Rel: June 23, 2023

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0977

Earnest H. Motley

v.

Express Services, Inc.; Cobb Consulting Company, LLC, d/b/a Express Employment Professionals; Will Cobb; and Timothy Marell Gilbert

Appeal from Montgomery Circuit Court
(CV-20-900386)

MITCHELL, Justice.

Timothy Marell Gilbert hit and injured Earnest H. Motley with a shovel while they were working for Capitol Container, Inc. ("Capitol"). Gilbert was a temporary employee who had been sent to work for Capitol by Express Services, Inc., a temporary-employment provider. In addition to suing Gilbert, Motley sued Express Services and related parties in the Montgomery Circuit Court, alleging that they were responsible for his injuries. Those defendants filed a motion for summary judgment, which the circuit court granted. Motley appealed. We affirm the judgment.

Facts and Procedural History

Express Services provided temporary workers to Montgomery businesses through its franchisee, Cobb Consulting Company, LLC, doing business as Express Employment Professionals, which was owned by Will Cobb (Express Services, Cobb Consulting, and Cobb are referred to collectively as "Express").

In 2016, Express's sales representative, Latoria Perdue, negotiated an agreement with Capitol's human-resources director, Thomas Peters, to provide Capitol with temporary workers. According to Peters, he told Perdue during negotiations that "all of [Capitol's] people had to be drug

screened and background checked" and that Capitol was not "accepting anybody with acts of violence in their background." Peters further testified that "[Perdue] -- who sold this -- told me that she was setting us up in the computer, and she would handle all of that."

Peters then signed a written "Staffing Agreement" on behalf of Capitol with Express. Concerning background checks, the Staffing Agreement stated: "Express will, at your written request, conduct criminal history checks and drug screens as permitted by state law. The costs vary depending on the specific test or report ordered and the charges will be agreed upon prior to ordering the tests and/or reports."

The next year, Gilbert applied to work for Express. In his written application, he disclosed a 2006 conviction for "discharge of a firearm." His disclosure said: "Shot gun in air because a [man] beat my sister and 10 year old cousin and put them in ICU. So I shot in the air to scare him off." Express also interviewed Gilbert in person. It then hired him and assigned him to work for Capitol as a temporary general laborer.

Motley, a Capitol employee, trained and supervised Gilbert. About two months into Gilbert's tenure with Capitol, he and Motley got into a dispute. When Motley had his back turned, Gilbert hit him in the back

of the head and the neck area with a shovel, injuring him. Gilbert later pleaded guilty to criminal assault.

Motley sued Gilbert and Express in the circuit court; he asserted several claims against Express: negligence; negligent hiring, training, or supervision; wantonness; nuisance; respondeat superior; negligent retention; and combined and concurring negligence or wantonness. Express moved for summary judgment on all claims. The circuit court granted Express's motion based on "the arguments and submissions of the parties." Motley then filed a motion to alter, amend, or vacate the judgment, which the circuit court denied. Motley appealed to this Court, seeking reversal of the summary judgment entered against him on four of his claims. This Court remanded the case to the circuit court because claims remained pending against Gilbert. The circuit court then entered an order certifying the summary judgment in favor of Express as a final judgment under Rule 54(b), Ala. R. Civ. P. Motley's appeal is now properly before us.

Standard of Review

On appeal from a summary judgment, this Court applies de novo "'the same standard of review the trial court used in determining

whether the evidence presented to the trial court created a genuine issue of material fact.'" American Liberty Ins. Co. v. AmSouth Bank, 825 So. 2d 786, 790 (Ala. 2002) (citation omitted). The initial burden is on the movant to establish that no genuine issue of material fact exists. Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C., 792 So. 2d 369, 372 (Ala. 2000). The burden then shifts to the nonmovant to present substantial evidence creating a genuine issue of material fact. Id. "[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989); see also § 12-21-12(d), Ala. Code 1975. And, "[w]hen the trial court does not give specific reasons for entering a summary judgment, we will affirm the judgment if there is any ground upon which the judgment could have been based." McCloud v. City of Irondale, 622 So. 2d 1272, 1273 (Ala. 1993).

Analysis

Motley argues that summary judgment was improper as to the following claims against Express: (1) negligence; (2) negligent hiring, training, or supervision; (3) wantonness; and (4) nuisance. We disagree.

A. Negligence

Motley first attempts to have his negligence claim against Express reinstated. In doing so, he cites QORE, Inc. v. Bradford Building Co., 25 So. 3d 1116, 1124 (Ala. 2009), which states: "Even when a third party is not in privity with the parties to a contract and is not a third-party beneficiary to the contract, the third party may recover in negligence for breach of a duty imposed by that contract," but only "if the breaching party negligently performs the contract with knowledge that others are relying on proper performance and the resulting harm is reasonably foreseeable." Based on QORE, Motley argues that Express is liable for negligence because it (1) was contractually obligated to Capitol to conduct a background check on Gilbert, (2) knew that Motley was reliant on that agreement, and (3) knew of Gilbert's conviction and that background checks were for safety. Thus, Motley concludes, Express is liable for failing to conduct a background check to his detriment.

Motley's argument rests on the premise that Perdue and Peters orally agreed that Express would conduct a background check before sending any candidate to work for Capitol. In making this argument, Motley points to Peters's statements to Perdue that "all of [Capitol's] people had to be drug screened and background checked" and that Capitol was not "accepting anybody with acts of violence in their background." Peters also testified that "[Perdue] -- who sold this -- told me that she was setting us up in the computer, and she would handle all of that."

In response, Express disputes -- as it did in its motion for summary judgment -- Motley's characterization of the agreement between Express and Capitol. Express says that the written Staffing Agreement completely expressed their agreement and notes that its terms required a background check only "at [Capitol's] written request" and after "charges [had been] agreed upon." Accordingly, Express argues, evidence of an inconsistent oral agreement to provide background checks was barred by the parol-evidence rule.

Under the parol-evidence rule, "absent some evidence of fraud, mistake, or illegality, a party to an unambiguous written contract cannot offer parol, or extrinsic, evidence of prior or contemporaneous oral

agreements to change, alter, or contradict the terms of the contract." Environmental Sys., Inc. v. Rexham Corp., 624 So. 2d 1379, 1381 (Ala. 1993). "'The applicability of the parol evidence rule necessarily rests upon the existence of a valid written instrument that completely and accurately expresses obligations assumed by or imposed upon the parties'" -- that is, whether the writing is "integrated." Prince v. Poole, 935 So. 2d 431, 444 (Ala. 2006) (citation and emphasis omitted).

Motley does not dispute that the alleged oral agreement was prior to or contemporaneous with the Staffing Agreement. Nor does he dispute that the alleged oral agreement's effect was to change, alter, or contradict the terms of the Staffing Agreement. Rather, Motley contends, "there is a question of fact as to whether [the Staffing Agreement] was intended to be a full and final agreement" between Express and Capitol. Motley's brief at 30.

Whether a writing is integrated is a question of law. Hurst v. Nichols Research Corp., 621 So. 2d 964, 967 (Ala. 1993). In evaluating whether the Staffing Agreement was integrated, we focus on two aspects of the agreement highlighted by Motley. First, he says, the Staffing Agreement contains "neither a merger clause nor anything indicative of

intent to make that writing the entire agreement." Motley's brief at 29. A merger clause is a contractual provision that creates "a presumption that the writing [is] integrated." Ex parte Palm Harbor Homes, Inc., 798 So. 2d 656, 660 (Ala. 2001) (emphasis omitted). But the absence of a merger clause does not equate to a lack of integration. See Rexham, 624 So. 2d at 1383 (explaining that "[a]n integration, or merger, clause is a portion of a particular contract that restates the rationale of the parol evidence rule" -- namely, the presumption that "'all prior negotiations are merged into the written contract, which purports to cover the entire transaction'" (quoting Guilford v. Spartan Food Sys., Inc., 372 So. 2d 7, 9 (Ala. 1979))). And Motley offers nothing to demonstrate that the Staffing Agreement lacks integration, other than to make a conclusory assertion along those lines.

Second, Motley argues that "the [Staffing Agreement] actually contains language indicating that [it] is not a full and final agreement." Motley's brief at 29. Specifically, Motley highlights a statement in the Staffing Agreement that "'[b]ill rates are subject to change with appropriate notice.'" Id. Motley asserts -- without citation -- that "[a]ny agreement in which price points and bill rates are subject to change

cannot be considered a complete, final, integrated agreement." Id. But contract terms subject to later modification are binding until changed. See Davis v. City of Montevallo, [Ms. 1210016, Jan. 13, 2023] ___ So. 3d ___, ___ (Ala. 2023) (explaining that a party's "'ability to later modify [contract] provisions does not justify a disregard of currently valid provisions'" (quoting Ex parte Graham, 702 So. 2d 1215, 1219 (Ala. 1997))). Accordingly, Express's reservation of the right to change bill rates with notice does not disprove the Staffing Agreement's integration. And, because the circuit court's summary judgment on the negligence claim could have rested on the applicability of the parol-evidence rule, Motley has failed to show reversible error as to that claim.

B. Negligent Hiring, Training, or Supervision

Next, Motley argues that summary judgment was improper as to his claim of negligent hiring, training, or supervision. This claim is established by showing that (1) the employer hired, trained, or supervised an employee with an incompetency; (2) the employer knew of the incompetency or would have learned of it by exercising due care; and (3) the employee caused the plaintiff harm due to the incompetency. See Jones Express, Inc. v. Jackson, 86 So. 3d 298, 305 (Ala. 2010) ("[I]mplicit

in the tort of negligent hiring, retention, training, and supervision is the concept that, as a consequence of the employee's incompetence, the employee committed some sort of act, wrongdoing, or tort that caused the plaintiff's injury."); Lane v. Central Bank of Alabama, N.A., 425 So. 2d 1098, 1100 (Ala. 1983) ("'Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge.'" (citation omitted)).

Motley argues that a jury was entitled to find "that [Express] could have learned of Gilbert's incompetency, violent propensities, and/or substantial criminal history of violent acts had [it] exercised due and proper diligence throughout his hiring process." Motley's brief at 15. Specifically, he says that Express was required to conduct due and proper diligence by (1) conducting a background check on Gilbert and (2) following its own hiring procedures. But Motley fails to show that Express had a duty to perform either action.

1. Background Check

Motley says that Express was required to conduct a background check on Gilbert because "it was explicitly requested by [Capitol] that [Express] not send [it] any temporary workers with violent criminal backgrounds." Motley's brief at 18. Motley again notes Peters's testimony that, while negotiating the Staffing Agreement, Peters told Perdue that employees sent to Capitol were to be background checked because Capitol was not "accepting anybody with acts of violence in their background." Motley further argues that a background check was required because Express "had knowledge of Mr. Gilbert's violent felony conviction as he disclosed to [Express] a conviction for shooting a firearm into [the air]." Id. at 11.

Motley's argument rests entirely on Synergies3 Tec Services, LLC v. Corvo, 319 So. 3d 1263 (Ala. 2020), a plurality decision of this Court. In Synergies3, the plaintiffs were customers of DIRECTV, which hired Synergies3 to install DIRECTV equipment in customers' homes. 319 So. 3d at 1267, 1269. A Synergies3 employee allegedly stole from one of the plaintiffs' homes while installing equipment. Id. at 1267. The plaintiffs sued the companies and claimed that they were liable for negligent

hiring, training, and supervision. Id. Following a jury trial, the trial court entered a judgment in the plaintiffs' favor, and the companies appealed. Id. at 1270-71.

This Court affirmed the judgment as to liability for negligent hiring, training, and supervision. Id. at 1278. A plurality found substantial evidence that (1) the employee "had a criminal history involving theft that should have been detected in a proper background check"; (2) the employee "had admitted to [his ex-wife] that he had been suspended at his previous employment by the same person who hired him at Synergies3 for stealing a customer's ring"; and (3) the employee's ex-wife "had discovered a stash of women's jewelry in [his] vehicle." Id. The plurality reasoned that the plaintiffs had "submitted substantial evidence creating a factual dispute as to whether Synergies3 and DIRECTV should have performed a more thorough background check and thereby discovered [the employee's] criminal history and whether it should have been foreseeable to Synergies3 or DIRECTV that [the employee] would steal from a customer during an installation." Id.

In Motley's view, "[j]ust like in Synergies3, [Express] failed to do any type of criminal background check on Mr. Gilbert, even though it was

explicitly requested by [Capitol] that [Express] not send [it] any temporary workers with violent criminal backgrounds." Motley's brief at 18. "In fact," he continues, Express's "failure to perform the background check is more egregious than the employer in Synergies3." Id. He asserts: "[U]nlike the employer in Synergies3 [Express] had knowledge of a violent felony conviction as Mr. Gilbert disclosed to [Express] a conviction for shooting a firearm into [the air]." Id.

But Synergies3 did not address whether a defendant had a duty to conduct a background check -- that fact was assumed without analysis; it addressed only whether the background check a defendant had already conducted was sufficient. The background check conducted in Synergies3 failed to detect criminal history that would have been found had the check been done properly. Accordingly, a plurality of this Court reasoned that there was substantial evidence that the background check was insufficient. Synergies3, 319 So. 3d at 1278.

Synergies3 does not support Motley here, and he provides no other authority or argument to support his position. Therefore, Motley has not demonstrated a genuine issue of material fact as to whether due care required a background check.

2. The Adequacy of Express's Interview Process

According to Motley, "[e]ven if a background check was not required by [Capitol], [Express's] interview and hiring process of Mr. Gilbert was still woefully inadequate." Motley's brief at 21. In particular, Motley contends that Express's "interview process was not followed when hiring Mr. Gilbert." Id. Motley rests this argument on two alleged facts: (1) Gilbert "was asked virtually no questions throughout his interview as it relates to his fitness for employment" and (2) Express "failed to perform any employment verifications at all for Mr. Gilbert." Id. at 21-22.

Motley's argument fails for two reasons. First, he provides no legal authority for his argument. See Welch v. Hill, 608 So. 2d 727, 728 (Ala. 1992) ("'Where an appellant fails to cite any authority for an argument, this Court may affirm the judgment on those issues, for it is neither the Court's duty nor its function to perform all the legal research for an appellant.'" (citation omitted)). And second, Motley does not provide any evidence or argument that Express would have been more likely to learn about Gilbert's criminal history by asking about his fitness for employment or by obtaining an employment verification. The only questions Motley says Express failed to ask were those listed on Gilbert's

"Workforce Summary," which documents a standard set of questions and the candidate's responses. But none of those questions explicitly addressed criminal history, and Motley gives no explanation of how they would have. Nor does he explain how an employment verification would have led Express to know anything more about Gilbert's criminal history than it already knew.

In sum, Motley has not provided substantial evidence that due care required Express to conduct a background check or to interview Gilbert differently, and, thus, he has not shown reversible error as to his claim of negligent hiring, training, or supervision.

C. Wantonness

Motley also disputes the circuit court's judgment as to wantonness. Wantonness is "'[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others.'" Tutor v. Sines, [Ms. 1210037, Feb. 17, 2023] ___ So. 3d ___, ___ (Ala. 2023) (quoting § 6-11-20(b)(3), Ala. Code 1975). To prevail, the plaintiff must show that the defendant (1) consciously did some act or omitted some duty (2) "'"while knowing of the existing conditions and being conscious that, from doing or omitting

an act, injury will likely or probably result."'" Id. at ___ (citations omitted).

Motley argues that a reasonable jury could "determine that [Express's] failure to adequately interview and vet Mr. Gilbert was done with reckless indifference to the consequences of such an omission." Motley's brief at 23. He contends that Express "knew that inadequately interviewing potential employees and failing to perform background checks could lead to individuals being injured." Id. at 25. "Even so," he continues, Express "sent Mr. Gilbert to [Capitol] with knowledge of prior violent criminal conduct and with knowledge that [Capitol] did not want temporary employers with violent criminal histories." Id. On Motley's understanding, this conduct led "to a surely foreseeable altercation that left [him] permanently injured and disabled." Id. He concludes that there was substantial evidence for a "jury to find that [Express] failed or omitted to properly interview, vet, hire, and/or terminate Mr. Gilbert, and that [it was] aware that such a failure or omission could result in potential safety issues that could injure others." Id. at 25-26.

But, as explained above, Motley has not shown that Express had a duty to conduct a background check or that its interview of Gilbert was

inadequate. Moreover, wantonness requires knowledge of likely or probable injury, and Motley alleges only that Express knew its course of conduct "could result in potential safety issues that could injure others." Motley's brief at 26 (emphasis added). Therefore, Motley has not shown reversible error as to his wantonness claim.

D. Nuisance

Finally, Motley contests summary judgment on his nuisance claim. As Motley acknowledges, a nuisance claim consists of "the elements of legal duty and causal relation between the conduct or activity complained of and the hurt, inconvenience, or damage sued for." Tipler v. McKenzie Tank Lines, 547 So. 2d 438, 440 (Ala. 1989); cf. § 6-5-120, Ala. Code 1975 (defining nuisance as "anything that works hurt, inconvenience, or damage to another"). Motley says that Express breached its duty by failing to conduct "any type of background check or thorough interview." Motley's brief at 32. But, as with his other claims, Motley has not established that this duty existed. Therefore, Motley has not shown that summary judgment was improper as to his nuisance claim.

Conclusion

Because Motley has failed to show that the circuit court erred by entering summary judgment in favor of Express, we affirm that judgment.

AFFIRMED.

Parker, C.J., and Shaw, Wise, Bryan, Stewart, and Cook, JJ., concur.

Sellers and Mendheim, JJ., concur in the result.