ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

TARRON v. BOWEN MACHINE & FABRICATING, INC.
CV-09-0230-PR
222 Ariz. 160, 213 P.3d 309 (App. 2009)

PARTIES AND COUNSEL:

Petitioner: Plaintiffs James Tarron and Sherry Tarron, represented by Ronald Ozer and Burt Rosenblatt, of Ely, Bettini, Ulman & Rosenblatt.

Respondent: Defendant Bowen Machine & Fabricating, Inc., represented by Ralph E. Hunsaker and Taylor C. Young, of the Cavanagh Law Firm.

FACTS:

In February 2004, James Tarron, an employee of Phelps Dodge, was injured at the copper smelter where he worked. Phelps Dodge had contracted with Bowen to provide temporary workers to assist in cleaning and rebuilding a converter. Two Bowen employees, Cruz and Halkini, were assigned to prepare the area to install a dome cover. To do so, they removed the access ramps between the converter and its "punching platform," which created a gap between the converter and platform. Halkini put yellow caution tape across the opening to prevent falls. According to both Phelps Dodge's standard operating procedures and OSHA standards, however, he should have installed a cable, wire rope, chain, or a permanent steel barrier. Phelps Dodge's subsequent safety analysis checks identified but failed to correct the hazard.

The next night, Tarron walked over to the punching platform and leaned over to see if his crew was underneath the platform. In so doing, he placed one hand on a post and the other hand on the plastic tape, thinking a handrail was in place. He fell 18 feet to the ground floor and fractured his ankle and elbow, resulting in permanent injuries. Tarron received treatment and eventually returned to work, but he continued to experience pain.

In February 2006, the Tarrons filed suit against Bowen, alleging Bowen was vicariously liable for its employees' negligence and Tarron's resulting injury. Bowen moved for summary judgment, arguing that as a general employer, it could not be held liable for the actions of the employees it lent to Phelps Dodge. The Tarrons moved for partial summary judgment on the issue of vicarious liability. The trial court denied Bowen's motion but granted the Tarrons' motion, concluding that, under the contractual agreement between Bowen and Phelps Dodge, "Bowen had an apparently unexercised 'right to control'" the work of its employees. Ultimately, the jury awarded the Tarrons $1.5 million and found Bowen 60% at fault for James Tarron's injuries. Bowen appealed.

The court of appeals reversed. It found Bowen, a general employer, could be vicariously liable for a lent employee's tortious conduct if it had control of or the right to control the performance of the lent employee's work. The court found a genuine issue of material fact existed as to this question, rendering summary judgment for either party improper. Although substantial evidence supported the trial court's conclusion that Phelps Dodge undisputedly exercised actual control over the work at issue, the Master Agreement between Phelps Dodge and Bowen provided that Bowen had the exclusive right to control "the method of performance of the Work." This contractual language was sufficient to preclude summary judgment in favor of Bowen but not to resolve the disputed issue of which party (or both) *as a matter of fact* had the right to control the specific injury-producing conduct at issue. The court concluded the agreement constituted relevant evidence to be considered by the jury in resolving the right to control issue.

The appellate court remanded to the trial court for a new trial, directing that Bowen could present evidence to convince a jury that it surrendered the right to control. The court further directed that the jury be instructed that any such surrender must have been explicitly or impliedly accepted by Phelps Dodge, either by contract or conduct.

The Tarrons filed a petition for review; Bowen filed a cross-petition for review.

ISSUES:

Petition for Review

Is Bowen liable as a matter of law for the negligence of their [sic] own employees, who are working as lent employees within a Phelps Dodge smelter, where Bowen and Phelps Dodge entered into contracts that explicitly provided that Bowen had the exclusive right to control the method of performance of Bowen's employees' work?

Cross-Petition for Review

In determining which of two employers could be held vicariously liable for the negligence of two "lent employees," was the general employer entitled to judgment as a matter of law when the evidence in the record conclusively established that the special employer had *exclusive* control of, and the *exclusive* right to control, the lent employees' performance of the "specific injury-causing activity," even in light of inapplicable boilerplate language in a 14-year-old contract between the two employers?

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