Circuit Court for Cecil County
Case No. C-07-CV-20-000246

UNREPORTED

IN THE APPELLATE COURT OF

OF MARYLAND*

No. 252

September Term, 2022

TAMMIE JO WAGONER

v.

DANIEL LEWIS, ET AL.

Kehoe,
Beachley,
Tang,

JJ.

Opinion by Kehoe, J.

Filed: March 31, 2023

* At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

** This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In June 2020, Tammie Jo Wagoner[1] hired Robert Evick, d/b/a Bob the Tree Guy, a landscaper, to trim a number of trees located on the property of her neighbors, Kimberly Laurel Lewis and Daniel Lewis. Ms. Wagoner's property shares a boundary with the Lewis' property, and Ms. Wagoner was troubled by branches of the Lewis' trees that extended over their property line and onto her property. Ms. Wagoner did not confer with the Lewises before hiring Mr. Evick, and the Lewises were displeased when they discovered that their trees had been trimmed and damaged. The Lewises subsequently brought suit against Ms. Wagoner for trespass and for the cost of replacing the damaged trees. A court trial in the Circuit Court for Cecil County resulted in a money judgment in favor of the Lewises in the amount of $16,250.

Ms. Wagoner presents one issue on appeal, which we have reworded:

> Did the trial court err in concluding that she was liable for the damage to the Lewises' trees?[2]

We will vacate the judgment of the circuit court and remand this case for further proceedings.

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[1] The cover pages of the parties' briefs identify the appellant as "Tammie Jo Wagner." The record indicates that appellant's last name is "Wagoner."

[2] Ms. Wagoner presents the issue thus:

> Did the trial Court err in its legal conclusion that the Appellant was liable for damage caused by an independent contractor it had hired where there was no applicable exception to the general rule of non-liability for the acts of an independent contractor?

THE STANDARD OF REVIEW

When reviewing judgments entered as the result of a court trial, "the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8–131(c). When reviewing for clear error, this Court

> does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case. Nor is it our function to weigh conflicting evidence. Our task is limited to deciding whether the circuit court's factual findings were supported by substantial evidence in the record. And, in doing so, we must view all the evidence in a light most favorable to the prevailing party.

Liberty Mut. Ins. Co. v. Maryland Auto. Ins. Fund, 154 Md. App. 604, 609 (2004) (cleaned up).

ANALYSIS

In her brief, Ms. Wagoner asserts:

> The uncontroverted evidence was that the Appellant/Defendant had specifically instructed the contractor not to trim any of the Appellees/Plaintiffs trees more than 1 foot over the Appellant/Defendant's fence, which itself was well within the Appellant/Defendant's property, so as not to encroach upon it. Both parties had had a fence erected significantly within their respective properties, and there was a passageway between the two corresponding fences. There was no evidence that the Appellant/Defendant herself trespassed upon the property or caused any damage.
>
> The evidence was that the independent contractor did not follow the Appellant/Defendant's instruction and he damaged the Appellees/Plaintiffs' trees.

Ms. Wagoner is correct that, as a general rule, "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 servants." RESTATEMENT (SECOND) OF TORTS § 409 (1965). The rationale behind this rule is that an employer has no control over the acts of the independent contractor. *Rowley v. Mayor & City Council of Baltimore*, 60 Md. App. 680, 686–87 (1984), *aff'd*, 305 Md. 456 (1986) (citing *Gardenvillage Realty Corp. v. Russo*, 34 Md. App. 25, 35 (1976)).

But the rule is subject to exceptions,[3] and one of them is that "an employer may be held liable for the negligent performance of the contractor's work [] when the injury was directly caused by 'the thing contracted to be done,' rather than by [a] 'collateral' or 'casual' act of negligence on the part of the contractor." *Rowley*, 60 Md. App. at 687–88 (citing *Philadelphia, Baltimore & Washington Railroad Company v. Mitchell*, 107 Md. 600, 606 (1908); *Samuel v. Novak*, 99 Md. 558, 569 (1904); *Deford v. State, Use of Keyser*, 30 Md. 179 (1869); *Washington Suburban Sanitary Commission v. Grady Development Corp*., 37 Md. App. 303, 314, 1977); and *Gardenvillage Realty*, 34 Md. App. at 40).

[3] As this Court has observed, "Maryland has recognized such a myriad of exceptions to the rule of non-liability that its continued viability as a general principle of law has become suspect." *Rowley,* 60 Md. App. at 687 (citing *Washington Suburban Sanitary Commission v. Grady Development Corp*., 37 Md. App. 303, 314 (1977)).

This principle applies in cases involving damage to, or the removal of, trees. *Samson Const. Co. v. Brusowankin*, 218 Md. 458, 462 (1958). In that case, a developer entered into a contract with the Lincoln Clearing Company for the latter to remove all of the trees on the developer's property. In doing so, Lincoln also removed trees from adjoining properties. *Id.* The trial court instructed the jury that, based upon the evidence, Lincoln was liable as a matter of law, but that Samson would be liable only if the jury found that it had been negligent. *Id.* The Supreme Court of Maryland[4] agreed and explained that:

> If the injury that occurs is such as might have been anticipated as a probable consequence of the execution of the work let out to the contractor under the instructions given by the employer, the employer, as well as the contractor, may be held liable.

Id. at 464 (citations omitted).

Samson Construction involved tree removal. In *Melnick v. C.S.X. Corp*., 68 Md. App. 107, 110–11 (1986), *aff'd*, 312 Md. 511, (1988), this Court addressed the right of a property owner to remedy encroaching vegetation. We explained:

> In *Michalson v. Nutting*, 275 Mass. 232, 175 N.E. 490 (1931), the Supreme Judicial Court of Massachusetts announced that a property owner, whose house had been damaged by encroaching roots from his neighbor's land, had no cause of action against him, but had a well-recognized right to resort to self-help and cut off the intruding growth. The policy behind this rule of self-help was that

[4] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

> [a]n owner of land is at liberty to use his land, and all of it, to grow trees. Their growth naturally and reasonably will be accompanied by the extension of boughs and the penetration of roots over and into adjoining property of others.

In *Melnick*, we adopted "the 'simplicity and certainty'" of the Massachusetts Rule as the law of this State. 68 Md. App at 116.

At the close of trial, the court delivered an opinion from the bench in which it reviewed the evidence presented by the parties and concluded that Ms. Wagoner was "liable for the actions of her agent." Specifically, the court stated in pertinent part:

> The Court heard from Ms. Wagoner. She indicated that she does have approximately one foot from the property line. The property line would therefore be located within this alleyway. The Lewis' have a fence on their property.
>
> She indicated she never had a boundary line survey. She retained Bob the Tree Guy, and in June of 2020, he came to her home. His name is Robert Evick. He performed services that included cutting the Leyland cypresses. *She indicated that she told him, don't cut more than one foot beyond her fence line. She said she left.* She became aware that the trees had been cut further back than that when Mr. Lewis approached her with regard to that matter.
>
> * * *
>
> Plaintiffs claim that the Defendant or her agents entered their property, caused damage to the Leyland cypresses. Defendant claims that she has the right of self-help, that she hired an independent contractor to do landscaping work which included cutting the Plaintiff's trees, that she gave very specific instructions. It's clear from the photographs that were offered into evidence, Plaintiff offered photographs of the trees prior to the cutting. The Court believes that Plaintiffs had healthy, mature, attractive trees in their yard. The Court finds that they were clearly cut on June 16, 2020. The Court finds that the cutting that was done was well beyond normal, reasonable pruning. *And it clearly had to have been done by someone being*

> *on Plaintiff's property. It was clearly a trespass. The cutting is well within the Plaintiff's property line*.
>
> [T]he Massachusetts rule is Maryland law. Certainly, Defendant[has] a right to cut those areas that infringe or impede her property. This cutting was well beyond that. That's clear. Although the property line is not clearly delineated, both parties agree that the trees were located on the Plaintiff's property. So I think there's no question that a trespass did occur in order for this type of damage to be done to this tree -- to these trees. And so therefore, it's clearly in excess of self-help.
>
> Defendant argues that she hired an independent contractor. He exceeded the scope of instructions that she gave, and therefore, she should be relieved of liability. She indicates that she had no control. She gave instructions. That person went beyond their control.
>
> *Generally, that landowner would not be responsible for negligent actions of an independent contractor, but the Court notes the Defendants have a duty towards their neighboring property owner not to cause them harm*. And given the relationship of the parties, the nature of the relationship of the parties, I believe this case is one of an exception to the independent contractor rule. That cannot be delegated.
>
> So the Court believes that the Defendant is liable for the actions of her agent, whether that agent is an employee or an independent contractor.

* * *

We do not agree with the trial court's conclusion that property owners have a legal duty "towards their neighbors not to cause them harm." In the context of the present case, and consistent with the "Massachusetts Rule," Ms. Wagoner had the right to engage in self-help to remove encroaching vegetation from the Lewis' property. She did not have the right to enter upon the Lewis property to do so. Nor did she have the right to instruct Mr. Evick to do so. If Ms. Wagoner instructed Mr. Evick to trim the Lewis' trees on their side of the property line and he did so, then she is liable to Mr. and Ms. Lewis for the

damage to the trees. If she did not so instruct Mr. Evick, then she is not.[5] It is necessary for the trial court to resolve this factual issue.

We vacate the judgment of the circuit court and remand this case to it for the court to make a finding as to this issue. If it can, the court may do so based on the evidence admitted at trial. If the court believes that additional evidence might be helpful, the court may reopen the case to give the parties an opportunity to present additional evidence. Finally, the court may conduct a new trial on the issue of liability.

THE JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY IS VACATED AND THIS IS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

[5] We express no opinion as to whether Mr. Evick would be liable.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0252s22cn.pdf