

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002406-MR

MARSHALL CLARK AND JOAN CLARK

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 01-CI-001267

CLARK CONSTRUCTION COMPANY
OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, JOHNSON, AND PAISLEY, JUDGES.

DYCHE, JUDGE. Marshall and Joan Clark appeal from a summary judgment of the Warren Circuit Court dismissing their personal injury action against Clark Construction Company of Kentucky (no relation). We affirm.

Marshall was employed by an insulation contractor, whose name he does not recall, in the summers of 1962 and 1963 while he was in high school. He obtained that employment through his step-father, who was also employed by the same

contractor, who apparently was a sub-contractor under Clark Construction Company, the primary contractor for the construction of Diddle Arena on the campus of Western Kentucky University. Marshall's complaint initially joined other defendants and made claims of premises and products liability. All the defendants except for Clark were dismissed, having settled with Marshall and Joan.

This matter proceeded, and Clark filed a motion for summary judgment, asserting that the claims against it were barred by the "exclusive remedy" provisions of the Kentucky Workers' Compensation Act, KRS 342.690. The motion was granted following briefing and argument to the trial court, and this appeal followed. KRS 342.690 provides, in part,

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

KRS 342.610(2) provides, in part,

(2) A contractor who subcontracts all or any part of a contract and his carrier shall be

liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:

. . .

(b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

Clark argued below, and the trial court found, that under these statutes Clark was a contractor, had secured the required insurance coverage, and therefore the Workers' Compensation Act provided Marshall's sole and exclusive remedy for any injury he had received while working on the Diddle Arena project.

On appeal, Marshall and Joan make three arguments. They first maintain that, because Clark did not procure insurance specifically on Marshall, it had failed to comply with the statutory requirements, and they are therefore entitled to seek remedies outside of the Workers' Compensation Act. There is no merit in this argument. There is no such requirement, in the statute or otherwise.

The founder and principal of Clark has testified that the company was at all times, including during the construction of Diddle Arena, properly covered by workers' compensation insurance, and that all its subcontractors were required to provide such coverage to their employees. Marshall has produced no countervailing evidence, and no issue of fact, genuine or otherwise, has been created.

Marshall next argues that whether the work that Clark performed at Diddle Arena was a regular or recurrent part of its trade or business was a jury question. We disagree. Marshall's reliance on *dicta* in Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378 (1992), is misplaced. Clark was in the business of constructing large buildings. Diddle Arena was a large building. Its construction by Clark was a regular and recurrent part of Clark's business. The fact that some aspects of its construction were new or unique does not create a factual question, nor does the fact that it subcontracted out some of the tasks involved, such as insulation. There was no factual issue presented by appellants, and no error, legal or otherwise, by the trial court.

Marshall's final argument is that the Workers' Compensation Act does not apply to his injury, and if it does such application is unconstitutional. His argument is based on the fact that the limitation period and the period of repose

have both expired on his workers' compensation claim, and he is therefore barred from asserting the claim. Unfortunately for Marshall, our highest court has ruled against him. William A. Pope Co. v. Howard, Ky., 851 S.W.2d 460 (1993), holds that the twenty-year repose period provided in KRS 342.316(a) does not work to revive an otherwise extinguished claim, and that such statute is constitutional; in any event, the twenty-year period would not aid Marshall. See Wright v. Oberle-Jordre Co., Ky., 910 S.W.2d 241 (1995). The most relief Marshall could gain from this argument is the opportunity to file a workers' compensation claim, and we have no such request before us.

The judgment of the Warren Circuit Court is affirmed.

PAISLEY, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

Kenneth L. Sales
Joseph D. Satterley
Sales, Tillman, Wallbaum
Catlett & Satterley
Louisville, Kentucky

BRIEF FOR APPELLEE:

Rebecca F. Schupbach
Stites & Harbison
Louisville, Kentucky