RENDERED: JANUARY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002566-MR

MILDRED LEE, INDIVIDUALLY,
AND AS EXECUTRIX OF THE
ESTATE OF DUEL LEE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 04-CI-001843

E. I. DUPONT DE NEMOURS
AND COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

KELLER, JUDGE: Mildred Lee (Lee), individually and in her capacity as representative of her late husband's estate, appeals from the Jefferson Circuit Court's order granting summary judgment to E. I. DuPont de Nemours & Company (DuPont). Although it is not clear from the circuit court's cursory order, it appears that the court granted summary judgment to DuPont based on the exclusive remedy provisions of the Workers'

Compensation Act, KRS Chapter 342. Lee argues on appeal that DuPont's actions amounted to the deliberate intention to cause Duel Lee's (Duel) death, thereby negating the protection from civil suit provided to employers under KRS Chapter 342; that DuPont's actions amounted to unprovoked aggression by an employee or officer, thus negating the exclusive remedy protection; and that the circuit court granted summary judgment before Lee could complete discovery. For the reasons set forth below, we disagree with Lee and affirm the Jefferson Circuit Court.

FACTS

Because this matter is before us on summary judgment, we will deem that the following facts, which favor Lee, are true. Duel worked for DuPont from 1950 through 1984. During his employment at DuPont, Duel was exposed to asbestos fibers and dust. In August of 2002, Duel was diagnosed with mesothelioma and died within several days of receiving that diagnosis. Duel's mesothelioma was caused by his exposure to asbestos. Lee filed suit against DuPont and a number of other entities on behalf of Duel and his estate. Because this appeal does not concern those other entities, we will only summarize the facts as they apply to Lee's claims against DuPont.

Lee alleged and offered evidence that DuPont had knowledge of the dangers associated with asbestos exposure prior to and during Duel's employment with DuPont. Lee further alleged that DuPont and the other defendants "intentionally and willfully concealed from the public their knowledge of the hazardous nature of asbestos, and . . . intentionally and willfully failed to warn persons such as [Duel] of dangers

inherent in the handling, cutting, tearing-out, and general exposure to their asbestos products." Finally, Lee alleged that DuPont "intentionally and deliberately caused [Duel] to be exposed to asbestos" and "intentionally and deliberately failed to provide safety equipment to protect [Duel] from exposure to asbestos," all of which led to Duel's death from mesothelioma.

During the course of this litigation, DuPont filed a motion for summary judgment. In its motion, DuPont asserted that it was exempt from civil liability because of its status as Duel's employer and the exclusive remedy provisions of KRS Chapter 342. Lee argued before the circuit court, as she does here, that DuPont's actions amounted to an intentional act sufficient to abrogate those exclusive remedy provisions. The circuit court granted DuPont's motion on November 9, 2006, less than two weeks before trial.[1] It is from the circuit court's order of summary judgment that Lee appeals. For the reasons set forth below, we affirm.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002); *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is only proper when "it would be

[1] We note that, with the exception of Garlock, Inc., the other defendants apparently settled with Lee or had been dismissed prior to trial. Trial began on November 28, 2006, and concluded with a verdict in favor of Garlock on December 8, 2006.

impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. With this standard in mind, we will analyze the issues raised by Lee on appeal.

ANALYSIS

1. Exclusive Remedy

Lee argues that DuPont's failure to take any actions to warn or protect Duel from the known dangers of asbestos amounted to an intentional act to harm Duel and to cause his illness and ultimately his death. Lee also argues that "[a]llowing a toxic substance known to result in serious illness and death that [was] present on [DuPont's] property to infiltrate [Duel's] body [was] an act of physical aggression." According to Lee, DuPont's intentional acts and/or acts of physical aggression were sufficient to remove the shield of exclusive remedy from DuPont. Because these two arguments are intertwined, we will address them together.

We begin our analysis by examining the statutory scheme of exclusive remedy set forth in KRS Chapter 342. KRS 342.690(1) provides that, if an employer secures the required payment of compensation:

> the liability of such employer under [KRS Chapter 342] 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 . . . on account of such injury or death.

The preceding exclusive remedy provision does "not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of" an employee, officer, or director. KRS 342.690(1). KRS 342.610(4) provides that

> If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependent . . . shall receive the amount provided in this chapter in a lump sum to be used, if desired, to prosecute the employer. The dependents may bring suit against the employer for any amount they desire. If injury or death results to an employee through the deliberate intention of his employer to produce such injury or death, the employee or his dependents may take under this chapter, or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee, his dependents or personal representatives as is recoverable at law.

In summary, the above subsections provide that an insured employer is exempt from civil liability unless the employer intentionally causes injury or death to an employee or an employee's injury or death was caused by the unprovoked physical aggression of a fellow employee or of an officer or director of the employer.

Next we look to existing case law interpreting the exclusive remedy and intentional act provisions of KRS Chapter 342. In *Fryman v. Electric Steam Radiator Corporation*, 277 S.W.2d 25 (Ky. 1955), Fryman alleged that he suffered injuries while operating a dangerous machine, that his employer had notice of the dangerous condition of the machine, and that, by permitting him to work under such dangerous conditions, his

employer acted with deliberate intent to injure him. The former Court of Appeals held that Fryman's civil suit had been properly dismissed. In doing so, the Court positively cited to case law from jurisdictions with similar statutory provisions, noting that "[m]ost of the cases, if not all, from the other jurisdictions have interpreted the meaning of the phrase 'deliberate intention' to be that the employer must have determined to injure an employee and used some means appropriate to that end, and there must be a specific intent." *Fryman*, 277 S.W.2d at 27.

In *McCray v. Davis H. Elliott Co.*, 419 S.W.2d 542 (Ky. 1967), McCray's estate alleged that the Davis H. Elliott Company (Davis), acting through its agents, directed McCray to work on a tall pole in close proximity to a power line. At the time, McCray was an apprentice who lacked the experience to appreciate the danger posed by the power line and who had not been properly equipped. McCray came in contact with the power line and died. His estate alleged that Davis, because of the above, deliberately intended for McCray to come in contact with the power line. The former Court of Appeals, with little explanation, held that McCray's allegations did not rise to the level necessary to negate the exclusive remedy provisions of KRS Chapter 342.

Shamrock Coal Co., Inc. v. Maricle, 5 S.W.3d 130 (Ky. 1999), arose after the legislature made significant changes to KRS Chapter 342 in 1996. In pertinent part, those reforms increased the level of proof needed for coal miners to obtain retraining incentive benefits (RIB). Following passage of the 1996 changes to KRS Chapter 342, a

number of former Shamrock Coal Co., Inc. (Shamrock) employees, who did not qualify for RIB under the 1996 reforms, filed a civil suit against Shamrock.

The employees alleged, in pertinent part, that Shamrock

> was "negligent, careless and reckless" in its mining operations and conducted those operations in "gross disregard" of [the miners'] health, safety, and welfare. They also alleged that Shamrock "intentionally violated" safety procedures established by statutes and regulations, and that Shamrock engaged in outrageous conduct, thereby "intentionally or recklessly" causing the plaintiffs to suffer extreme emotional distress.

Shamrock Coal Co., Inc., 5 S.W.3d at 132.

Shamrock filed a motion to dismiss, which the circuit court denied, declaring in pertinent part, that the exclusive remedy provision of KRS Chapter 342 unconstitutionally denied the plaintiffs their jural right to a remedy. This Court denied Shamrock's request for a writ of prohibition, holding that the allegation of an intentional act by the plaintiffs was sufficient to confer jurisdiction on the circuit court. The Supreme Court of Kentucky reversed this Court, holding that, "for all matters falling within" the purview of the Workers' Compensation Act "no trial court has subject matter jurisdiction . . . ." *Id*. at 134. As to the intentional act exemption from the exclusive remedy provisions of KRS Chapter 342, the Supreme Court held that "absent 'willful and unprovoked physical aggression' by an employee, officer, or director, there is no exception to the exclusive liability provision of the Workers' Compensation Act." *Id*. at 135.

In *Moore v. Environmental Const. Corp.*, 147 S.W.3d 13 (Ky. 2004), Moore died when a trench in which he was working collapsed. Following an investigation, a Kentucky OSHA inspector issued four citations. Moore's survivors filed suit against his employer, alleging that Environmental Construction Corporation's (Environmental) failure "to take the proper precautions constituted a deliberate intention to kill" Moore. *Id*. at 16. A jury agreed with Moore's survivors and found that Environmental "had caused the death of John G. Moore, Jr. through 'deliberate intention'. *Id.* at 14. The circuit court granted Environmental's motion for a judgment notwithstanding the verdict, finding that "'the only reasoned analysis is that John G. Moore, Jr. did not die as a result of the deliberate intention of the Defendant or its employees.'" *Id.*

The Supreme Court of Kentucky affirmed. In doing so, the Supreme Court noted that Environmental failed to comply with Kentucky OSHA regulations and that Environmental "knew that injury or death could result from a failure to take the proper precautions. Nevertheless, Environmental's violation of OSHA regulations and acknowledgement [sic] of the possible consequences does not amount to a deliberate intention to produce John G. Moore, Jr.'s death." *Id.* at 18-19.

We note that the Supreme Court favorably cited the opinion of the United States District Court for the Eastern District of Kentucky in *Blanton v. Cooper Industries, Inc.,* 99 F.Supp.2d 797 (E.D.Ky. 2000), holding that:

> without evidence that the employers acted to harm employees, evidence that the employers knew that employees would be exposed to chemicals that caused cancer but did not take

> measures to reduce or alleviate risks, was insufficient to give rise to a tort cause of action under the deliberate intention exception to the exclusivity provision of Kentucky's Workers' Compensation Act.

Moore, 147 S.W.3d at 17.

Furthermore, the Supreme Court noted holdings from other jurisdictions, notably Tennessee, where "evidence of an employer's failure to follow safety regulations and a history of disregarding safety regulations or permitting dangerous working conditions has been found insufficient to establish that an employer had actual intent to injure an employee." *Id*. (Citations omitted). Finally, the Supreme Court noted that:

> [m]any other states in which Workers' Compensation exclusivity is abrogated when the employer intentionally causes injury or death, have concluded that violations of OSHA regulations or other safety standards alone do not rise to the level of an intentional wrong necessary to overcome the Workers' Compensation exclusivity provisions because mere knowledge and appreciation of the risk involved in an act is not the same as the intent to cause the injury. Mere carelessness or negligence, however gross, wanton or reckless, does not establish such intent.

Id. at 17-18.[2] (Footnotes omitted).

Finally, we look to Professor Larson, who noted that a number of jurisdictions have legislatively permitted civil suits by employees against employers when the actions of the employers do not rise to the level of intent. Several other jurisdictions

[2] We note that a different panel of this Court held, in a not to be published case, that "short of injuries inflicted by an unprovoked act of physical aggression directed against an employee with the deliberate and specific intent of causing harm, the exclusive remedy for workplace maladies lies under the rubric of the Workers' Compensation Act - not in a civil action for damages. An allegation of inferred or constructive intent . . . is simply insufficient to trigger the Act's intentional act exception clause." *Hunton v. Detrex Corp.*, 2006 WL 1789147 (Ky.App. 2006).

have carved out judicial exceptions to the exclusive remedy provisions of their Workers' Compensation Acts for conduct amounting to gross negligence or wanton/reckless behavior. However, as noted by Professor Larson, in those states that retain the requirement for an intentional act to abrogate the exclusive remedy provision, the general rule is that:

> [e]ven if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully [sic] failing to furnish a safe place to work, willfully violating a safety statute, failing to protect employees from crime, negligent hiring, refusing to respond to an employee's medical needs and restrictions, allowing excessive levels of employee horseplay or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.
>
> . . .
>
> [W]hat is being tested here is not the degree of gravity or depravity of the employer's conduct, but rather the narrow issue of the intentional versus the accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.

Larson's, *Workers' Compensation, Desk Edition*, §103.03. (Footnotes omitted).

Based on all of the above, in order to abrogate the exclusive remedy provisions of KRS Chapter 342, a plaintiff must establish that his employer acted with the

specific intent to harm him. It is not sufficient to show gross negligence or even recklessness, and intent will not be inferred from such negligence. With this in mind, we now look to Lee's claims.

Lee has alleged that DuPont knew of the dangers of asbestos and, despite that knowledge, not only did nothing to protect Duel from exposure to asbestos, but actively hid those dangers from Duel. DuPont's actions, if proven to be true, might rise to the level of gross or wanton negligence. However, DuPont's knowledge and appreciation of the risks involved in working with and exposure to asbestos, and its failure to protect Duel from those risks, do not rise to level of intent. We note Lee's argument that this Court should adopt the meaning of intent from the Commonwealth's criminal statutes and case law interpreting those statutes. However, the Supreme Court dealt with that argument in *Moore,* holding that:

> [a]ppellants' reliance on the inferred intent approach in homicide cases is misplaced as the actions of defendants in such homicide cases involve intentional action directed toward the victim. In the case of *Parker v. Commonwealth,* on which Appellants rely, the actions of the defendant involved one blow to his 22 month-old stepson's head with his fist and other blows to the child's head by striking it against a fixed object. There, the defendant's intent could be inferred because of the direct action he took and the extent of the victim's injuries. Had the blows to the child's head been an accident they would not have been so numerous or severe. In *Hudson v. Commonwealth,* the defendant strangled his girlfriend to death, bound and gagged her and left her body in the trunk of a car. In *Stopher v. Commonwealth,* the defendant killed a sheriff's deputy by shooting him in the face and in *Smith v. Commonwealth,* the defendant shot an acquaintance at point blank range. The intentional and

> vicious actions by the defendants in each of these cases eliminated the possibility that the deaths were caused by accident and justified the inferred intent approach. Absent actions of the same nature, this approach cannot be used to infer deliberate intent under KRS 342.610(4).

147 S.W.3d at 19 (citations in footnotes in original omitted).

Here, as in *Moore*, Duel cannot show that DuPont acted with the specific intent to cause harm exhibited by the criminal defendants in *Parker, Hudson, Stopher,* and *Smith.*[3]

Based on the above, we hold that Lee has failed to establish that DuPont's conduct rose to the level necessary to abrogate its protection from civil suit provided by KRS Chapter 342.

2. Entitlement to Additional Discovery

At the outset of this litigation, the trial court entered the master order developed for the handling of asbestos litigation. That order set forth the rules and the time frame for conducting discovery. Approximately two months before the discovery deadline, Lee filed a motion asking the trial court to compel DuPont to produce corporate witnesses. Lee stated that she was seeking "information that is relevant to DuPont's knowledge of the hazards associated with exposure to asbestos-containing materials throughout the time Duel Lee worked at its facility." Five days before the expiration of discovery, the trial court entered an order denying Lee's motion to compel. Lee

[3] *Parker v. Commonwealth*, 952 S.W.2d 209 (Ky. 1997); *Hudson v. Commonwealth*, 979 S.W.2d 106 (Ky. 1998); *Stopher v. Commonwealth,*, 57 S.W.3d 787 (Ky. 2001); and *Smith v. Commonwealth,* 737 S.W.2d 683 (Ky. 1987).

subsequently asked the trial court to re-schedule the trial in this matter, which the trial court did. However, the trial court stated that Lee would not be permitted to identify or call any witnesses not already identified. The trial court ultimately granted DuPont's motion for summary judgment.

Lee argues that the circuit court's summary judgment was premature because the circuit court had prevented her from conducting "discovery of various witnesses, including a corporate representative for Dupont [sic] pursuant to Cr [sic] 30.02(6). The information which Lee attempted to obtain involved matters directly related to Dupont's [sic] knowledge of the dangers of asbestos-containing materials and its conduct in causing Lee to be exposed to those materials which is clearly relevant to the determination of Dupont's [sic] intent to harm Duel Lee."

In support of her position, Lee cites several cases that indicate that a circuit court should not grant summary judgment prior to the completion of discovery. However, that case law is not relevant to this appeal for three reasons. First, Lee was granted significant latitude in conducting discovery in this matter. Second, Lee did not plead or allege that anyone associated with DuPont engaged in any deliberate acts of physical aggression against Duel.

Finally, Lee states that the additional information she sought concerned DuPont's knowledge of the harmful nature of asbestos and DuPont's conduct in continuing to expose Duel to asbestos. Although CR 26.02(1) provides great latitude to the parties in conducting discovery, that discovery must be "relevant to the subject matter

involved in the pending action." "It is a well established principle that a trial court has broad discretion over disputes involving the discovery process." *Sexton v. Bates,* 41 S.W.3d 452, 455 (Ky.App. 2001). As noted above, even if we accept that DuPont knew of the dangers associated with asbestos and continued to expose Duel to those dangers, the testimony Lee says she was seeking would not have enabled her to meet her burden of proving that DuPont's knowledge and conduct rose to the level of intent required by KRS Chapter 342 and relevant case law. Therefore, any additional discovery would not have been relevant, we discern no abuse of discretion in the circuit court's denial of Lee's motion to compel, and we hold that the circuit court's granting of summary judgment was not premature.

CONCLUSION

DuPont may have known of the dangers associated with exposure to asbestos and may have done nothing to protect or warn Duel Lee of those dangers. However, under current precedent, that conduct by DuPont did not rise to the level necessary to show that DuPont deliberately intended to cause injury or death to Duel Lee. Pursuant to SCR 1.030(8)(a), we are bound to follow that precedent; therefore we are compelled to hold that DuPont is exempt from civil liability under the exclusive remedy provisions of KRS Chapter 342. Furthermore, we hold that the circuit court did not prematurely grant DuPont's motion for summary judgment because Lee could not have proven through additional discovery that DuPont's conduct rose to the level necessary to show that DuPont deliberately intended to cause injury or death to Duel Lee.

For the above reasons, we affirm.

ALL CONCUR.

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