RENDERED: December 10, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002278-MR

JAMES DAVID STOKES AND
CINDY STOKES — APPELLANTS

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 96-CI-00202

JIM SKAGGS, INC. AND
UNDERWRITERS SAFETY & CLAIMS — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. James David Stokes and Cindy Stokes (Stokes) appeal from an order of the Caldwell Circuit Court entered August 7, 1998, which granted summary judgment in favor of Jim Skaggs, Inc. (Skaggs). We affirm.

On September 21, 1995, Stokes and a co-worker were engaged in boring a hole under a highway for the installation of sewer lines. While they were in the hole, employees of Skaggs detonated an explosive device which caused rocks and other debris to fly through the hole, causing injury to Stokes. It appears that Stokes and his co-worker had informed Skaggs' employees of

their presence in the area and asked that they receive warning prior to the detonation of explosives. One of Skaggs' own employees testified that no warning was given prior to detonation. Stokes' medical bills were paid by workers' compensation, and it also appears that he received approximately one month of temporary total disability payments while he was off work.

On September 17, 1996, Stokes filed a complaint against Skaggs seeking damages for injuries and other alleged losses resulting from the blasting incident. In its answer, Skaggs claimed protection under the exclusivity provisions of Kentucky's Workers' Compensation Act.

Skaggs filed a motion for summary judgment on March 25, 1998. In its motion, Skaggs alleged that on the date of the accident Stokes was an employee of K & Y Construction Company (K & Y). Skaggs stated that it had a contract with the Princeton Water and Waste Water Commission for the highway project, and that it had subcontracted a portion of the work to K & Y. Skaggs argued that as a contractor, it was entitled to protection under the exclusivity of liability provisions of KRS 342.690. In his response, Stokes argued that there was no evidence that Skaggs was, in fact, a contractor aside from a "self-serving" affidavit of Jim Skaggs. Stokes further alleged that even if Skaggs was a contractor, KRS 342.690 provides relief from the exclusive liability provisions if an injury is caused by wilful and unprovoked physical aggression of an employer. In support of his argument, Stokes alleged that Skaggs' employees were untrained

and improperly equipped and that they failed to follow federal and state safety standards regarding warnings to be given during blasting procedures. In response to Stokes' allegations, Skaggs filed a reply containing the contract between Skaggs and the commission. On May 21, 1998, the trial court entered an order granting summary judgment in favor of Skaggs.

On June 5, 1998, Stokes filed a motion requesting that the order granting summary judgment be altered, amended, or vacated. As grounds for the motion, Stokes alleged that the order was premature due to the fact that it was entered before a scheduled hearing on the matter had occurred. In the alternative, Stokes argued that summary judgment was improper due to the existence of an issue of genuine material fact. In support of his argument, Stokes submitted the affidavit of Karl White, his co-worker on the date of the accident. In the affidavit, White stated:

> ...
>
> 2. I was and am not a permanently contracting individual or company with K & Y and was and am not a full-time employee of K & Y. I am my own employer.
>
> 3. I did regularly but not exclusively contract with K & Y and/or Jim Skaggs, Inc., during times relevant to the lawsuit and the present time. My method of operation required that I submit bids on each job, including any Jim Skaggs, Inc., jobs. I provided my own employee benefits for myself and/or others that may have been employed by me from time to time. I made bids and worked on projects individually as well as with other companies and Jim Skaggs, Inc., and K & Y. I was paid on a per-job basis. I was not paid on an hourly basis.

> 4. I provided specialized equipment and labor for limited specialized work on each job I successfully bid, including that for Jim Skaggs, Inc., and K & Y.
>
> 5. The work I provided for Jim Skaggs, Inc., was never a regular and recurrent part of the work performed by Jim Skaggs, Inc. Jim Skaggs, Inc., has and never had any of the boring equipment necessary to perform the boring work which I performed for Jim Skaggs, Inc., and other companies and projects that I bid.

On June 26, 1998, the trial court entered an order vacating its order of May 21, 1998. The order noted that a hearing on the matter has been held on June 19, 1998, and that the issue was under further consideration.

On August 17, 1998, the trial court once again entered an order granting summary judgment in favor of Skaggs. The trial court stated in part:

> Even though Plaintiff has provided Karl White's affidavit, it remains uncontroverted that James Stokes was an employee of K & Y Construction which was a subcontractor of Jim Skaggs, Inc. Therefore, there is no material issue of fact involving whether K & Y was a subcontractor of Jim Skaggs, Inc. Since the requirements of KRS 342.610(2)(a) have been fulfilled it is not necessary to determine whether the the [sic] subcontractor's work was a regular and recurrent part of Jim Skaggs, Inc.'s work.
>
> Since James Stokes is the employee of subcontractor K & Y Construction, which has paid workman's compensation benefits to Stokes, then KRS 342.690 is invoked. It is an undisputed fact that these benefits have been paid to Stokes....KRS 342.690 states that "[if an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive...." A contractor has no a liability in tort to an injured employee of a subcontractor because the contractor is liable for workers' compensation benefits to

> the employee if the subcontractor, his employer, has not secured those benefits. The contractor's potential liability for workers' compensation benefits relieves the contractor from tort liability under KRS 342.690. Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459 (1986).
>
> ...
>
> The exclusive remedy provision of KRS 342.690 has a "willful and unprovoked physical aggression" clause which amounts to an exception to the general rule which absolves the contractor from liability. The Plaintiff contends that the failure to warn of the upcoming blast amounts to an act of "willful and unprovoked aggression" as described by the statute. Russell v. Able, 931 S.W.2d 460 (Ky. Ct. App. (1996), involved actual physical contact between the parties and can be distinguished from the failure to warn of the impeding blast which is at issue in the case. The record contains no evidence that the current case could be considered to involve an act of wilful physical aggression. Therefore, there is no issue of material fact concerning the exception to the exclusive remedy provided by KRS 342.690.

This appeal followed.

Stokes first disputes the trial court's entry of summary judgment on the ground that K & Y was a subcontractor of Skaggs, thus giving Skaggs the status of contractor for the purpose of KRS 342.690. Stokes maintains:

> It appears from Carl's Affidavit that Carl contracted with K & Y to perform the work and hired David. Appellee may or may not have been aware of the relationship between K & Y and Carl. Nevertheless, a clear conclusion that a trier of fact could draw from Carl's Affidavit, is that he and David were not employees of K & Y but were independent contractors retained by K & Y do to this type of work on a job by job basis.

We note that summary judgment is proper when it appears that the opposing party cannot produce evidence at trial warranting

judgment in his favor. Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255, 256 (1985).

In considering Stokes' argument, we not only considered the affidavits of Skaggs and White, but also the deposition of James Stokes. In his deposition, Stokes indicated that at the time of the accident he was employed by K & Y as an hourly employee, and further testified that his medial bills and TTD benefits were paid by K & Y's compensation carrier.

First, Stokes' argument that he was an independent contractor as opposed to an employee of K & Y is without merit. Stokes himself testified that he was an hourly employee and if he was, as he claims, an independent contractor he would not have been entitled to the workers' compensation benefits he received. Stokes cannot be an employee of K & Y for purposes of workers' compensation on one hand and an independent contractor on the other for the purpose of maintaining a civil action.

Secondly, there is no evidence in the record to support Stokes' allegation that K & Y was not a subcontractor of Skaggs. Having reviewed White's affidavit, which is somewhat cryptic in nature, there is nothing in it which refutes Skaggs' allegations. If anything, White's affidavit supports Skaggs' claims in that he alleges that he was required to submit bids on Skaggs' jobs, provided benefits for himself and other employees, and was paid on a per-job basis. At no point does White clearly deny being a subcontractor of Skaggs. Once Skaggs meets the initial burden of showing a non-existence of a genuine issue of material fact, the burden shifts to Stokes to "present at least some affirmative

evidence" of the existence of a genuine issue of material fact. Hibbitts v. Cumberland Valley National Bank & Trust Co., Ky. App., 977 S.W.2d 252, 253 (1998). We do not believe that White's affidavit satisfies this burden.

Next Stokes argues that the trial court erred in finding that his injury was not caused by wilful or unprovoked physical aggression on behalf of Skaggs. We disagree.

Under KRS 342.690(1):

> The exemption from liability given an employer by this section shall also extend to such employer's ...employees, officers or directors,...provided the exemption from liability given an employee, officer, or direction or an employer or carrier shall not apply in any case where the injury...is proximately caused by the wilful and unprovoked physical aggression of such employee, officer or director.

In Russell v. Able, Ky. App., 931 S.W.2d 460 (1996), this provision was construed to allow an action for negligence and battery against an injured worker's co-employee.

As Skaggs points out on appeal, Stokes has failed to show an act of physical aggression on behalf of Skaggs' employees. We interpret this section to require some kind of physical contact before it applies as in the Russell case, where the claimant was injured when her co-worker came up behind her and placed her knee behind the claimant's knee, causing her to fall. We believe that absent some kind of physical contact, the exception to KRS 342.690(1) does not apply.

Finally, Stokes argues that the 1996 amendments to the worker's compensation act are unconstitutional. In addressing the same issue on Skaggs' motion for summary judgment, the trial

court noted that Stokes had failed to give notice of his constitutional challenge to the state attorney general as required by KRS 418.075. Compliance with KRS 418.075 is mandatory, and in the absence of the required notification the trial court is without jurisdiction to rule on the issue. See Maney v. Mary Chiles Hospital, Ky., 785 S.W.2d 480 (1990). Because the trial court properly refused to rule on this issue there is nothing for us to review. Stokes' notification of the attorney general on appeal does not cure his earlier failure to do so.

Having considered the parties' arguments on appeal, the order of the Caldwell Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

JOHNSON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, CONCURRING: I concur in the result reached by the Majority Opinion, but choose to write separately. I disagree with the discussion by the Majority on page 9 of its opinion wherein it refers to a "physical contact" requirement. KRS 342.690(1) makes no reference to "physical contact." It appears obvious to me that an injury could be "proximately caused by the wilful and unprovoked physical aggression" of an employee without "physical contact" occurring, e.g., the wilful and unprovoked throwing of an explosive device that caused the loss of hearing. However, I do not believe the appellants' claim comes under KRS 342.690(1) exception because I do not believe

there is any evidence to support a finding that the blasting was done in a manner to constitute wilful, physical aggression. I agree that the actual blasting was wilful; however, the physical aggression upon Stokes was at worst negligent and not wilful.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Richard L. Walter
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