

RENDERED: MARCH 22, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000044-MR

FORD MOTOR COMPANY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY SHAW, JUDGE
ACTION NO. 15-CI-003525

CLARA SUSAN SHEETS,
EXECUTRIX OF THE ESTATE OF
STEVEN RAY SHEETS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, DIXON AND GOODWINE, JUDGES.

COMBS, JUDGE: The Appellant, Ford Motor Company, appeals from an order of the Jefferson Circuit Court denying its motion for summary judgment. For the reasons set forth below, we vacate and remand.

This is an asbestos case. The decedent, Steven Ray Sheets, worked as a millwright for approximately forty years. In July 2015, he was diagnosed with malignant mesothelioma. On July 17, 2015, Mr. Sheets filed a Complaint in the Jefferson Circuit Court against Ford and multiple other defendants alleging that he had contracted mesothelioma as a result of his exposure to asbestos. In the 1970s and 1980s, Mr. Sheets had worked at Ford while he was employed by Rapid Industries, which was an independent contractor of Ford. Sadly, Mr. Sheets died on July 26, 2015, from a self-inflicted gunshot wound. The Appellee, Clara Susan Sheets, Executrix of the Estate of Steven Ray Sheets, revived his lawsuit and was substituted as Plaintiff.

On August 4, 2017, Ford filed a motion for summary judgment. Ford contended that “neither the record evidence nor Kentucky law supports Plaintiff’s claims Summary judgment is appropriate at this stage for three separate reasons, each of which is independently fatal to Plaintiff’s claims against Ford.” Ford argued that it was immune from tort liability as an “up-the-ladder” or statutory employer under KRS¹ 342.610(2)(b) of the Kentucky Workers’ Compensation Act (Act), citing *General Electric v. Cain*, 236 S.W.3d 579 (Ky.

¹ Kentucky Revised Statutes.

2007).² Ford also argued that it had no duty to warn independent contractors pursuant to *Brewster v. Colgate Palmolive Co.*, 279 S.W.3d 142 (Ky. 2009). Ford

² KRS 342.610 governs liability for workers' compensation. Subsection (2) provides in relevant part that "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. . . ." *Cain* explains that:

If premises owners are "contractors" as defined in KRS 342.610(2)(b), they are deemed to be the statutory, or "up-the-ladder," employers of individuals who are injured while working on their premises . . . [and] like any other employers, are immune from tort liability . . . with respect to work-related injuries Thus, whether an owner is entitled to "exclusive remedy" immunity depends upon whether the worker was injured while performing work that was "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession" of the owner. If so, the owner is immune; if not, the owner is subject to tort liability.

Cain goes on to explain that as a precondition to the applicability of the exclusive remedy provision of the Act, KRS 342.690(1), a premises owner must prove that it has secured the payment of workers' compensation benefits, either through insurance or self-insurance.

[A] premises owner who asserts exclusive remedy immunity must both plead and prove the affirmative defense. Even when the underlying facts are undisputed, a conclusion that a defendant is entitled to judgment as a matter of law must be supported with substantial evidence that a defendant was the injured worker's statutory employer under a correct interpretation of KRS 342.610(2)(b). *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Statements that amount to legal conclusions are not properly included in an affidavit and, in any event, are not substantial evidence. 2A C.J.S. *Affidavits* § 39 (2006). Substantial evidence that a defendant was an injured worker's statutory employer entitles the defendant to prevail as a matter of law unless the plaintiff goes forward with contrary evidence.

236 S.W.3d at 585.

also argued that there was a lack of causation because Plaintiff's evidence -- even when viewed in a light most favorable to her -- could not meet the standard set forth in *Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868 (Ky. App. 2001).

On September 5, 2017, Sheets filed a response.

On November 30, 2017, the trial court entered a one-sentence, hand-written order, which provided as follows in its entirety: "Motion for Summary judgment filed by Δ Ford Motor Company is Denied."

On December 29, 2017, Ford filed a notice of appeal to this Court from the trial court's "November 30, 2017, Order denying Ford's motion for summary judgment based on 'up-the-ladder' immunity under the Kentucky Workers' Compensation Act, KRS 342.690. This appeal is by matter of right under *Ervin Cable Constr., LLC v. Lay*, 461 S.W.3d 422 (Ky. App. 2015)."

On January 1, 2018, Sheets filed a motion for transfer of the appeal to the Supreme Court. By order entered March 22, 2018, the Supreme Court summarily denied the motion.

On May 16, 2018, Sheets filed a motion to dismiss Ford's appeal and argued, *inter alia*, that an order denying a motion for summary judgment is interlocutory and not appealable and that "Ford's interlocutory appeal is only possible because of this Court's holding in *Ervin . . .*"

On May 24, 2018, Ford filed a response.

By order entered July 12, 2018, this Court denied Sheet's motion to dismiss, but we held that "any jurisdictional issues may be revisited by the panel of this Court considering the merits of the appeal."

On appeal, Ford argues that the trial court erred in denying its motion for summary judgment because it is immune from tort liability as a statutory or up-the-ladder contractor under the Workers' Compensation Act and that this Court has jurisdiction to review the trial court's interlocutory order under *Ervin*. Sheets again urges us to dismiss the appeal.

In *Ervin*, which also involved the issue of up-the-ladder immunity under KRS Chapter 342, this Court held as follows:

Ordinarily, a trial court's order denying summary judgment is not immediately reviewable on appeal since such an order is considered interlocutory. However, in this case Ervin Cable moved for summary judgment on grounds of absolute immunity, the denial of which is subject to immediate appeal since immunity is designed to free the possessor not only from liability, but also from the costs of defending an action. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883 (Ky.2009). In other words, the denial of a substantial claim of immunity is an exception to the finality rule that interlocutory orders are not immediately appealable. *Id.* As a result, this court has jurisdiction to address Ervin Cable's claim that the trial court improperly denied its motion for summary judgment.

Id. at 423.

We agree with Ford that this Court has jurisdiction under *Ervin* to review an order denying summary judgment in a case where the trial court has determined that the defendant is not entitled to up-the-ladder immunity as a matter of law. However, in the case before us, we cannot ascertain **any** basis for the trial court's ruling, which is determinative of whether we have jurisdiction to review it. *See JW Res., Inc. v. Caldwell*, No. 2015-CA-001802-MR, 2017 WL 1102984 at *3 (Ky. App. Mar. 24, 2017) (“[A] ruling [denying summary judgment] relating directly to immunity confers this Court with jurisdiction for an interlocutory appeal pursuant to *Prater* and *Ervin Cable*, while a ruling denying summary judgment based on the record does not.”). Something more is needed than the one-sentence order perfunctorily stating only that Ford's motion for summary judgment is denied.

In *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988), a civil rights action under 42 U.S.C.³ §1983, various Kentucky state officials appealed from an order of the district court denying their motion for summary judgment based on qualified immunity. The Sixth Circuit held that the district court's ruling was deficient, in part, because:

the court neglected to state more fully the basis for its conclusions. . . . We recognize that Rule 52(a), Fed.R.Civ.P., provides that findings of fact and conclusions of law are unnecessary when the district

³ United States Code.

court grants or denies a motion for summary judgment.^[4]
Because interlocutory review is available for the denial of such motions based on qualified immunity, however, we believe it is better practice for the district court to set forth with precision the basis for its decision. This will facilitate intelligent appellate review, and we believe it will conserve scarce judicial resources in the long run.

Id. at 426 (emphasis added) (citation omitted). We believe that would be the better practice here as well. We decline -- as we must -- to substitute our judgment (necessarily based on our own speculation) for the reasoning of the trial court, which is wholly absent from its abbreviated order.

Accordingly, we vacate the trial court's November 30, 2017, order denying Ford's motion for summary judgment. We remand this matter to the trial court with direction to enter an order specifically setting forth the basis for its determination.

ALL CONCUR.

⁴ As does Kentucky Rule of Civil Procedure (CR) 52.01 ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . .").

BRIEFS FOR APPELLANT:

Paul D. Hudson
Kalamazoo, Michigan

R. Thad Keal
Prospect, Kentucky

BRIEF FOR APPELLEE:

Joseph D. Satterly
Louisville, Kentucky