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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002268-MR

PATRICIA MEEK, INDIVIDUALLY AND
PATRICIA MEEK, EXECUTRIX OF THE
ESTATE OF FAY EDWARD MEEK — APPELLANTS

APPEAL FROM MARTIN CIRCUIT COURT
v. HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 98-CI-00199

MARTIKI COAL CORPORATION — APPELLEE

AND NO. 2001-CA-002306-MR

COLUMBIA NATURAL RESOURCES, INC. AND
JOHN BUURMAN — APPELLANTS

APPEAL FROM MARTIN CIRCUIT COURT
v. HONORABLE STEPHEN N. FRAZIER, JUDGE
ACTION NO. 98-CI-00199

MARTIKI COAL CORPORATION, INC. — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This opinion covers two of three appeals from a decision of the Martin Circuit Court granting summary judgment (in a wrongful death action) to an "up the ladder" employer, on the basis that the incident was covered exclusively by the Kentucky Workers' Compensation Act. The estate and surviving spouse appealed, as well as a couple of possible tortfeasors. This appeal asks the question of whether an "up the ladder" contractor is liable for its torts where the subcontractor has workers' compensation coverage. We opine that a labor service company that provides its employees with workers' compensation coverage is a subcontractor and does not retain for its employees, the right to sue the contracting business (which is a contractor under KRS 342.610(2)) for torts committed by the contracting business or its employees. Hence, we affirm.

Fay Edward Meek was a coal truck driver who died on September 19, 1997, while operating the truck in the normal course of business. The accident occurred when both the electrical retarder system and the mechanical braking system failed on the truck which caused the truck to plummet over a sixty-five foot embankment.

Martiki Coal Corporation ran the mine and owned the truck involved in this accident. Martiki contracted with P & P

of Kentucky, Inc. for drivers. The deceased was an employee of P & P which had a contract (Service Agreement) with Martiki under which P & P was to provide drivers and workers' compensation benefits for such drivers. Paragraph 8 of said contract required P & P to indemnify Martiki for any loss as a result of all claims in connection with all injuries (including death) by P & P employees except: "However, that Contractor (P & P) shall not indemnify Company [Martiki] for claims, demands or causes of action due to the sole negligence or willful misconduct of Company [Martiki]." P & P did cover the decedent in its workers' compensation policy but Martiki did not.

Martiki also used a Service Agreement to contract out some of the truck maintenance with Ganote Enterprises, Inc. Ganote did not work on electrical retarder systems, which would presumably leave Martiki responsible for such. The investigation of the accident by the U.S. Mine Safety and Health Administration concluded that the cause of the accident was "the failure of the electrical retarder and the mechanical brakes."

The estate and surviving spouse collected workers' compensation benefits from P & P and also filed a wrongful death action against Martiki, Ganote, and Columbia Natural Resources, Inc., and its employee, John Buurman for possible comparative tort liability for having parked Columbia's truck on the road used in the fatal drive. Martiki sought and received summary

judgment in its favor holding that Martiki was immune from tort liability pursuant to the exclusivity provisions of the Kentucky Workers' Compensation Act (KRS 342.690), and as an "up the ladder" contractor (KRS 342.610(2)). Martiki was retained in the case as a defendant on the pending cross-claims for indemnification.

The estate and surviving spouse appealed, as well as John Buurman, Columbia Natural Resources, and Ganote. Ganote's appeal is not before us but the remaining appeals were consolidated. The appellants contend the trial court erred in granting summary judgment under CR 56.01 because there are genuine issues of fact as to whether Martiki was a contractor, and as to whether Martiki met the statutory prerequisite of securing workers' compensation coverage before the "exclusivity" or tort immunity kicks in.

The facts in the case of M.J. Daly Co. v. Varney, Ky., 695 S.W.2d 400 (1985) were very similar to the present case. M.J. Daly was also a summary judgment case wherein Varney was an employee of a labor service company (much like P & P). M.J. Daly Co. (much like Martiki) contracted with the labor service company for workers. The contract required the labor service company to provide workers' compensation coverage for its employees (much like the "Service Contract"). Varney, the employee, was injured on the job (much like the decedent).

Varney filed a workers' compensation claim against the labor service company and collected benefits (like the estate and surviving spouse against P & P). A subsequent tort action against M.J. Daly Co. alleged its negligence was responsible for his injuries and sought common law damages. (The wrongful death action seeks common law damages.) Our Supreme Court said the question in this case was "whether M.J. Daly Co. can claim statutory immunity based on the exclusive remedy provisions of the Workers' Compensation Act by qualifying as either an 'employer' or as a 'contractor' within the definition of those terms as used in the Act." M.J. Daly, 695 S.W.2d at 401. The Court went on to discuss the term "contractor" under KRS 342.610(2) and determined there really was not a contractor/subcontractor relationship. Id. However, in U.S. Fidelity & Guaranty Co. v. Technical Minerals, Inc., Ky., 934 S.W.2d 266 (1996), the Supreme Court revisited M.J. Daly, and decided that under KRS 342.610(2) a contract labor company is a subcontractor and the business contracting with the labor service company is a contractor. Also, Martiki is a mining company under KRS 342.610(2) which deems it a contractor for purposes of "up the ladder" liability where a subcontractor like P & P does not have workers' compensation coverage.

In U.S. Fidelity, as in M.J. Daly, the subcontractors did secure workers' compensation coverage while the contractors

did not get a separate policy. Our Supreme Court reviewed the facts in both cases, as well as precedent, and reversed M.J. Daly by holding that the contracting business is protected from claims from the employees of the contract labor company by the exclusive remedy provision of KRS 342.690(1) because the contracting business "would have been liable for workers' compensation benefits if the contract labor company had not already secured those benefits." (emphasis added.) U.S. Fidelity, 934 S.W.2d at 269. See also Matthews v. G & B Trucking, Inc., Ky. App., 987 S.W.2d 328 (1999), for when a subcontractor is liable for torts. Accordingly, the Court's interpretation of KRS 342.690(1) concerning the "employer obligation to secure payment of compensation as required by this chapter. . . ." is broader than the appellants seek, and the obligation is satisfied where the subcontractor purchases the coverage.

For the foregoing reasons, the summary judgment of the Martin Circuit Court is affirmed.

BAKER, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent and will endeavor to express my concerns with this case and the underlying tragedy.

The nature of Martiki's mining operation appears to be that of a manager orchestrating a series of special service organizations around the business of mining coal. No Martiki employees actually existed to perform the mining activities. Rather, Martiki entered into a series of agreements for the various services entailed in the mining of coal.

Of particular significance to the outcome of this case is whether Martiki was indeed a contractor (a term treated as being synonymous with employer for purposes of the exclusivity of workers compensation secured by P & P). Neither the trial court nor our majority opinion addresses the significance of Paragraph 8 of its contract with P & P:

> However, that Contractor [P & P] shall not indemnify Company [Martiki] for claims, demands, or courses of action due to the sole negligence or willful misconduct of Company [Martiki].

It is strange language that appears to be out of context with the relationship of contractor/subcontractor. If indeed it signifies a different relationship other than contractor (employer) / subcontractor (employee), then possibly the exclusivity of the workers compensation may be affected as well. Appellant also points out that Martiki exercised and retained a tremendous degree of control over P & P as a matter of fact. That control, coupled with the mysterious indemnity language of paragraph 8, serves as a material fact in dispute

whose very existence mitigates against entry of summary judgment.

Additionally, it is not wholly clear what was the nature of the regular or recurrent business of Martiki: whether it was mining coal with its own employees or whether it was acting merely as a mega-manager moving service groups about to accomplish coal production merely in a managerial capacity. Thus, we cannot determine with certainty a true definition of its business function –- a fact which negates our ability at this point to ascertain whether P & P was performing a service as subcontractor that constituted the regular or recurrent business of Martiki as contractor. In summary, the business identity of Martiki appears to be so amorphous as to render additional factual inquiry a necessity.

Both appellants' briefs raise the question of what does it mean to "secure payment" of workers compensation in order to invoke immunity from tort. Matthews v. G & B Trucking, Inc., Ky.App., 987 S.W.2d 328 (1998), does indeed hold that payment of workers compensation benefits to an injured employee by a subcontractor does not shield the overall contractor from tort liability of its own. Another question to be answered, therefore, is whether Martiki's requirement that P & P secure workers compensation coverage satisfies its own obligation to "secure" such payment. That is a legal question that can only

be answered following an analysis of the convoluted business relationship existing between Martiki and P & P.

Therefore, I would vacate the summary judgment and remand this case to sort out the facts in dispute in order to ascertain what legal standard should apply. It will not be an easy task, but it is one that public policy concerns for corporate accountability appear to necessitate.

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