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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001158-MR

SHERRY H. HARROD, ADMINISTRATRIX
OF THE ESTATE OF JEREMY SCOTT HARROD — APPELLANT

v.

APPEAL FROM CLAY CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 01-CI-00442

THE ESTATE OF FRED A.
COLLATZ, III — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE: Sherry H. Harrod, Administratrix of the Estate of Jeremy Scott Harrod (hereinafter “Harrod”) has appealed from the Clay Circuit Court’s order granting the Estate of Fred A. Collatz, III’s (hereinafter “the Estate”) motion for summary judgment and dismissing her complaint for wrongful death and personal injury with prejudice. Having determined that any further recovery is barred by the exclusive remedy provision of KRS Chapter 342, the Workers’ Compensation Act, we must affirm.

On the evening of December 4, 2000, Dr. Fred A. Collatz, III (hereinafter "Dr. Collatz"), Jeremy Harrod (hereinafter "Jeremy") and Kelly Stewart (hereinafter "Kelly") were tragically killed in the crash of a helicopter piloted by Dr. Collatz. Dr. Collatz, Jeremy and Kelly were all employees of Christian Cardiology, P.S.C. (hereinafter "Christian Cardiology") located in Manchester, Kentucky. The R-44 helicopter involved in the accident was purchased by Christian Cardiology that October. Jeremy was in charge of the computer systems for Christian Cardiology, and was a salaried employee. On the day of the crash, it was common knowledge in the office through statements of Dr. Collatz and Jeremy that the three employees were planning on flying in the helicopter to Jackson to look at the newly leased offices, and then proceeding to Lexington to purchase office furniture for the new clinic. Jeremy was to measure the clinic for computer wires and determine what other equipment he still needed. Sherman Sizemore (hereinafter "Sherman"), another employee of Christian Cardiology, was to drive in a rented truck to Lexington where he was to meet the helicopter and drive the four men to purchase and load the furniture. Dr. Collatz was to call Sherman in the event that the plans changed. Then Sherman was to have returned Dr. Collatz, Jeremy and Kelly to the helicopter and proceed to Jackson with the truck while the others returned by helicopter.

Sherman left Manchester sometime after 4:00 p.m., and arrived in Lexington at approximately 7:00 p.m. at the location he was supposed to meet the helicopter. Dr. Collatz, Jeremy and Kelly left Manchester in the helicopter at approximately 7:00 p.m. as well. Sandy Hubbard, at that time a nurse with Christian Cardiology, received a telephone call from Kelly during the flight at approximately 7:15 p.m. requesting Sherman's pager number. Shortly after 7:00 p.m., Sherman received a page originating from Kelly's cellular phone. When he attempted to return the page, Sherman only heard a choppy noise. Further attempts to call Kelly went directly to his voicemail system. The helicopter crashed at 7:18 p.m. between Manchester and Lexington, and the wreckage was not found until the next day.

Harrod, Jeremy's mother, was appointed the administratrix of her son's estate, while Dr. Collatz's wife, Theresa Collatz, was appointed the administratrix of his estate. The survivors of Dr. Collatz, Jeremy and Kelly applied for and collected $50,000 in death benefits from Ohio Casualty Group, the workers' compensation carrier for Christian Cardiology. On December 3, 2001, Harrod filed a complaint in Clay Circuit Court against the Estate, seeking damages for wrongful death and personal injury due to the negligent conduct of Dr. Collatz, as well as punitive damages due to Dr. Collatz's gross negligence,

recklessness, and willful and wanton misconduct. In its answer, the Estate raised as an affirmative defense that the suit was barred by the exclusive remedy provision of KRS 342.690(1) as both Dr. Collatz and Jeremy were engaged in the course and scope of their employment for Christian Cardiology at the time of the fatal crash. Following some discovery, the Estate filed a motion for summary judgment on this ground, arguing that the crash did not come within the willful and unprovoked physical aggression exception to the exclusive remedy provision. Before issuing a ruling on the Estate's motion, the circuit court allowed Harrod to take the depositions of several potential defense witnesses as to whether Dr. Collatz and Jeremy were in the course and scope of their employment. After reviewing the deposition testimony, the parties' briefs and the other evidence of record, the circuit court granted the Estate's motion, noting on the record that there was nothing to convince him that this was not a business trip. The circuit court's oral ruling was reduced to a written order on May 29, 2003. This appeal followed.

On appeal, Harrod argues that the circuit court's entry of a summary judgment was improper as there remained genuine issues of material fact as to whether Dr. Collatz and Jeremy were in the course and scope of their employment when the helicopter crashed, that her receipt of workers' compensation

benefits would not bar the action, and that the circuit court's decision was premature in light of a similar case pending before the Supreme Court of Kentucky. On the other hand, the Estate continues to argue that the uncontested evidence of record establishes that Jeremy and Dr. Collatz were in the course and scope of their employment at the time of the crash. In particular, the Estate asserts that Harrod's claims are barred by the exclusive remedy provisions of the Workers' Compensation Act, that the exception to the exclusive remedy provision is not applicable in this case, that there are no genuine issues of material fact to be decided, and that the rule against hearsay is not a bar to the admission of testimony regarding the purpose of the flight. Furthermore, the Estate argues that the summary judgment was not prematurely entered and asserts that the Estate was not properly named or sued in the original lawsuit.

Our standard of review of summary judgments is well settled:

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party

> bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in Steelvest used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue de novo. (Citations in footnotes omitted.)

Lewis v. B&R Corporation, Ky.App., 56 S.W.3d 432, 436 (2001). With this standard in mind, we shall review the circuit court's ruling in this matter.

As agreed below, the pivotal issue in this case is whether Dr. Collatz and Jeremy were in the course and scope of their employment for Christian Cardiology when the fatal crash occurred. KRS 342.690(1) provides, in pertinent 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. . . . 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 were the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

The case law interpreting this statute has consistently held that, "[e]xemption from liability provided an employer by the statute also extends to employees of the employer." Wymer v. JH Properties, Ky., 50 S.W.3d 195, 197 (2001). Furthermore, in Travelers Indemnity Co. v. Reker, Ky., 100 S.W.3d 756, 760 (2003), the Supreme Court stated that:

> We have consistently held that, except for the clause pertaining to a "willful or unprovoked physical aggression" at the hands of the employer or insurer or their agents, KRS 342.690(1) and its predecessor statutes shield a covered employer and its insurer from any other liability to a covered employee for damages arising out of a work-related injury.

See also Shamrock Coal Co., Inc. v. Maricle, Ky., 5 S.W.3d 130 (1999); McCray v. Davis H. Elliott Co., Inc., Ky., 419 S.W.2d 542 (1967).

In this case, Harrod attempts to argue that Jeremy was not in the course and scope of his employment because the crash happened outside of the Manchester office and outside of his normal working hours, and because moving furniture was not a

part of his normal work duties. Additionally, she asserts that any testimony concerning the purported work-related purpose of the flight would be inadmissible as hearsay. Furthermore, Harrod asserts that Dr. Collatz was outside the course and scope of his employment because he had apparently deviated from the original plan to fly from Manchester to Jackson, and then to Lexington, as the crash occurred on a direct path between Manchester and Lexington. As a result, Harrod asserts that the Estate failed in its burden of proving its affirmative defense, i.e., that her suit is barred by the exclusive remedy provision of KRS 342.690(1). We disagree.

The crux of Harrod's argument hinges on her assertion that deposition testimony regarding the purpose of the trip was inadmissible hearsay. KRE 801(c) provides the definition of hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible except as provided by the rules. KRE 802. However, there are several exceptions to the rule against hearsay. See KRE 801A; KRE 803; KRE 804. Our Supreme Court has addressed the hearsay rule as follows:

> The essence of the rule prohibiting the admission of hearsay evidence is the absence of an opportunity for cross-examination. While a number of exceptions have been developed to permit the admission of hearsay

> evidence when it has been shown to be necessary and trustworthy, the general rule has not been lost in the exceptions. . . . [T]he statements must possess characteristics or have been made under circumstances which substantially eliminate the possibility of error. Reliability must be established.

Barnes v. Commonwealth, Ky., 794 S.W.2d 165, 168 (1990).

Harrod argues that the deposition testimony concerning the purpose of the trip would be inadmissible at trial because it constituted hearsay to which no exception would apply. The Estate counters with the argument that the statements fit within several exceptions, including KRE 801A(c)(1), which provides that, "[a] statement by the deceased is not excluded by the hearsay rule when offered as evidence against the plaintiff in an action for wrongful death of the deceased." KRE 803(3) also provides an exception for "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." We agree with the Estate that the statements attributed to both Jeremy and Dr. Collatz as to the work-related purpose of the flight are admissible as exceptions to the rule against hearsay. The statements attributed to the declarants retain sufficient reliability to alleviate any possibility of error. There is no evidence that any of the employees of Christian Cardiology had any reason to fabricate their

testimony, and Doug Jarvis, who had never met Dr. Collatz prior to renting a truck to him, testified that Dr. Collatz told him he was using the truck to get office furniture.

Reviewing the deposition testimony in its entirety, we must hold that the circuit court was correct in finding that there was nothing to convince him that the trip was not made for a business purpose. We agree with the Estate's assertion that the only testimony supporting Harrod's theory that the flight was not business related was her own testimony. However, she had no knowledge at all that Jeremy was even planning a helicopter flight that evening, for business or for pleasure. Her testimony concerning Jeremy's usual work hours and other aspects of his work for Christian Cardiology constitute mere conjecture, and is not sufficient to overcome the overwhelming deposition testimony establishing that the flight was related to business.

Harrod next asserts that her receipt of workers' compensation benefits does not preclude the present action. Harrod relies upon the opinion of Russell v. Able, Ky.App., 931 S.W.2d 460 (1996), to support this argument. However, the Russell case deals with the exception to the exclusive remedy rule of KRS 342.690(1) in that Russell claimed that she was injured in the course and scope of her employment by the willful and unprovoked aggression of a co-employee. The court

ultimately reversed the entry of a summary judgment, concluding that:

> [A] material issue of fact exists as to whether Able's conduct constituted a willful and unprovoked act of aggression thereby falling outside of the immunity provided under KRS 342.690. If such is the case, Russell may be permitted to proceed with her common-law action against Able in accordance with KRS 342.700(1).

Id. at 463. In the present case, we agree with the Estate's argument that the exception for unprovoked physical aggression contained within KRS 342.690(1) is inapplicable. Nowhere has Harrod claimed, nor can she establish, that the actions of Dr. Collatz were intentional in causing the tragic deaths of all three occupants of the helicopter, including his own.

Finally, Harrod urges this Court to hold that the circuit court's entry of a summary judgment was premature in light of a case currently pending before the Supreme Court of Kentucky on discretionary review. However, that case[1] deals with the application of KRS 342.610(4), which provides an exception from the exclusivity provision of the Workers' Compensation Act when an employee is injured or killed due to the deliberate intention of the employer to produce the injury or death. Although Harrod attempts to apply this reasoning to her case, we have already determined that Harrod never claimed that the

[1] Moore v. Environmental Construction Co., 2001-SC-000227-DG.

exclusion for the unprovoked physical aggression of an employee was applicable in her case. Therefore, there is no need to await the Supreme Court's decision prior to rendering an opinion in this case.

As a final argument, the Estate asserts that it was not properly named as the defendant in the suit in that Harrod should have named Dr. Collatz's personal representative rather than the Estate itself. We note that the circuit court initially raised this issue at the March 6, 2003, hearing regarding the Estate's motion for summary judgment, but that the circuit court indicated that it would not be reviewing the issue. It is clear from the record that the circuit court based its decision on its finding that Harrod failed to counter the Estate's evidence that the flight was for a business purpose. Because the circuit court did not do so, we shall not address this issue any further.

For the foregoing reasons, the Clay Circuit Court's summary judgment dismissing the action with prejudice is affirmed.

ALL CONCUR.

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