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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002015-MR

BRIAN TEISMANN; GAVIN ELLIS;
JAMES MCCULLEY; AND MELISSA ANN MCCULLEY

APPELLANTS

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD KOPOWSKI, JUDGE
ACTION NO. 01-CI-00285

CAMPBELL COUNTY FIRE DISTRICT NO. 2;
CENTRAL CAMPBELL COUNTY FIRE DISTRICT;
COLD SPRINGS CRESTVIEW VOLUNTEER FIRE
DEPARTMENT; HIGHLAND HEIGHTS VOLUNTEER
FIRE DEPARTMENT; WILDER VOLUNTEER FIRE
DEPARTMENT; MARK CLAIR; JEFF BAKER;
STEVE LEHMAN; AND RON LANE

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: BUCKINGHAM, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Brian Teismann, Gavin Ellis, James McCulley, and
Melissa McCulley (hereinafter appellants) have appealed from an
order entered by the Campbell Circuit Court on August 22, 2001,

which granted the appellees'¹ motion to dismiss for failure to state a claim upon which relief can be granted.² Having concluded that the complaint properly stated a claim upon which relief can be granted and that at this stage of the proceedings the pleadings present a genuine issue as to a material fact concerning the defense of joint venture, we must vacate the trial court's dismissal of the appellants' complaint and remand this matter for further proceedings.³

On April 10, 2000, Campbell County Fire District No. 2, the Cold Spring Crestview Volunteer Fire Department, the Highland Heights Volunteer Fire Department, and the Wilder Volunteer Fire Department participated in a joint firefighter training exercise at a house located in Campbell County, Kentucky.⁴ The purpose of this exercise was to have a "controlled burning" of the house, i.e., the house was deliberately set on fire so the firefighters could train inside an actual burning building. Teismann, Ellis,

¹The appellees are Campbell County Fire District No. 2; Central Campbell County Fire District; Cold Spring Crestview Volunteer Fire Department; Highland Heights Volunteer Fire Department; Wilder Volunteer Fire Department; Mary Clair; Jeff Baker; Steve Lehman; and Ron Lange.

²Kentucky Rules of Civil Procedure (CR) 12.02.

³While the appellees have argued in their brief that the order of dismissal should be affirmed on other grounds, we note that the only issue relied upon by the trial court for dismissing this action was the doctrine of joint venture. We express no opinion as to the merits of any other defense, and this Opinion is not intended to act as a bar to any defense.

⁴According to the appellants' brief, Northern Kentucky University owned both the house and property where the training exercise was conducted. The university is not a party to this dispute.

and McCulley, three of the appellants herein, participated in this training exercise.⁵ Teismann was a volunteer firefighter for Campbell County Fire District No. 2, and Ellis and McCulley were volunteer firefighters for the Highland Heights Volunteer Fire Department. The exercise was supervised by Lieutenant Mary Clair of the Cold Spring Crestview Volunteer Fire Department, Captain Jeff Baker and Captain Steve Lehman of the Highland Heights Volunteer Fire Department, and Safety Officer Ron Lange of the Cold Spring Crestview Volunteer Fire Department, four of the appellees herein.

Unfortunately, the training exercise went awry and the firefighters were trapped inside the burning house. Teismann, Ellis, and McCulley claim that as a result of the incident they suffered severe injuries, which included second and third degree burns on various parts of their bodies.

On July 25, 2000, the Kentucky Labor Cabinet cited Campbell County Fire District No. 2 for six safety violations pursuant to KRS⁶ 338.031(1)(a), for failing to "furnish to each of [its] employees employment or a place of employment which are [sic] free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees." The citations stated that with regard to the training exercise:

1. Campbell County Fire District No. 2 did not repair two doors which jammed and

⁵A fourth individual also participated, but he was never a party to this litigation.

⁶Kentucky Revised Statutes.

blocked the main means of egress from the house.

2. Diesel fuel was improperly used to start the fire.
3. Campbell County Fire District No. 2 failed to ensure that each hose line was capable of delivering 95 gallons of water per minute or that an instructor had been assigned to each crew.
4. Campbell County Fire District No. 2 did not ensure that safety personnel were in the proper positions.
5. Campbell County Fire District No. 2 failed to ensure that the stated means of egress from the building were accessible.
6. Campbell County Fire District No. 2 failed to ensure that no other fires were burning at the time of the exercise.

On March 7, 2001, the appellants filed a complaint in Campbell Circuit Court, alleging inter alia: (1) that they were injured as a result of the negligence of Lt. Clair, Capt. Baker, Capt. Lehman, and Off. Lange; (2) that the appellees were negligent per se due to the numerous safety violations; and (3) that the appellees intentionally caused the firefighters' injuries. The firefighters sought compensatory damages and payment of medical expenses for their injuries and punitive damages for the alleged malicious and reckless conduct of the appellees. Melissa McCulley, wife of injured firefighter James McCulley, also asserted a loss of consortium claim for the injuries suffered by her husband.

On April 27, 2001, the appellees filed a CR 12.02 motion to dismiss, claiming that the appellants had failed to

state a claim upon which relief can be granted and that the Campbell Circuit Court lacked subject matter jurisdiction of this action. The appellees argued, inter alia, that the appellants' exclusive remedy was pursuant to the Workers' Compensation Act.⁷ The trial court agreed and on August 22, 2001, it entered an order dismissing the appellants' complaint. The trial court found that the training exercise was a joint venture; and therefore, the appellants' sole remedy was to pursue a claim under the Workers' Compensation Act.⁸ This appeal followed.

We agree in part with the appellants' argument that the trial court erred in ruling that the joint venture doctrine barred their common-law claims against the various appellees. From the current state of the record, it would be premature to make a determination as to whether the joint venture doctrine is applicable. However, we do conclude that the appellants have stated a claim upon which relief can be granted and that dismissal under CR 12.02 was improper.

Recently, our Supreme Court in Roethke v. Sanger,⁹ discussed the doctrine as follows:

⁷See KRS 342.690. (We note that this statute constitutes a bar to any claim other than a workers' compensation claim only "[i]f an employer secures payment of compensation as required by this chapter[.]" This Opinion does not address the issue of whether the appellees actually provided the workers' compensation coverage required under this statute.)

⁸Volunteer firefighters are expressly covered by the Worker's Compensation Act under KRS 342.640(3).

⁹Ky., 65 S.W.3d 352, 364 (2001).

Sometimes referred to as a joint adventure, a joint enterprise is "an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses." Eubank v. Richardson, Ky., 353 S.W.2d 367, 369 (1962); see also Drummy v. Stern, Ky., 269 S.W.2d 198, 199 (1954). In Huff v. Rosenberg, Ky., 496 S.W.2d 352 (1973), we enumerated the elements essential to a joint enterprise, viz: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to voice in the direction of the enterprise, which gives an equal right of control." Id. at 355 (citing Restatement (Second) of the Law of Torts, § 491, cmt. c (A.L.I. 1965).

While no published Kentucky case has applied this doctrine as a bar to a third-party negligence action based on the workers' compensation exclusive remedy provision, the doctrine has been so used in other jurisdictions. In Conner v. El Paso Natural Gas Co.,¹⁰ the Court of Appeals of Arizona stated:

Where a joint venture exists, each of the parties is the agent of the others and each is likewise a principal of the others so that the act of one is the act of all. West v. Soto, 85 Ariz. 255, 336 P.2d 153 (1959). For purposes of workmen's compensation, each individual joint venturer is the employer of all employees doing work on behalf of the joint venture, W.B. Johnston Grain Co. v. Self, 344 P.2d 653 (Okl. 1959); Insurance Company of North America v. Dept. of Industry, 45 Wis.2d 361, 173 N.W.2d 192 (1970); Industrial Commission v. Lopez, 150 Colo. 87, 371 P.2d 269 (1962), and each enjoys the protection of the exclusive remedy

¹⁰123 Ariz. 291, 599 P.2d 247 (1979).

provisions, Felder v. Old Falls Sanitation Co., Inc., 47 A.D.2d 977, 366 N.Y.S.2d 687 (1975); Cook v. Peter Kiewit Sons Co., 15 Utah 2d 20, 386 P.2d 616 (1963); Guilbeau v. Liberty Mutual Insurance CO., 324 So.2d 571 (La.App.1975); Lewis v. Gardner Engineering Corp., 254 Ark. 17, 491 S.W.2d 778 (1973).

For the joint venture doctrine to apply, all four essential elements must be present; and at this stage of the proceedings, it is premature to make a determination as to whether there is a genuine issue as to a material fact regarding these essential elements. If no such factual issue exists, then summary judgment may well be appropriate; if such a factual issue does exist, then that issue or those issues will have to be presented to the fact-finder for the appropriate findings.¹¹ Regardless, the trial court erred by dismissing the complaint pursuant to CR 12.02.

Therefore, while Teismann may be precluded under the workers' compensation exclusivity bar from pursuing a claim against his own fire department, Campbell County Fire District No. 2, he will only be barred from pursuing common-law claims against the Cold Spring Crestview Volunteer Fire Department, the Highland Heights Volunteer Fire Department, or the Wilder Volunteer Fire Department if after further discovery there is no genuine issue as to any material fact regarding the elements required for the doctrine of joint venture to be applied or if the proper factual findings in support of such a bar are made.

¹¹Cf. Julian Consolidated, Inc. v. Conrad, 553 So.2d 784 (Fla. Dist. Ct. App. 1989).

Likewise, while Ellis and McCulley may be precluded from pursuing an action against the Highland Heights Volunteer Fire Department, they will only be precluded from pursuing common-law claims against Campbell County Fire District No.2, the Wilder Volunteer Fire Department, or the Cold Spring Crestview Volunteer Fire Department if after further discovery there is no genuine issue as to any material fact regarding the elements required for the doctrine of joint venture to be applied or if the proper factual findings in support of such a bar are made. Accordingly, we hold that the trial court erred as a matter of law by dismissing the appellants' common-law claims under CR 12.02 based on the doctrine of joint venture; and we vacate the order on this issue and remand this matter for further proceedings.

Our holding that there must either be no genuine issue as to any material fact or that proper factual findings must be made regarding the applicability of the joint venture doctrine also extends to Melissa McCulley's loss of consortium claim. In Brooks v. Burkeen,¹² our Supreme Court held that "[t]he decision by a spouse to be covered by the Workmen's Compensation Act [is] binding upon his or her marital partner. . . ." Hence, Melissa McCulley is precluded from pursuing a loss of consortium claim against her husband's fire department if James accepted its workers' compensation coverage. However, pursuant to Brooks, she may not be precluded from pursuing a loss of consortium claim against the other appellees. Accordingly, the dismissal of

¹²Ky., 549 S.W.2d 91, 93 (1977).

Melissa McCulley's loss of consortium claim is also vacated and her case is remanded with the appellants' cases for further proceedings regarding the essential elements of the joint venture doctrine.

For the foregoing reasons, the order of dismissal of the Campbell Circuit Court is vacated and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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