NO. 4-10-0668 Order Filed 5/9/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JESSICA WATKINS, as Special Administrator of the Estate of CHARLES E. WATKINS, JR., Deceased, Plaintiff-Appellant, v. JOHN BLAKELY, Defendant-Appellee.	))))))))	Appeal from Circuit Court of Sangamon County No. 02L405 Honorable Peter C. Cavanagh, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and McCullough concurred in the judgment.

ORDER

Held: Where the evidence in the record demonstrates that defendant did not retain sufficient control over the work performed by plaintiff to impose liability, summary judgment in favor of defendant was appropriate, as defendant did not owe plaintiff a duty to exercise reasonable care, and therefore, defendant was not subject to liability for plaintiff's injuries.

Plaintiff, Jessica Watkins, as special administrator of the estate of decedent, Charles E. Watkins, was substituted as the named plaintiff in this personal-injury action. Watkins died for reasons unrelated to this case during the pendency of the trial court proceedings. For ease and clarity, throughout this decision, we refer to Watkins as the party plaintiff. Watkins appeals the entry of summary judgment in favor of defendant, John Blakely, a homeowner, on Watkins' negligence claim arising out of his injuries caused by his fall while working on Blakely's garage. We affirm.

I. BACKGROUND

The following facts are taken from the pleadings and attached documents. Watkins filed a complaint alleging that Blakely breached his duty of reasonable care to Watkins by (1) providing defective scaffolding, (2) failing to properly instruct Watkins on the assembly and management of the scaffolding, (3) providing Watkins with alcoholic beverages while he worked, (4) encouraging or allowing Watkins to consume the alcohol while he worked, and (5) failing to exercise his supervisory control over the project by refusing to take action after recognizing the work was being performed in a dangerous manner.

Blakely had been friends with Eddie Sullenger for a number of years. Sullenger would often help Blakely with odd jobs at Blakely's home and Blakely would generally compensate Sullenger by providing him alcohol and cigarettes. In December 2001, Blakely had retained Sullenger to paint the outside of a two-story garage at Blakely's house. Sullenger and Watkins had been friends for a number of years as well. Sullenger asked Watkins if he would like to accompany him to Blakely's house where he could relax and watch while Sullenger continued his painting project. After drinking approximately seven beers, Watkins volunteered to climb up the scaffolding and paint the upper portion of the garage, as Sullenger was afraid of heights. Watkins placed a ladder on top of the scaffolding in order to reach the highest part of the garage. When Blakely returned home from work, he saw Watkins on the ladder painting. Blakely went inside to use the restroom and, while he was inside, Watkins fell to the ground, approximately 12 feet, and was injured.

Blakely testified in his deposition that he met Watkins through Sullenger in 1980 and has only interacted with him once or twice since then. Watkins helped Blakely shingle the roof of his house in 1992. For that service, Blakely paid Watkins with beer. Blakely said he considered both Sullenger and Watkins to be "alcoholics."

In November 2001, Blakely testified, he and Sullenger began staining his house, a two-story log cabin. Though Sullenger did not request payment, Blakely knew his purchase of beer for Sullenger "just happened to go along with it." It took the two of them approximately three weeks to do the house. They then started on the garage. Sullenger drank while he worked. They used scaffolding that he and Sullenger put together to reach the higher parts. The day before Watkins' accident, Blakely recalled that Sullenger had mentioned that, due to impending cold weather, the garage needed to be completed quickly. Sullenger suggested that he get Watkins to help, as he "was not scared of heights." Blakely told Sullenger that he "[did]n't care" if Watkins helped.

The next morning, Blakely said he picked up Sullenger at Watkins' house and discovered that Watkins was, in fact, going to help. Blakely said he did not recall any discussion regarding payment for Watkins, but Blakely knew Watkins probably expected to receive "something in return." The group stopped at a convenience store and Sullenger purchased cigarettes, cigars, and two cases of beer. Blakely said he dropped the two men off at his house around 10:30 a.m. and he left for work. When he arrived home at 4 p.m., he was "shocked for how much work was done in that amount of time." It appeared as if the two men had completed only about 45 minutes worth of staining. As he drove up the driveway, Blakely saw Sullenger with a beer in his hand and Watkins on a ladder on the

scaffolding with a beer sitting on the scaffolding. Blakely greeted both men. Sullenger said to Blakely: "'I told [Watkins] to get down two or three times. He's kind of wobbly.'" Blakely said: "'I told you guys not to get drunk.'" Blakely said he could tell "they were little bit under the weather." Blakely went in the house. A few minutes later, Sullenger came inside and told Blakely that Watkins had fallen. Blakely went outside and saw Watkins lying on the ground in the "fetal position" moaning. Blakely said Watkins "was conscious, but he was hurting."

During Sullenger's deposition, Watkins' attorney sought a detailed description of Sullenger's history of employment. Sullenger said his "last recent job" was remodeling the Route 66 Hotel between September 2002 and April 2003. Counsel asked: "Do you have a history of working for people, for doing odd jobs for people?" Sullenger said he did and named Blakely as one of those individuals. He testified that he had been doing "odd jobs" for Blakely since 1977.

Sullenger said he met Blakely in 1977 when they both worked for Springfield Township. They became friends and often got together socially. Between 1980 and 1990, Blakely would pay Sullenger cash for doing odd jobs. In 1992, Blakely started building his house and Sullenger helped. Blakely paid him in cash but would also buy him a 12-pack after work. Sullenger admitted he usually drank while working. Sullenger said he had known Watkins since childhood, and he had "always been a drinker," starting at 16 years old.

Sullenger said he helped Blakely assemble the scaffolding for the staining project. He thought Blakely paid him $60 or $70 for staining the house. Sullenger bought

his own beer from the "advancement" he received from Blakely. They started on the garage in November 2001. They had used a sprayer on some of it, but then Sullenger said he realized it would look better and would not be as wasteful if the stain was brushed on. Sullenger said he decided to brush the front and back, leaving the sides sprayed. Blakely purchased the stain for the project.

On the day of the incident, Sullenger said he got ready to go to Blakely's house to work on the garage. Watkins asked if he could help. Sullenger called Blakely and asked if Watkins could join him to "keep [him] company, maybe have a few beers." Sullenger said Blakely said: "'Okay, whatever.'" Sullenger did not recall Watkins saying anything about being paid. Sullenger said Watkins "wasn't really going to go out there and work. He was going to go out there and drink beer and be out in the country and be peaceful and relax while [Sullenger] was staining."

After Blakely picked up Sullenger and Watkins, Sullenger asked Blakely to stop at a convenience store so he could "get some cigarettes and pick up some beer." Sullenger bought two cases of beer, cigarettes, and cigars. Blakely dropped them off at his house and left. Sullenger said Blakely "no sooner pulled out of the driveway than [Watkins] popped open a beer." Sullenger said he did not hear Blakely and Watkins discuss any terms about Watkins performing any work at Blakely's house. He said he did not know if Blakely knew Watkins was going to do any staining. According to Sullenger, Blakely only knew Watkins "was going to go out there and get a buzz."

As Sullenger was preparing a can of stain for application, Watkins, who was sitting on the deck drinking a beer and smoking a cigar, told Sullenger to get him a bucket

and he would help. Sullenger had told Blakely that he would stain the back of the garage only as far up as he could reach from the ground, as he was afraid of heights. Blakely told Sullenger that he would get on the scaffolding and stain the higher parts "when [he gets] time." Sullenger mentioned to Watkins that he was not getting on the scaffolding and Watkins said: "'Don't worry about it. I'll get up there.'" Sullenger said he told Watkins if he got on the scaffolding, he could not take a beer. Watkins told Sullenger not to worry.

The following exchange occurred during Sullenger's deposition:

"Q. Was he doing this just because he was bored, or did he think he was going to get paid for it?

A. Just because he was bored, something to do. Two days prior to that, he was painting the eaves of his house, 40 foot high.

Q. As long as you've known [Watkins], have you known him to be the type of guy to volunteer to do work?

A. Yeah, if it consists of getting a buzz, yeah.

Q. What do you mean by that?

A. If you--consist on beer.

Q. You mean–

A. If I buy beer, he'll give me a hand doing anything.

* * *

Q. If--he will do it if he knows he's going to get beer out of it?

A. Yeah."

Sullenger said Watkins drank seven or eight beers in a five-hour period. He and Watkins were drinking from the cases of beer that Sullenger had purchased that morning. Watkins retrieved a bucket of stain, climbed on the scaffolding and started staining. Watkins then asked Sullenger for a ladder. Sullenger handed Watkins the ladder as he stood on the scaffolding. Watkins opened the ladder and climbed up. He was trying to reach a spot that Sullenger had pointed out that he had missed when he fell. Sullenger said that Blakely had just returned home and was inside his house at the time Watkins fell. Sullenger ran inside to get Blakely and called an ambulance. According to Sullenger, Watkins broke his leg, hip, three ribs, and pelvis in the fall. He was in a coma for approximately 45 days.

Watkins filed a motion for summary judgment, claiming that, based on the pleadings and depositions filed in the case, there was no dispute that Watkins and Blakely had an employee-employer relationship and that Blakely had failed to maintain a safe work environment. As a result, Watkins claimed he was entitled to a judgment as a matter of law.

Blakely also filed a motion for summary judgment, claiming the pleadings and depositions filed in the case "directly contradict[ed] [Watkins'] allegations of the existence of an employee-employer relationship, agency or any other such relationship." Blakely asserted that the "facts, testimony and Illinois case law fail to support" the allegations that Blakely owed Watkins a duty of care.

On January 13, 2010, the trial court conducted a hearing on both parties' pending motions for summary judgment. We have no record of that hearing: no transcript,

bystander's report (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)), or agreed statement of facts (Ill. S. Ct. R. 323(d) (eff. Dec. 13 ,2005)). However, the court's docket entry states that Watkins' motion was denied due to "a material fact issue." The court took Blakley's motion under advisement. Later, the court also denied Blakley's motion for summary judgment, finding there remained a genuine issue of material fact as to "whether [Watkins] intended to perform work" for Blakely.

On February 6, 2010, Blakely filed a motion for clarification or reconsideration, claiming the trial court had failed to rule on Blakely's first issue of whether there existed an employer-employee relationship between he and Watkins. On March 15, 2010, the court entered the following docket entry in response to Blakely's motion for clarification:

> "[Blakely] had no contact with [Watkins], and no evidence is offered that [Blakely] offered compensation to [Watkins]. [Blakely], who did not remain on the worksite for this job while the work was performed, had no right to control [Watkins], and no employee v. employer relationship exists.
>
> [Blakely]'s Motion for Summary Judgment as to the employee v. employer relationship is granted as insufficient facts or evidence support the existence of such a relationship."

On March 30, 2010, Watkins filed a motion to reconsider, claiming the existence of an employer-employee relationship is a question of fact, not a question of law. Watkins argued the trial court erred in granting Blakely's motion for summary judgment

on that issue when there "is a sufficient amount of evidence to be given to the jury for their determination of an employee-employer relationship and whether [Blakely] remained in control of the project enough to establish liability."

On June 30, 2010, after a hearing on Watkins' motion to reconsider, the trial court entered the following docket entry: "Arguments heard. Motion denied. [Watkins] granted 21 days to file an amended complaint."

On July 28, 2010, the trial court entered a formal written order reflecting the court's ruling from March 15, 2010. The court granted Blakely's motion for summary judgment, finding "no employer/employee relationship existed between Plaintiff Watkins and Defendant Blakely." The court ruled all other pending motions were moot. The court also entered an Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) ruling, indicating no just reason to delay an appeal in this matter existed. This appeal followed.

II. ANALYSIS

Watkins claims the trial court erred by granting summary judgment in Blakley's favor. Watkins asserts that the court improperly determined that, as a matter of law, no employee-employer relationship existed between Watkins and Blakely and therefore, Blakely owed Watkins no duty to provide a safe work environment.

Summary judgment should be granted only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). In determining whether summary judgment is appropriate, the trial court must construe the pleadings, depositions, admissions, and

affidavits strictly against the party seeking summary judgment and liberally in favor of the party opposing it. *In re Estate of Whittington*, 107 Ill. 2d 169, 177 (1985). Though a plaintiff need not prove his case during a summary-judgment proceeding, he must present some evidentiary facts to support the elements of his cause of action. *Krueger v. Oberto*, 309 Ill. App. 3d 358, 367 (1999). We review entry of a summary judgment *de novo*. *Majca v. Beekil*, 183 Ill. 2d 407, 416 (1998).

In any action for common-law negligence, the plaintiff must plead and prove that defendant owed a duty of care to the plaintiff. See *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). Whether a duty exists is a question of law to be determined by the court. *Happel*, 199 Ill. 2d at 186. Although the issues of negligence and due care are ordinarily questions of fact for the jury, "if upon the undisputed facts, reasonable men exercising fair and honest judgment would be compelled to conclude that such facts failed to establish due care on the part of plaintiff or negligence on the part of the defendant, then these issues become questions of law." *Wills v. Paul*, 24 Ill. App. 2d 417, 421 (1960).

In this case, Watkins argues on appeal that a duty of care arose when Blakely employed him to stain his garage. It follows, argues Watkins, that as his employer, Blakely had a duty to provide him a reasonably safe place to work. Because such a duty would only follow if there was an employee-employer relationship, we must first analyze the relationship between Watkins and Blakely.

There are six factors that should be considered in determining whether the parties are engaged in an employment relationship: (1) whether the employer retained a right to control the manner in which the work is done, (2) the method of payment, (3) the

right to discharge, (4) the skill required in the work to be done, (5) whether the employer provided the tools, materials, or equipment, and (6) whether the alleged employer deducted for withholding tax. *Davis v. Industrial Commission*, 261 Ill. App. 3d 849, 852-53 (1994). In *Davis*, this court considered these factors in its analysis to determine whether the injured claimant was an employee or an independent contractor. Among the factors, "the right to control the work is the single most important factor in determining the parties' relationship." *Davis*, 261 Ill. App. 3d at 853. This court concluded that, based on "the facts and circumstances of this case as a whole," the claimant was actually an independent contractor, not an employee. *Davis*, 261 Ill. App. 3d at 854.

In *Davis*, the respondent had placed a classified advertisement in the newspaper requesting the permanent part-time services of a handyman for a variety of jobs. *Davis*, 261 Ill. App. 3d at 850. The respondent hired the claimant, who worked 40 to 50 hours per week for $6.00 per hour. *Davis*, 261 Ill. App. 3d at 851. While constructing a pole barn on the respondent's property, the claimant was injured. *Davis*, 261 Ill. App. 3d at 851. His workers' compensation claim was denied because it was determined that there was no employee-employer relationship between the claimant and the respondent. *Davis*, 261 Ill. App. 3d at 850.

In considering the claimant's appeal, this court found that (1) the respondent had exercised "very little control" over the claimant's work; (2) the manner, means, and method in which the tasks were performed were left entirely to the claimant's discretion; (3) the respondent did not supervise the claimant, as he was free to begin and end work whenever he wished; (4) the respondent instructed the claimant only in general terms

about what task needed to be completed; and (5) the claimant was responsible for his own income taxes and received no benefits. *Davis*, 261 Ill. App. 3d at 853. From these factors, this court concluded that the claimant's relationship with the respondent was that of an independent contractor, not an employee. *Davis*, 261 Ill. App. 3d at 854.

The facts of the case *sub judice* are even less indicative of an employee-employer relationship than those set forth in *Davis*. For example, in *Davis*, the claimant was paid hourly and had responded to an advertisement for employment. Construing the facts in this case in a light more favorable to Watkins than to Blakely, as we are required to do, we will assume that Blakely knew Watkins was coming to his house to help Sullenger stain the garage. Blakely exercised little, if any, control over Watkins. He had expressed that he wanted stain applied, but he had not instructed Watkins, or even Sullenger, as to the manner, means, or method he should use to do so. Except for a few minutes, Blakely was not on site when Watkins worked on the garage. He and Watkins had not discussed compensation for Watkins' services.

Rather, the undisputed facts indicate that Watkins accompanied his friend Sullenger to Blakely's house. Sullenger had agreed to help Blakely apply stain to his garage. Watkins, on this one occasion, agreed to help Sullenger without any discussion or agreement regarding payment. Without Blakely's supervision, Watkins and Sullenger applied the stain to the garage while drinking alcohol. Watkins set Blakely's ladder on top of Blakely's scaffolding and applied the stain, until he fell to the ground. Based on these facts, as a matter of law, we find Watkins and Blakely were not involved in an employee-employer relationship and, therefore, Blakely owed Watkins no duty that would result from

that relationship.

In his argument regarding the amount of control Blakely retained over the project, Watkins quoted from comment c of section 414 of Restatement (Second) of Torts, stating that he and Sullenger were "'not entirely free to do work in [their] own way.'" It is interesting that Watkins cited to this section, as it governs an employer's duty owed to an independent contractor, not an employee, and is more applicable to the facts presented in this case.

Section 414 provides as follows:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts §414 (1965).

In determining whether Blakely owed Watkins a duty of care pursuant to this theory, we must consider again whether Blakely retained the requisite control over the work. This is not in the context of an employee-employer relationship, but rather, in the context of an employer "to others." This section addresses an employer's duty to employees of an independent contractor or other third parties. See *Connaghan v. Caplice*, 325 Ill. App. 3d 245, 249 (2001) (contractor hired by homeowner to build a garage fell off homeowner's ladder; trial court granted summary judgment in favor of homeowner because he did not retain control and, therefore, had no duty under section 414; appellate court affirmed on

same grounds). If we accept Sullenger's testimony that Blakely did not know beforehand that Watkins would be participating in the staining process, this theory of liability could apply to this case. It could be said that Sullenger was hired by Blakely as an independent contractor and Watkins was an employee of Sullenger. We would then need to determine whether Blakely, an employer of an independent contractor, owed a duty to Watkins, an employee of the independent contractor.

Comment c to section 414 of the Restatement provides:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts §414, Comment c, at 388 (1965).

"[A] general right to ensure that safety precautions are observed and that work is done in a safe manner will not impose liability on the general contractor unless the

evidence shows that the general contractor retained control over the means and methods of the independent contractor's work." *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 1071 (2003). See also *Fris v. Personal Products Co.*, 255 Ill. App. 3d 916, 924 (1994) ("Applying section 414, the courts of this State have now recognized that an employee hired by an independent contractor to do construction work may obtain recovery for injuries sustained in the course of that work from the owner of the premises where the owner has retained the requisite control over the work and has failed to exercise that control properly."). Whether an employer retained sufficient control is typically a question of fact, but where the evidence in the record is insufficient to raise a question of fact, the issue may be decided as a matter of law. *Connaghan*, 325 Ill. App. 3d at 249.

Granted, Blakely had the right to stop the work, tell Sullenger and Watkins to be careful, and to change their ways if he thought something was unsafe. He also supplied the stain, brushes, ladder, and scaffolding for the project. However, these facts do not establish sufficient control to impose a duty under section 414. There is nothing in the record to suggest that Blakely directed the "operative details" (Restatement (Second) of Torts §414, Comment c, at 388 (1965)) of the staining project. In fact, the evidence demonstrated that it was Sullenger who told Blakely that it would be better to apply the stain with brushes rather than a sprayer, and Blakely agreed. The fact that Blakely provided the ladder and the scaffolding is "not enough to establish that [Blakely] retained control over the 'incidental aspects' of [Watkins'] work." *Connaghan*, 325 Ill. App. 3d at 250 (quoting *Fris*, 255 Ill. App. 3d at 924). Blakely did not tell Watkins how to use the ladder or scaffolding or where to place them. See *Connaghan*, 325 Ill. App. 3d at 250.

Accordingly, we find no genuine issue of material fact in dispute concerning the extent of Blakely's control of the work performed by Watkins. He simply did not retain sufficient control to impose upon himself liability for Watkins' injuries. As a result, Blakely is entitled to a judgment as a matter of law. See *Connaghan*, 325 Ill. App. 3d at 250-51.

Again, we note that typically the issues of negligence, contributory negligence, and proximate cause are matters for a trier of fact. However, such matters can be decided as a matter of law where the evidence as a whole overwhelmingly favors a defendant such that no contrary verdict could stand. *Cf. Ellis v. Howard*, 4 Ill. App. 3d 852, 854-55 (1972) (question of fact remained as to whether homeowner was negligent for removing a safety guard from a saw that injured his handyman). On that point, as this court has stated before, "[w]e would abjure our responsibilities if we did not say as a matter of law that the plaintiff was not in the exercise of due care and caution for his own safety." *Ferguson v. Lounsberry*, 58 Ill. App. 2d 456, 463 (1965). There is no evidence the ladder or the scaffolding in this case was defective. Instead, Watkins stepped onto a ladder placed on top of scaffolding and reached as far as he could to stain a section that he had missed. He did so under the influence of alcohol. We think "all minds would reasonably agree" that Watkins "inadvertently, unthinkingly, heedlessly, or carelessly" engaged in conduct that resulted in his injuries. *Ferguson*, 58 Ill. App. 2d at 462. For these reasons, we find that Blakely is entitled to a judgment in his favor as a matter of law.

Watkins also contends that the trial court erred in relying on the fact that there was no evidence that Watkins and Blakely actually had a conversation regarding Watkins' employment. Watkins claims the court's reliance on a nonexistent conversation

is in violation of the Dead-Man's Act (735 ILCS 5/8-201 (West 2008)). We find this argument moot based on the preceding discussion and holding. Regardless of the court's basis for granting Blakely's motion for summary judgment, this court has affirmed the court's decision on the basis the evidence in the record, which demonstrates that Blakely did not retain sufficient control of the project so as to impose liability. See *People v. Brownlee*, 186 Ill. 2d 501, 511 (1999). Our holding is not affected by any conversation, or lack thereof, between Watkins and Blakely.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.