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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000049-MR

WILLIAM HELTON — APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 07-CI-00014

TRI-COUNTY CYCLES BARBOURVILLE, LLC; MYERS CHEVROLET-OLDSMOBILE-CADILLAC, INC.; AND GREGORY WILCHECK — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: William Helton appeals from summary judgments granted by the Knox Circuit Court in favor of Tri-County Cycles Barbourville, LLC; Myers Chevrolet-Oldsmobile-Cadillac, Inc.; and Gregory

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Wilcheck, dismissing the civil action Helton had filed resulting from injuries he sustained in an all-terrain vehicle (ATV) accident. The circuit court had concluded that the appellees were entitled to immunity from Helton's claims because of the exclusivity provisions of the Kentucky Workers' Compensation Act. We affirm.

Helton was employed as a salesman for Myers Chevrolet. Wilcheck was the majority shareholder, dealer, CEO, CFO, director, president, secretary, and treasurer for Myers Chevrolet. Myers Chevrolet owned a 50% percent interest in Tri-County Cycles. Tri-County Cycles would sell ATVs and motorcycles but had not yet opened for business at the time of Helton's injury.[2]

On April 28, 2006, Helton was injured while riding as a passenger on a Yamaha Rhino ATV driven by Wilcheck and owned by Tri-County Cycles. Helton had just finished working with a Myers Chevrolet customer concerning the sale of a vehicle and had been directed by Wilcheck to ride as a passenger on the ATV for a test run. Wilcheck acknowledged that he was "jacking around" and doing donuts prior to the accident. As Wilcheck made a sharp turn to park the vehicle on the Tri-County Cycles lot, it flipped and landed on Helton's leg.

As a result of the accident, Helton fractured his right leg, which required a plate and several screws to be implanted. Helton filed a workers' compensation claim against Myers Chevrolet, and on August 15, 2008, an administrative law judge awarded Helton lifetime benefits. The claim has now

[2] Tri-County Cycles was scheduled to open for business on the Monday following the accident.

been settled between Helton and Myers Chevrolet's workers' compensation insurer.

On January 9, 2007, Helton filed a civil complaint in the Knox Circuit Court alleging general negligence against Tri-County Cycles, Myers Chevrolet, and Wilcheck. He also filed a products liability claim against Tri-County Cycles. The circuit court initially denied the appellees' motion for summary judgment and held the case in abeyance while Helton pursued his workers' compensation claim against Myers Chevrolet.

On November 18, 2008, the circuit court granted summary judgment in favor of Myers Chevrolet and Wilcheck on the basis of workers' compensation immunity pursuant to KRS 342.690(1), which provides in part as follows:

> 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.

On December 17, 2008, the court also granted summary judgment in favor of Tri-County Cycles on the basis of workers' compensation immunity. This appeal by Helton followed.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Further, "the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact." *Id.* at 482.

Helton first argues that the circuit court erred in awarding summary judgment in favor of Tri-County Cycles because Tri-County Cycles was neither his direct employer nor his statutory "up-the-ladder" employer and, therefore, was not entitled to workers' compensation immunity. When the facts are substantially undisputed, the question of employment status is an issue of law. *Brewer v. Millich*, 276 S.W.2d 12, 15 (Ky. 1955).

The circuit court noted that all Myers Chevrolet salespersons, including Helton, had executed a salesperson's license with Tri-County Cycles as required by the Kentucky Motor Vehicle Commission. The court further noted that Tri-County Cycles had no separate employees of its own but that it had relied on the employees of Myers Chevrolet for the work that had been performed prior to the opening of the business. The court then held as follows:

> The court finds that if Mr. Helton was acting in the course and scope of his employment with Myers Chevrolet at the time of his accident on April 28, 2006,

> he must also be found to have been acting in the course and scope of any employment or prospective employment of Tri-County Cycles Barbourville, LLC as Tri-County Cycles Barbourville, LLC had no separate employees and the[y] could not independently commit an act of negligence that is separate and apart from the claims alleged against Greg Wilcheck and Myers Chevrolet.

The court cited no legal authority to support its conclusion.

Helton argues that the court erred in determining that he was an employee of Tri-County Cycles. He asserts that he worked exclusively for Myers Chevrolet and never was on Tri-County Cycles' payroll. He further states that he never sold any ATV, motorcycle, or other vehicle for Tri-County Cycles. In addition, Helton states that Tri-County Cycles, a separate corporation from Myers Chevrolet, had not yet opened for business.

Although we have not been cited any Kentucky decision directly on point, the appellees have cited *Levine v. Lee's Pontiac*, 203 A.D.2d 259, 609 N.Y.S.2d 918 (N.Y.A.D. 1994), which is similar to this case. Levine was employed by both Lee's Toyota and Lee's Pontiac. The two businesses were separate corporations, sharing the same building but occupying opposite sides. The two businesses jointly operated a service department in the building. Levine had general supervisory responsibilities in each business, including supervision of the service department. He took his orders from Lee Feore, who was the owner, president, and general manager of both corporations.

While working for Lee's Toyota, Levine was seriously injured when a vehicle driven by a Lee's Pontiac employee crashed through a wall and struck a desk behind which Levine was standing. After accepting workers' compensation benefits from Lee's Toyota, Levine filed an action against Lee's Pontiac and the other employee. The trial court awarded summary judgment in favor of Lee's Pontiac and the employee based on a special employment relationship between Levine and Lee's Pontiac.

On appeal, the appellate court affirmed the trial court determination of a special employment relationship. *Id*. at 260-61. Additionally, the court stated

> Furthermore, where, as here, the facts clearly demonstrate the plaintiff's dual employment status, whether the relationship between two corporate entities is that of joint venturers, parent and subsidiary, corporate affiliates, or general and special employers, immunity will be extended to all the plaintiff's employers where the plaintiff has accepted Workers' Compensation benefits[.]

Id. at 261.

Helton was issued a motor vehicle salesperson's license for both Myers Chevrolet and Tri-County Cycles prior to his injury. In our view, the issuance of Helton's license for both businesses establishes his joint employment status with both Myers Chevrolet and Tri-County Cycles.

We find the reasoning of the *Levine* court to be persuasive and hold that Helton's dual employment status precluded him from avoiding summary

judgment in favor of Tri-County Cycles after he accepted workers' compensation benefits from Myers Chevrolet.[3]

Helton next argues that the trial court erred by granting summary judgment to Wilcheck because Wilcheck was not acting within the course and scope of his employment at the time of the accident. Helton contends that Wilcheck was engaged in "horseplay," that such conduct was outside the course and scope of Wilcheck's employment, and, therefore, that Wilcheck does not have immunity. *See Kearns v. Brown*, 627 S.W.2d 589, 591 (Ky. App. 1982).

> KRS 342.690(1) states in part:
>
> > The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

This court stated in *Kearns*:

> > [T]he immunity provisions of KRS 342.690 are not applicable to a fellow employee whose actions are so far removed from those which would ordinarily be anticipated by the employer that it can be said that the employee causing the injury has removed himself from the course of his employment or that the injury did not arise out of the employment.

627 S.W.2d at 591.

[3] Further, this includes immunity from Helton's additional claims of negligent entrustment and products liability against Tri-County Cycles. *Borman v. Interlake, Inc*., 623 S.W.2d 912 (Ky. App. 1981).

In *Haines v. BellSouth Telecommunications, Inc.*, 133 S.W.3d 497, 499-500 (Ky. App. 2004) (footnotes omitted), this court stated that "[a]s a general rule under KRS 342.690(1), an injured worker may not maintain an action at law against a fellow employee, unless the fellow employee, *i.e.*, the alleged tortfeasor, committed a 'willful and unprovoked [act of] physical aggression' against the injured worker." Further, this court in *Haines* stated that in determining whether the fellow employee's act falls within the scope of his employment, "the fellow employee's intent in committing the act in question must also be taken into account." *Id*. at 500. In this regard, this court further explained in *Haines* that an act of "horseplay" may be outside the scope of employment "if it is committed with improper intent." *Id*.

It is undisputed that Wilcheck was Helton's supervisor and that the accident occurred during business hours on the premises of Tri-County Cycles. There is no allegation or evidence to support a finding that Wilcheck committed an act of willful or unprovoked aggression against Helton. Furthermore, although Wilcheck may have been recklessly and negligently operating the ATV at the time of the accident, his actions were nonetheless within the scope of his employment, thereby affording him immunity under KRS 342.690(1).[4] The court did not err in awarding summary judgment in favor of Wilcheck.

[4] The ALJ in the workers' compensation action by Helton against Myers Chevrolet determined, contrary to Myers Chevrolet's argument in that case, that Wilcheck was operating the ATV within the scope of his employment at the time of the accident. We agree that the ALJ ruled correctly.

Finally, Helton argues that the circuit court erred by extending the exclusive remedy immunity under KRS 342.690 to Myers Chevrolet because Myers Chevrolet failed to affirmatively prove that it secured workers' compensation insurance.

KRS 342.690(2) states:

> If an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may claim compensation under this chapter and in addition may maintain an action at law or in admiralty for damages on account of such injury or death, provided that the amount of compensation shall be credited against the amount received in such action, and provided that, if the amount of compensation is larger than the amount of damages received, the amount of damages less the employee's legal fees and expenses shall be credited against the amount of compensation. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risks of his employment, or that the injury was due to the contributory negligence of the employee.

In *General Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007), the Kentucky Supreme Court held:

> A certification of coverage from the Department of Workers' Claims or an uncontroverted affidavit from the employer's insurer is prima facie proof that a company has secured payment of compensation for the purposes of KRS 342.690(1). Absent evidence that the coverage was in some way deficient as to a worker, such a showing is enough to invoke the exclusive remedy provision of KRS 342.690(1), if applicable.

Id. at 605.

Although Myers Chevrolet did not produce a certification of coverage from the Department of Workers' Claims or an affidavit, Myers Chevrolet produced a copy of their workers' compensation insurance policy, which stated that the policy was in effect from January 1, 2006, to January 1, 2007. We conclude that this evidence coupled with Helton's workers' compensation award is sufficient to invoke the exclusive remedy immunity under KRS 342.690(1). The circuit court did not err in awarding Myers Chevrolet summary judgment.

The orders and judgments of the Knox Circuit Court are affirmed.

ALL CONCUR.

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