

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JOHN PRYCE, JR.,)	CIVIL ACTION
)	
)	NO. 95-4417
Plaintiff)	
)	
vs.)	
)	
D. JACKSON & ASSOCIATES, INC.,)	
d/b/a UNI-TEMP and UNIVERSAL)	
FOREST PRODUCTS, INC.,)	
)	
Defendants)	

TROUTMAN, S.J.

M E M O R A N D U M

Plaintiff in this action, John Pryce, sustained serious and permanent injuries in a workplace accident with a power saw. At the age of 17, Pryce was hired by Jackson Associates, d/b/a Uni-temp, which is in the business of providing laborers to various industries. Uni-Temp sent Pryce to work at a wood processing plant operated by defendant Universal Forest Products, Inc.¹ Although Pryce was a minor and, therefore, prohibited by the federal Fair Labor Standards Act from engaging in certain dangerous work, Universal assigned him to cut wood with a power-driven circular saw that Universal itself had designed and

1. By order entered on April 25, 1996, (Doc. #16), D. Jackson & Associates, Inc., was dismissed from this action for lack of subject matter jurisdiction over the claim asserted against that defendant. Universal Forest Products, Inc., therefore, is now the only defendant in this action.

assembled from various component parts for its particular and unique tasks. On December 1, 1993, while operating the saw, plaintiff's right hand came into contact with the blade, partially severing the thumb and severely damaging the index finger on that hand.

Pryce alleges that because he was a minor and thereby prohibited by law from doing the dangerous work which resulted in his injuries, defendant Universal's conduct in assigning plaintiff to work with a power saw amounts to negligence per se. Plaintiff also alleges that Universal was negligent in designing, manufacturing, assembling and supplying the power saw used at its wood processing facility. In addition, plaintiff has asserted a strict liability claim against Universal, alleging that it designed, manufactured, assembled and supplied to plaintiff, an intended user, an unreasonably dangerous, defectively designed saw, and failed to adequately warn plaintiff of the dangers inherent in the intended use of the saw. Finally, plaintiff alleges that Universal breached express and implied warranties that the saw was fit for its intended purpose.²

Defendant Universal has not disputed the essential facts upon which plaintiff's claims are based, i.e., that plaintiff, while still a minor, was injured as a result of operating power equipment at Universal's wood processing plant. Nevertheless, defendant has filed a summary judgment motion,

2. Originally, plaintiff had likewise asserted a claim for punitive damages, but that claim was subsequently dropped from the case.

presently pending before the Court, in which it asserts that it cannot be held legally responsible for any negligence which might have caused plaintiff's injuries because of Pennsylvania's "borrowed servant" doctrine.³ Defendant Universal contends that it was plaintiff's employer for purposes of the Pennsylvania Workers' Compensation Act, and, therefore, is protected by the Act's bar against imposition of tort liability upon an employer, notwithstanding Uni-temp's assumption of responsibility for actual payment of the workers compensation due to plaintiff for his injuries. Defendant also contends that there is no legally cognizable basis for plaintiff's breach of warranty and strict liability claims, since Universal is not in the business of manufacturing and selling equipment such as the saw here in issue.

Summary Judgment Standard

Although quite familiar, the legal standards governing the Court's consideration of defendant Universal's summary judgment motion bear repeating. Generally, summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P 56(c).

To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, i.e., one upon

3. The parties agree that Pennsylvania tort law provides the rule of decision in this diversity action.

which a reasonable factfinder could base a verdict for the non-moving party and one which is essential to establishing the claim. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). The Court is not permitted, when considering a motion for summary judgment, to weigh the evidence or to make determinations concerning the credibility thereof. Our sole function, with respect to the facts, is to determine whether there are any disputed issues and, if there are, to determine whether they are both genuine and material. Id.

The Court's consideration of the facts, however, must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts must be drawn in favor of that party as well. Tiqq Corp. v. Dow Corning Corp, 822 F.2d 358 (3d Cir. 1987).

In order to obtain a summary judgment, the proponent of the motion has the initial burden of identifying, from the sources enumerated in Rule 56, evidence which demonstrates the absence of a genuine issue of material fact. When confronted by a properly supported motion for summary judgment, the opposing party is required to produce, from the same sources, some contrary evidence which could support a favorable verdict. Thus,

[T]he mere existence of some evidence in support of the non-moving party will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-moving party on the issue.

Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1308 (3rd Cir. 1995).

If the movant succeeds in demonstrating that there are no genuine issues of material fact in dispute, or if the parties agree as to the essential facts, the Court must then be satisfied that the moving party is entitled to judgment as a matter of law. Obviously, it will avail the proponent of summary judgment nothing if the undisputed facts, considered in light of the substantive legal standards applicable to the claim, do not support a judgment in its favor.

In this case, the parties' disagreement pertains primarily to the legal effect of the facts established through discovery concerning (1) plaintiff's employment relationships with defendant Universal Forest Products and former co-defendant Uni-Temp; (2) an agreement between Universal and Uni-Temp regarding the payment of plaintiff's workers compensation claim; and (3) the manufacture/assembly and use of the power saw. In the context of instant motion, therefore, the Court is required to determine, as a matter of law, whether plaintiff's claims are viable in light of the undisputed facts relevant to those claims.

Borrowed Servant Doctrine

Since there is no question that plaintiff was injured during the course and scope of his employment and that, pursuant to the Pennsylvania Workers' Compensation Act, liability of the employer under the Act is exclusive of all other claims and actions, 77 Pa. Cons. Stat. Ann. §481(a), plaintiff will be foreclosed from pursuing this action against Universal if it is

determined that Universal was his employer at the time of the accident.

Although it is likewise undisputed that plaintiff was hired and paid by Uni-Temp, defendant Universal argues that under Pennsylvania law, Universal was plaintiff's employer for purposes of applying the exclusive remedy provision of the Workers' Compensation statute in that plaintiff's deposition testimony, as well as the testimony of other witnesses, clearly establish that Universal had the exclusive right to control plaintiff's performance of the work that he was assigned.

The legal standards for determining Universal's employer status are derived primarily from decisions of the Pennsylvania courts resolving disputes over the responsibility for workers' compensation payments to injured employees. In the context of this action, we look to the standards developed for establishing the true employer of a "borrowed" employee, *i.e.*, "an employee...furnished by one entity to another." Accountemps v. W.C.A.B. (Myers), 548 A.2d 703, 705 (Pa. Cmmwlth. 1988). In Accountemps, which likewise involved an agency in the business of supplying temporary employees to clients, the court reiterated and applied the method previously set forth by the Pennsylvania Supreme Court with respect to determining whether a person generally employed by one entity has become the employee of another. The primary factor in such analysis is "the right to control the employee's work [and] his manner of performing it." Id.

As plaintiff argues, there are also several other factors which may be considered in determining an injured party's employer, both in the "borrowed" servant context and in general. Such factors include responsibility for payment of wages, the right to hire and fire, the right to select an employee to be loaned, the right to replace one loaned employee with another, and the level of skill or expertise required for the work and possessed by the employee. Id.; JFC Temps, Inc. v. W.C.A.B. (Lindsay), 680 A.2d 862 (Pa. 1996).

Nevertheless, "the right to control the performance of the work is the overriding factor" in determining the employer. JFC Temps at 865. See, also, Wetzel v. City of Altoona, 618 A.2d 1219 (Pa. Cmmwlth. 1992); Wilkinson v. K-Mart, 603 A.2d 659 Pa. Super. 1992); Rolick v. Collins Pine Co., 925 F.2d 661 3rd Cir. 1991). Thus, under Pennsylvania law, as clearly and succinctly stated in JFC Temps, "The entity possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised." 680 A.2d at 862.

Consequently, to decide whether Universal was, as it argues, plaintiff's employer at the time of the accident, we must examine the record for indicia of control over the manner of plaintiff's performance of his work at Universal.

Although plaintiff testified that he was given virtually no training or direction by Universal employees concerning how to use the saw, there is no evidence that he was

previously familiar with, or had ever before operated, that type of equipment. There is likewise no evidence that Uni-Temp had specific knowledge of the work he would be assigned at Universal, or provided him with instruction, training or supervision concerning any type work that he might be expected to perform when sent to a Uni-Temp client's facility. Plaintiff testified that he was told by a Uni-Temp employee only that he was to report to Universal for the second shift to stack wood.

(Deposition Testimony of John Pryce at 58). When he arrived at Universal for the first time, plaintiff reported to a Universal supervisor, Kevin Dexter, who sent him to a worksite where another laborer was operating a saw. (Id. at 13, 65). Pryce testified that he was supposed to stack the wood, but the other laborer told him to feed the wood into the saw and showed him how to do it. (Id. at 65). The next day, Pryce again reported to Dexter, who took him to a different saw and showed him how to stack wood. (Id.) When Pryce next reported to Dexter an hour later, Dexter put him to work on the saw on which plaintiff was injured several weeks later. (Id. at 66). In general, plaintiff testified that Dexter, a Universal employee, was his boss, i.e., the person who told him what to do and how to do it while Pryce worked at Universal. (Id. at 82, 83). Although plaintiff may have been given very little training, instruction or supervision by Universal employees, he was given none whatsoever by Uni-temp, and plaintiff himself was not independently knowledgeable or skilled in the performance of the tasks he was assigned by

Universal. In general, it is clear from plaintiff's testimony that a Universal supervisor not only decided which tasks plaintiff was to perform but also instructed him, however minimally, in the means and methods developed and preferred by Universal to accomplish those tasks.

Kevin Dexter, the Universal supervisor identified by Pryce as his boss, confirmed that he showed plaintiff how to run the saw and instructed him in the way to perform all of the component tasks of the job plaintiff was assigned to do. (Deposition Testimony of Kevin Dexter at 26, 29).⁴

The deposition testimony of Thomas Staskel, current General Manager and former Plant Manager at the Universal facility involved in this action, is also instructive on the issue of control. In response to questions concerning training of new employees, Staskel testified that Kevin Dexter would have been responsible for showing a new second-shift employee what to do or for assigning such employee to work with someone more experienced. (Deposition of Thomas Staskel at 31). Staskel further testified that it was Universal's policy to train all new employees and that Pryce was under the direction of Universal while working at its premises. (Id. at 33, 83.)

4. Dexter testified that he provided far more extensive training and supervision to plaintiff between the date of hiring and the date of the accident than Pryce described. For purposes of the present discussion concerning control over the means and methods of plaintiff's performance, however, the discrepancies in the testimony concerning the extent of plaintiff's training and supervision do not create disputes of fact that are either genuine or material.

From the foregoing testimony, we conclude that plaintiff was a general laborer, without any special knowledge or expertise, who was hired by the Uni-temp agency and sent to Universal. There he was instructed to perform assigned tasks in accordance with Universal's standard procedures and to follow its established policies. Since Universal determined and exercised exclusive control over the manner of plaintiff's performance, Pryce was functionally and legally a Universal employee. We further conclude, therefore, that as plaintiff's employer, Universal is shielded from liability for plaintiff's tort claims pursuant to the exclusive remedy provision of the Pennsylvania Workers' Compensation Act.

Plaintiff has, however, asserted a number of reasons for denying summary judgment which are based upon factors other than his working relationship with Universal. In the first instance, plaintiff contends that the determination of employer/employee status is a fact-based inquiry. Although this is an accurate statement, as far as it goes, it does not foreclose summary judgment. As noted by the court in JFC Temps, "The question of whether an employer-employee relationship exists is one of law, based upon findings of fact." 680 A.2d at 864. Thus, where there are no disputed issues of fact in the record,

The issue of whether an employer is a "statutory employer" for purposes of the Workmen's Compensation Act is properly the subject of a motion for summary judgment, as "whether the facts as they are determined to exist constitute an employment relationship is strictly a question of law." Keller v. Old Lycoming

Twp., 286 Pa.Super. 339, 345, 428 A.2d 1358, 1361 (1981).

Wilkinson v. K-Mart, 603 A.2d 659, 660--661 (Pa. Super. 1992).

Based upon the record before the Court, we have here concluded that there are no disputed issues of fact concerning the nature and extent of Universal's control over plaintiff's performance of the work assigned to him by Universal. Since control is clearly the determinative factor in assessing an employment relationship, and there is no evidence suggesting that Universal did not exercise the requisite control over plaintiff's performance, there is no reason to submit to a jury the issue of whether there was an employer/employee relationship between Pryce and Universal. On the record before the Court, therefore, there is no impediment to granting defendant's summary judgment motion based upon the Court's determination that Pryce was a Universal employee.

Similarly, we reject plaintiff's contention that other factors, such as hiring, right to terminate employment and payment of wages and compensation, should be considered in determining plaintiff's status as an employee of Universal. We conclude, based on the record, that Universal's right to control plaintiff's performance is so clear that additional factors, which might be relevant to establishing an employment relationship in a more questionable situation, cannot overcome our legal conclusion that an employment relationship existed between Pryce and Universal at the time of the accident. It

would be inappropriate, therefore, in light of the substantive legal standards applicable to determining an employment relationship, to permit a jury to consider whether other factors identified by plaintiff as contrary to such a finding outweigh the evidence of control over the manner of plaintiff's performance of the tasks assigned to him by Universal. As noted, control over the manner of an employee's performance is the overriding factor under Pennsylvania law. Thus, once control has been established, that factor may not be outweighed by other evidence to negate the conclusion that an employment relationship existed between Pryce and Universal.

Plaintiff next argues that Universal is estopped from claiming to be his employer in that it refused to pay his workers' compensation claim and did not pay the fine imposed by the United States Department of Labor, Occupational Safety and Health Administration, (OSHA) for employing a minor in violation of the Fair Labor Standards Act. Plaintiff contends that, having argued vigorously that it was not plaintiff's employer for those purposes, Universal may not now claim employer status in order to avoid tort liability.

Although this argument has a facial appeal, we are ultimately unpersuaded by it. The record establishes that the payment of workers' compensation by Uni-Temp for the injuries sustained by Pryce was a matter of agreement between Universal and Uni-Temp, based upon negotiated conditions under which Universal would use Uni-Temp to supply it with laborers from time

to time. (See, Staskel Deposition at 11-12, 24). In return for a flat fee paid by Universal, Uni-Temp "paid the employee directly, and they took care of all other such employee costs." (Id. at 12). There is no evidence of any adjudication by a Pennsylvania administrative agency or court that Uni-Temp was responsible for payment of plaintiff's compensation as his true employer and/or that Universal was not responsible for payment of his compensation. It appears, rather, that after plaintiff applied for workers' compensation, Uni-Temp agreed to abide by its longstanding agreement with Universal and assume responsibility for paying the compensation.

In addition, there is no dispute that Uni-Temp agreed to be responsible for payment of the fine resulting from the OSHA violation because it admittedly violated its agreement with Universal to provide Universal with adult employees only, in accordance with the Universal policy against hiring minors. (See, Deposition of James Overbeek at 11, 47; Deposition of Kelly Lindenmuth 33, 43--50; Deposition of Thomas Staskel at 11, 22, 25). It was Universal, however, not Uni-Temp, that was actually cited for the violation of federal law arising out of Pryce's employment.

Plaintiff also contends that because he was a minor and Universal did not pay his workers' compensation, he falls within the exception to the exclusivity provision of the Workers' Compensation Act found in 77 Pa. Cons. Stat. Ann. §672(g). This section of the Act permits an illegally employed minor to pursue

a tort remedy against an employer if both the minor and the employer have elected not to be bound by the Workers' Compensation Act. In the event of such waiver, however, the minor employee does not receive compensation payments.

In light of the record in this case, we cannot agree that either party elected not to be bound by the Workers' Compensation Act. As noted, the actual payment of compensation by Uni-Temp rather than by Universal was a matter of agreement between Universal and Uni-Temp in which plaintiff in this action did not participate. Moreover, plaintiff did receive workers' compensation payments, and the record clearly establishes that until plaintiff was injured, Universal was unaware that it was employing a minor sent to it by Uni-Temp in contravention of Universal's policy against employing minors. Consequently, there is absolutely no evidence that, prior to the commencement of the instant action, either party intended, or expected, that §672(g) would be applicable.

Plaintiff's argument regarding the applicability of §672, however, is a bit more complex than the simple assertion that Pryce waived his right to compensation payments, since he clearly did not do so. Rather, plaintiff contends that under §§461 and 462 of the Workers' Compensation Act, Uni-Temp was a sub-contractor hired by Universal, a contractor, to perform work that is a recurrent part of Universal's business and that Uni-Temp was primarily liable for, and secured, the payment of Pryce's compensation. Thus, according to plaintiff's argument,

Universal, as a contractor, is subject to tort liability for its negligence in causing injury to Pryce, the employee of the subcontractor, Uni-Temp. Apparently, plaintiff is attempting to assert that Universal may be characterized as a contractor and Uni-Temp as subcontractor based upon the manner in which plaintiff was supplied to Universal as a laborer, as well as the fact that Uni-Temp actually paid his compensation. Plaintiff further argues that terming Universal a contractor and Uni-Temp a subcontractor somehow establishes a minor's waiver of compensation within the meaning §672(g).

It is not necessary, however, to determine plaintiff's precise reasoning in this regard in order to reject the waiver argument under §672(g), and/or any other application of §§461 and 462 to this action. As already noted and discussed, Uni-Temp's function vis a vis Universal was to supply general laborers for whatever specific tasks Universal chose to assign to such temporary help. Uni-temp neither trained, nor organized, nor supervised the laborers it procured for Universal in order for them to perform, under the direction of Uni-Temp, any part of the work that was part of Universal's business. Under the undisputed facts concerning the relationship between Universal and Uni-Temp, we conclude that these entities cannot be considered contractor and subcontractor within the meaning of §§461 and 462 of the Workers' Compensation Act. Consequently, the fact that Uni-Temp secured the payment of plaintiff's compensation as a result of

its agreement with Universal does not permit plaintiff to pursue a tort action against Universal.

In general, plaintiff's arguments in support of his contention that he should be permitted to seek a tort remedy for his injuries in addition to compensation focus on legal constructs and strained interpretations of the Workers' Compensation statute that distort the reality of the situation, i.e., that functionally, there was a master/servant relationship between Universal and himself. Plaintiff focuses on which entity, Universal or Uni-Temp, actually paid his compensation, not on which entity would likely have been responsible for the payments absent an agreement between Universal and Uni-Temp that did not involve or concern plaintiff in any way.

The question truly at the heart of the issues in this case is whether compensation is the appropriate and exclusive remedy for plaintiff's injury. Which entity paid the compensation is a technicality which plaintiff seeks to invest with great significance, but which is actually irrelevant. The statutory scheme that Pennsylvania has developed to provide a certain but exclusive remedy for injuries to employees should not be lightly disregarded in order to provide additional remedies in an arguably sympathetic case, particularly where the reality of the circumstances must likewise be disregarded and the Court must focus exclusively on strained constructions of specific provisions of the Pennsylvania Workers' Compensation Act.

As noted, under the universal interpretation of the Workers' Compensation Act adopted by Pennsylvania courts, the existence of an employment relationship is determined by the answer to one question, i.e., which entity that might arguably be considered an injured worker's employer exercised control over the worker prior to the injury? In the usual context, the answer determines which entity is responsible for payment of compensation. In the context of this case, however, the answer to the essential question determines whether compensation remains the plaintiff's sole remedy for the injury suffered within the course and scope of his employment, or whether he is permitted to pursue a tort remedy. If Universal had not exercised the requisite control over plaintiff's performance, it could then have been considered a third party against whom the injured worker could seek a recovery for negligence and other tort claims.

Under the circumstances of this case, however, we cannot, as plaintiff suggests, disregard the fundamental concept of control simply because the two businesses involved in this action reached an agreement concerning the payment of compensation in the event of injury to a laborer supplied by one to the other. The terms and conditions which govern the business relationship between Universal and Uni-Temp have nothing to do with either the circumstances of plaintiff's employment or the circumstances which led to his injury, and, therefore, cannot be

a decisive factor in determining whether plaintiff is limited to workers' compensation as the remedy for his injuries.

For all of the reasons stated herein, we reject plaintiff's arguments that he is entitled to pursue a tort remedy against Universal. We will, therefore, grant defendant's motion for summary judgment.

Strict Liability

Since we have concluded that plaintiff cannot pursue tort claims against Universal because of the existence of an employer/employee relationship between Universal and plaintiff, Universal is immune from plaintiff's strict liability and warranty claims as well his negligence claims. The exclusive remedy provision of the Workers' Compensation Act, §481(a), extends to "any and all other liability...in any action at law or otherwise on account of any injury or death." Consequently, unless there is some reason, other than those already raised by plaintiff and rejected by the Court, that plaintiff's strict liability and warranty claims are not covered by this statutory section, our granting of defendant's summary judgment motion will likewise extinguish those claims.

Plaintiff appears to argue, however, that his strict liability claim remains viable in that strict liability is imposed upon all manufacturers, sellers, assemblers and others in the chain of distribution of a defective product, regardless of

the relationship between plaintiff and a strictly liable defendant.

Leaving aside the question of the impact of the Workers' Compensation Act upon the law of strict liability, defendant Universal contends that, under any circumstances, strict liability may be imposed only where the defendant is in the business of manufacturing, selling, assembling or otherwise distributing the allegedly defective product. In this case, defendant Universal characterizes itself as, at most, an "occasional seller" of equipment it assembles and/or modifies for its own unique purposes.

This characterization is completely supported by the evidence adduced in support of Universal's motion for summary judgment. Wayne Knoth, Universal's senior vice-president of engineering, testified that defendant sells only worn-out or obsolete equipment, whether such equipment had been purchased or was designed and assembled by Universal. (Deposition of Wayne Knoth at 40, 63). Such testimony was confirmed by James Overbeek, Universal's vice-president of corporate services, and by Thomas Staskel, general manager of operations. (Overbeek Deposition at 61; Staskel Deposition at 83).

In addition to our conclusion that all tort claims in this action are barred by the Workers' Compensation Act, we agree with defendant that under Pennsylvania law, strict liability, as described and defined in the RESTATEMENT (SECOND) OF TORTS, §402A, extends only to entities which,

[B]ecause they are engaged in the business of selling or supplying a product may be said to have "undertaken and assumed" a special responsibility toward the consuming public and who are in a position to spread the risk of defective products...Occasional suppliers who are not in the business of selling or supplying such products are not "sellers" subject to strict liability.

Berkebile v. Brantley Helicopter Corporation, 337 A.2d 893, 898, n. 3 (Pa. 1975)(Emphasis added). There can be no dispute, in light of the record in this case, that Universal is not regularly engaged in the business of manufacturing, selling or otherwise supplying saws or other power equipment. Rather, defendant sometimes disposes of unusable or unwanted equipment by selling it rather than by disassembling or simply discarding it. Subjecting Universal to strict liability under such circumstances would be an unwarranted extension of Pennsylvania law under any circumstances, and would be particularly contrary to the law of Pennsylvania in the context of permitting an injured worker to circumvent the exclusivity provision of the Workers' Compensation Act.⁵

5. The only other possibility for permitting plaintiff's action to proceed against Universal based upon either a strict liability or negligence theory, notwithstanding the exclusivity provision of Pennsylvania's Workers' Compensation Act, is the "dual capacity" theory of liability. Although neither party to this action raised this possibility, the Court has sua sponte considered and rejected the applicability of the "dual capacity" theory of liability in this case.

The "dual capacity" theory was identified by the Pennsylvania Supreme Court in Tatrai v. Presbyterian University Hospital, 439 A.2d 1162 (Pa. 1982). As noted in Weldon v. Celotex Corp., 695 F.2d 67, 71 (3rd Cir. 1982), liability may be imposed upon an employer in accordance with the dual capacity

(continued...)

Conclusion

Based upon our consideration of the uncontradicted evidence in this action, and our application of the law of Pennsylvania to the undisputed facts established by the evidence, we will grant defendant Universal's pending motion for summary judgment and enter judgment in favor of the defendant. An appropriate order follows.

5. (...continued)
theory only when the employee's injury arose from an encounter with the employer or employer's product that was "totally extraneous to the employment scheme." Quoting, Tatrai, 439 A.2d at 1165. In this case, plaintiff's injury arose directly out of use of the power saw while in the course and scope of his employment. Pryce would not have sustained injury arising from use of the saw assembled by Universal if he had not been told to operate it as part of his duties for Universal.

A different situation would have been presented, and a potentially different outcome might have resulted, at least in the context of negligence and/or warranty theories, if Pryce had purchased a piece of obsolete equipment offered for sale by Universal and was later injured while using such equipment for his own purposes.

UNITED STATES DISTRICT COURT
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)	
Defendants)	

TROUTMAN, S.J.

O R D E R

AND NOW, this day of June, 1997, upon consideration of the Motion of Defendant, Universal Forest Products, Inc., for summary Judgment, (Doc. #20), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that the motion is **GRANTED**.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant, Universal Forest Products, Inc., and against the plaintiff.

IT IS FURTHER ORDERED that this action having been dismissed as to co-defendant, D. Jackson & Associates, Inc., d/b/a Uni-Temp, by order entered on April 25, 1996, the Clerk is directed to mark this action CLOSED for statistical purposes.

S.J.