IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

ANTWYAN D. PRYOR,

Plaintiff-Appellant,

Shelby Law No. 76490

Vs.

C.A. No. 02A01-9709-CV-00217

SOUTHBROOK MALL ASSOCIATES (LTD.) L.P. and AFFILIATED MALL MANAGEMENT, INC.,

Defendants-Appellees.

FILED

November 18, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

FROM THE SHELBY COUNTY CIRCUIT COURT
THE HONORABLE D'ARMY BAILEY, JUDGE

William E. Friedman of Memphis
For Appellant

Karen L. Schlesinger of Memphis
For Appellees

REVERSED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This case involves the liability of a shopping mall for the acts of a security guard. Antwyan Pryor (Pryor) appeals from the order of the trial court granting summary judgment to Southbrook Mall Associates, L.P. (Southbrook) and Affiliated Mall Management

(Affiliated).

On March 3, 1995, Pryor, was allegedly attacked and beaten by Elbert Taylor (Taylor), a security guard at Southbrook Mall in Memphis. Southbrook owns and Affiliated manages Southbrook Mall. Southbrook contracted with Federal Security Corporation (Federal) to provide security for the mall.

Pryor filed suit against Federal, Taylor[1], Southbrook, and Affiliated alleging that Taylor attacked him without provocation and caused "severe, painful, disabling and permanent personal injuries." Pryor further alleged that Taylor was an agent of the other defendants, and all were vicariously liable for his actions.

Plaintiff's action against Southbrook and Affiliated is premised solely on the doctrine of *respondeat superior* for the actions of the security guard, Taylor. Southbrook and Affiliated were granted summary judgment on the ground that Taylor was an independent contractor. Pryor has appealed, and the sole issue for review is whether the trial court erred in granting summary judgment.

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***Id.*** In ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn. 1993), our Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

Id. at 211 (citations omitted) (emphasis in original).

Summary judgment is only appropriate when the facts and the legal conclusions

---

[1] Although neither Federal nor Taylor were served with process, they filed, and the trial court granted, a motion to dismiss for failure of process to toll the statute of limitations. Federal and Taylor are not parties to this appeal.

drawn from the facts reasonably permit only one conclusion. ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. ***Bain***, 936 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is ***de novo*** on the record before this Court. ***Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn. 1997).

Southbrook and Affiliated assert that the facts are undisputed that Taylor is an employee of an independent contractor and that, therefore, they cannot be liable under the doctrine of *respondeat superior.* We recognize the general rule that an employer is not ordinarily liable for the negligence of an independent contractor. ***Potter v. Tucker***, 688 S.W.2d 833 (Tenn. App. 1985) (citing ***(International Harvester Co. v. Sartain***, 32 Tenn. App. 425, 222 S.W.2d 854 (1948). In ***Potter***, plaintiff sued the defendant for compensatory and punitive damages for unauthorized cutting of timber on her land. Plaintiff's adjoining landowner, Tucker, had contracted with Brown to cut timber on Tucker's property, but Brown, in performing the job, cut plaintiff's timber. Tucker contended that she could not be liable for Brown's action because he was an independent contractor. This Court determined from the record that Tucker exercised control over Brown, and the Court also discussed the liability of an employer of an independent contractor. The Court said:

> The courts of this state have repeatedly referred to the leading case of ***Powell v. Virginia Constr. Co.***, 88 Tenn. 692, 13 S.W. 691 (1890) for the definition of independent contractor:
>
> > An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work. The employer of such a contractor, if he be a fit and proper person, and the work be not in itself unlawful, or a nuisance in itself, or ***necessarily attended with danger to others***, will not be responsible for his negligence or that of his subcontractors or his servants. Mr. Thompson, in his work upon Negligence, says that "in every case the decisive question is, Had the defendant the right to control in the given particular the conduct of the person doing the wrong?" Thompson on Negligence, 909. (Emphasis supplied).
>
> ***Id.*** at 697.
>
> From the record before us, it appears that the defendant Brown and Tucker's agents testified concerning various aspects of the business operation in which Tucker exercised control over Brown. We also observe that a landowner contracting for the

> harvest of his timber should be cognizant of the obvious danger to his neighbor's property unless the boundary lines are explicitly pointed out to and scrupulously observed by the contractor. It could be argued that under these circumstances the actions of the independent contractor are "necessarily attended with danger to others" and constitute an exception to the general rule that the employer is not responsible for the actions of the independent contractor.

688 S.W.2d at 836.

In *McHarge v. Newcomer*, 117 Tenn. 595 (1906), our Supreme Court, in discussing the liability of the employer of an independent contractor, said:

> While the general rule of law is, as stated, that the proprietor or employer is not liable for the negligence of its contractor and the servants and assistants of the latter, yet there are well-established exceptions and limitations to it. These exceptions in general are: Where the act contracted to be done is wrongful or tortious in itself; where the injury is the direct or necessary consequence of the work to be done; ***where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the proprietor or employer***; when the work contracted for is intrinsically dangerous, and the performance of the contract will probably result in injury to third persons or the public; and where the proprietor interferes with the contractor in the performance of the work. Nor does it apply when the work has been completed and accepted. 1 Jaggard on Torts, 231; Commentaries on the Law of Negligence, secs. 645-651.

Id. at 604. (Emphasis supplied).

In the case before us, Southbrook and Affiliated contracted with Federal, an independent security agency, to provide protection to mall employees and patrons. Federal supplied the uniforms and equipment. It paid all taxes, social security benefits, unemployment taxes and any claims due to injuries, accidents or deaths of guard personnel. It carried liability insurance for the protection of Southbrook and Affiliated. Southbrook and Federal also agreed to a code of conduct for the security guards which was attached to the employment contract. The contract also listed regulations that each security guard should enforce.

Pryor insists since nothing in the contract between Southbrook and Federal states that Federal is an independent contractor, by implication Federal must be Southbrook's agent or employee. We disagree. The law in Tennessee is clear .. "[t]he mere placing of terms such as agent or independent contractor in the contract does not make them such in law."

United States v. Boyd, 363 S.W.2d 193, 201 (Tenn. 1962).

Pryor further contends that Southbrook and Affiliated exercised control over the security guards. Again, we disagree. The contract set forth regulations that the security guards were to enforce, and provided regulations pertaining to the guard's dress and conduct. However, the regulations do not rise to the level of control. Further, the affidavit of the Landlord Representative for Southbrook, Jackie Eakin, states that Taylor was not employed by the mall. Although the record indicates a lack of control by Southbrook and Affiliated, we must determine if this case falls within an

exception to the general rule.

In ***McClung v. Delta Square Ltd. Partnership***, 937 S.W.2d 891 (Tenn. 1996), our Supreme Court held that a business proprietor has a duty to take reasonable steps to protect customers if the proprietor has reason to know that criminal acts against the customer on his premises are reasonably foreseeable. Thus, it would appear that there is a disputed issue of material fact as to whether a duty is owed by the defendants and the extent of that duty. As our Supreme Court noted in ***McHarge v. Newcomer***, 117 Tenn. at 604, an exception to the general rule of nonliability of an employer of an independent contractor is "where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the proprietor or employer." Should it be determined that there is a duty requiring the employment of security personnel, the defendants would come within the exception to the general rule and be responsible for the actions of the independent contractor.

We also believe that there is a disputed issue of material fact as to whether the defendants in this case would come within another exception as set out in ***Powell v. Virginia Const. Co.***, 88 Tenn. at 697: "work necessarily attended with danger to others." We noted in ***Potter v. Tucker***, 688 S.W.2d 833 (Tenn. App. 1985) "that a landowner contracting for the harvest of his timber should be cognizant of the obvious danger to his neighbor's property unless the boundary lines are explicitly pointed out to and scrupulously observed by the contractor." ***Id.*** at 836. By the same token in the case at bar, all owners and operators should be cognizant of the obvious danger to the customers visiting them all that unless the security personnel act in a lawful manner, there is an obvious danger to the customers. Under these circumstances, we feel that there are disputed issues of material fact that preclude the granting of summary judgment in this case.

The parties have not cited, nor have we found a Tennessee case discussing the precise issue concerning security guards as we have in this case. However, courts in other jurisdictions have considered the question. 41 Am. Jur.2d ***Independent Contractors*** § 47 (1995) states:

> [s]tore operators have a nondelegable duty to the public to keep their place of business in a reasonably safe condition and free from danger of personal injury, and the fact that an independent contractor is engaged in the performance of work on the premises does not relieve them of that duty.
>
> ***Thus, a business that contracts with an independent contractor to supply security guards will be liable for the guards' intentional torts against customers and invitees of the place of business.***

See also Robert A. Brazener, Annotation, ***Liability of One Contracting for Private Police or Security***

Service for Acts of Personnel Supplied, 38 A.L.R.3d 1332, 1334 (1971 & Supp. 1996). (Emphasis supplied).[2]

In ***Peachtree-Cain Co. v. Pandazides***, 316 S.E.2d 9 (Ga. App. 1984), ***aff'd***, 327 S.E.2d 188 (Ga. 1985), the Georgia Court of Appeals ruled that the owners and property manager of a shopping center were vicariously liable to their invitees for intentional torts committed by the center's independent security service. There, the Peachtree-Cain Company and the Peachtree-Harris Company owned the Peachtree Center, a shopping center managed by Peachtree Center Management Company. Peachtree Management hired an independent contractor to provide security. The plaintiff brought suit against all the Peachtree companies, the security guard, and the security company alleging false arrest, slander, and invasion of privacy. ***Id.*** at 10.

The court held in pertinent part:

> As owners of the Peachtree Center complex that had undertaken to obtain security services, their duty to their invitees to provide responsible agents was personal and non-delegable, and thus it did not matter that the owners had an additional filter, i.e., the Peachtree Center Management Company, between themselves and the actual security guard. Because that duty was personal and non-delegable, a recovery based upon a breach of that duty would not constitute liability without fault. To hold that the appellants are immune from vicarious liability in these cases would, as noted above, present "opportunities for gross injustice" which will not here sanction.

Id.

In another pertinent case, ***Rockwell v. Sun Harbor Budget Suites***, 925 P.2d 1175 (Nev. 1996), an apartment complex hired an independent contractor to provide security guards. One of these guards shot and killed a tenant. The Nevada Supreme Court held that where a property owner hires security personnel to protect its premises and patrons, that property owner has a personal and nondelegable duty to provide responsible security personnel, and for respondeat superior purposes, the owner was the employer of the guard, even though the owner engaged a third party to hire the security personnel. ***Id.*** at 1179.

These are only two of many cases holding owners and operators of businesses liable for the intentional torts of security guards, even independent contractors.[3] These cases are persuasive, and are consistent with the previously

---

[2] A.L.R.3d states in pertinent part that

> because of the personal character of duties owed to the public by one adopting measures to protect his property, owners and operators of enterprises cannot, by securing special personnel through an independent agency for the purposes of protecting property, obtain immunity from liability for at least the intentional torts of the protecting agency. . . .

See also Brazener, 38 A.L.R.3d at 1343.

[3] ***See Zentko v. G.M. McKelvey Co.***, 88 N.E.2d 265, 268 (Ohio App. 1948) (stating that where an owner of an operation or enterprise undertakes to obtain security services, the owner's security duties are personal and nondelegable, and where the owner arranges for and accepts the services, the relationship of master and servant exists); ***Adams v. F.W. Woolworth Co.***, 257

mentioned exceptions to the general rule.

Accordingly, the order of the trial court granting summary judgment to Southbrook and Affiliated is reversed, and this case is remanded to the trial court for such further proceedings as are necessary. The costs of appeal are assessed against the Appellees.

. . . .
W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

____
ALAN E. HIGHERS, JUDGE

____
HOLLY KIRBY LILLARD, JUDGE

N.Y.S. 776, 781 (N.Y. App. Div. 1932)("A store owner who places a detective agency on his premises for the purpose of protecting his property by various means, including arrests, should not be immune from responsibility to an innocent victim of a false arrest made by the detective agency, even as an independent contractor."); ***Dupree v. Piggly Wiggly Shop Rite Foods, Inc.***, 542 S.W.2d 882, 888 (Tex. App. 1976) ("[B]ecause of the 'personal character' of duties owed to the public by one adopting measures to protect his property, owners and operators of enterprises cannot, by securing special personnel through an independent contractor for the purposes of protecting property, obtain immunity from liability for at least the intentional torts of the protecting agency or its employees."); ***see also Malvo v. J.C. Penny Co.***, 512 P.2d 575 (Alaska 1973); ***Noble v. Sears, Roebuck & Co.***, 109 Cal.Rptr. 269 (Cal. 1973); ***Safeway Stores, Inc. v. Kelly***, 448 A.2d 856, 861 n.12 (D.C. 1982); ***Hendricks v. Leslie Fay, Inc.***, 159 S.E.2d 362 (N.C. 1968); ***Moore v. Target Stores, Inc.***, 571 P.2d 1236 (Okla. App. 1977); ***Ross v. Texas One Partnership***, 796 S.W.2d 206 (Tex. App. 1990); ***U.S. §. Serv. Corp. v. Ramada Inn, Inc.***, 665 So.2d 268 (Fla. App. 1995). ***But see Mahon v. City of Bethlehem***, 898 F. Supp. 310 (E.D. Pa 1995).