed that he was acting as her agent or employee at the time the accident occurred. He also claimed that Ms. Morris owed him a duty of reasonable care, which was breached when she failed to say anything about his lack of safety equipment.

The plaintiff appealed and one of the arguments raised by the appellant was that there was a question of material fact as to whether he was acting as an agent of Ms. Morris at the time he was injured, and the Trial Court should, therefore, not have granted summary judgment.

The West Virginia Supreme Court addressed the plaintiff/appellant's argument as follows:

[2] The question of whether the appellant was an agent or an employee or an independent contractor of Ms. Morris is significant because this Court has recognized how one may be responsible for physical harm caused to his or her agent or employee, the Court has also recognized that, as a general proposition, one who hires an independent contractor is not responsible for injuries resulting from an act or omission of the contractor or the contractor's servant. Pasquale v. Ohio Power Company, 187 W. Va. 202, 418 S.E.2d 778 (1992). And in the present case, it appears that

the injury to the appellant was caused by his failure to use safety equipment.

Robertson, 546 S.E.2d at 772, 773.

In its opinion in Robertson, The West Virginia Supreme Court also discussed Shafer v. Acme Limestone Company, Inc., 206 W. Va. 333, 524 S.E.2d 688 (1999) and noted that in Shafer, the Court discussed the distinction between an agency relationship and an independent contractor relationship. The Court noted that in Shafer there was a significant discussion as to what constitutes the power to control and supervise the work to be done. In discussing Shafer, the Court in Robertson stated:

“The Court also discussed at length what constitutes the power to control and supervise the work to be done. The Court concluded that a hiring party could retain a broad general right of control over a party who did work for him without establishing an agency relationship. For instance, a hiring party could inspect the work, or stop it, or make suggestions or recommendations without changing the relationship from that of independent contractor to that of agent. Specifically, the Court stated in *Syllabus Pt. 4* of Shafer v. Acme Limestone Company, Inc., *supra*, that: an owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to ensure satisfactory performance of the contract-including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work-without changing the relationship from that of owner and independent contractor or changing the duties arising from that relationship.

Robertson, 546 S.E.2d at 773.

The Court in Robertson then noted that there was no evidence that Ms. Morris exercised control over the process of cutting the tree on her premises. The Court then held as follows:

“This Court believes that *Syllabus Pt. 4* of Shafer v. Acme Limestone Company, Inc., *id.*, indicates that Ms. Morris did not engage in the types of acts which would convert her relationship, and that the Circuit Court

properly concluded that no such relationship was established or could be established under the facts of this case.

Robertson, 546 S.E.2d at 773.

The Court also addressed the issue of whether tree cutting was inherently dangerous and constituted an exception to the rule set forth in Shafer. In addressing the inherently dangerous issue raised by the appellant, the Court held as follows:

“The Court notes that in Shafer v. Acme Limestone Company, Inc., *id.*, an exception to the general rule applies where one employs an independent contractor to do inherently dangerous work. Under that exception, the employing party may be liable for a workers’ injury even if the employing party does not exercise control sufficient to convert the relationship to an employment or agency relationship – but this is true only if the risk involved cannot be eliminated or significantly reduced by taking proper precautions.

The evidence adduced in the present case indicates that the risk of cutting the tree on Ms. Morris’ property, the risk which ultimately gave rise to the appellant’s injury, **could have been significantly eliminated or reduced by using safety ropes or safety equipment. Under such circumstances, the work was not so inherently dangerous as to bring into play the exception relating to inherently dangerous work discussed in Shafer v. Acme Limestone Company, Inc., *id.***

Robertson, 546 S.E.2d at 773, 774. (emphasis added)

19. The Court notes that the Plaintiffs’ expert would apparently extend strict liability to a great many common construction and industrial activities. It is not appropriate to basically eliminate the court’s ability to analyze and classify many activities as not being subject to strict liability. The implications of “lowering the bar” on classification of activities as subject to strict liability from a few activities to virtually any commercial or industrial activity having a component of hazard on the ability to conduct business in this state would be substantial.

20. West Virginia Code § 21,6-2 (a) (13), which prohibits children under the age of eighteen from being "employed, permitted or suffered to work . . . [r]oofing operations above ground level . . ." applies to the employer. In the case at bar, Danny Hensley d/b/a Royalty Builders was the employer of Robert France, not Southern Equipment Company.

21. Summary judgment is proper where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. West Virginia Rules of Civil Procedure 56 ©, Painter v. Peavy, 451 S.E.2d 755 (W. Va. 1994), Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995), Jjividen v. Law, 461 S.E.2d 451 (W. Va. 1995), Powderidge Unit Owners Ass'n v. Highland Properties, LTD., 474 S.E.2d 872 (W. Va. 1996); Dawson v. Norfolk & W.Ry., 475 S.E.2d 10 (W. Va. 1996); Freenfiled v. Schmidt Baking Co., 485 S.E.2d 391 (W. Va. 1997).

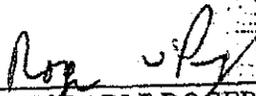
22. Plaintiff has failed to carry the burden of disputing or rebutting defendant's Motion for Summary Judgment.

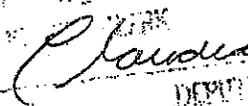
23. The record reflects that there are no genuine issues as to any material facts and, accordingly, defendant is entitled to judgment as a matter of law.

Therefore, the Court does hereby GRANT the defendant, Southern Equipment Company, Inc's Motion for Summary Judgment and dismisses this action, with prejudice.

The Clerk is hereby directed to forward copies of this Order to all parties and counsel of record.

ENTERED THIS 6<sup>th</sup> DAY OF November, 2007.

  
HONORABLE ROGER L. PERRY

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