RENDERED: JUNE 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-001884-MR

KENTUCKY FARM BUREAU MUTUAL
INSURANCE COMPANY — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CI-90058

KATHY DAVIS, PATRICIA DURFEE,
AND KENTUCKY EMPLOYERS MUTUAL
INSURANCE AUTHORITY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Kentucky Farm Bureau Mutual Insurance Company (KFB) appeals from a judgment of the Rowan Circuit Court, entered May 12, 2004, declaring that Kathy Davis, a KFB insured, is not immune under the exclusive remedy provisions of the Workers' Compensation Act from a damages suit brought against her by a former co-employee, Patricia Durfee. Durfee alleges that she was injured in an automobile accident negligently

caused by Davis. The trial court ruled that Davis was not acting within the course of her employment at the time of the accident and thus that the Workers Compensation Act did not bar Durfee's suit. KFB contends that the trial court applied the wrong test to determine whether Davis was acting as an employee and that the correct test yields a contrary result. We agree and so must reverse and remand.

At the time of the accident, in April 2002, Durfee and Davis were both employed by the Eastern Kentucky Tobacco Warehouse in Morehead. They managed the warehouse office, serviced agricultural loans to the warehouse's clients, and entered bookkeeping and other records into the company's computer. Although their duties overlapped to some extent, Durfee was Davis's superior and was primarily responsible for working with the loan customers. That work involved frequent trips from the office to deliver checks to the customers and to exchange documents.

For reasons not revealed in the record, on April 24, 2002, Durfee was without a driver's license, and so asked Davis to drive her on one of her check-delivering missions. Although generally both women enjoyed considerable autonomy in managing their work days, Davis testified that she doubted her employer would approve of her leaving the office for that purpose. She wished to help Durfee, however, so, to be on the safe side, she

clocked out as she left. After a brief trip to Davis's home, the women drove to Winchester to meet the client. The accident, in which Durfee suffered substantial injuries, occurred while they were en route.

Durfee was awarded Workers' Compensation benefits for medical expenses and partial disability. While that claim was pending, she filed the present civil action against Davis. KFB, Davis's liability insurer, intervened and sought a judgment declaring Davis immune from Durfee's suit under KRS 342.690(1), which grants immunity from an injured worker's common law damages claim to the injured worker's employer and her fellow employees. The fellow-employee immunity, however, is limited to instances in which the injured worker and the fellow employee whose negligence caused the injury were both acting in the course of their employment.[1] The question then arises: which test of the fellow employee's course of employment applies? Is it the workers' compensation test, or the vicarious liability test? At Durfee's urging, the trial court applied the latter test and ruled that because Davis had taken herself off the clock, and in any event had exceeded the scope of her authority, she could not be deemed to have been acting within the course of her employment.

[1] Kearns v. Brown, 627 S.W.2d 589 (Ky.App. 1982).

As KFB points out, however, in Jackson v. Hutchinson,[2] the former Court of Appeals adopted the regular workers' compensation course of employment standard for determining fellow-employee immunity. The court stated:

> A test of fellow-employee immunity is whether each of the employees involved would have been entitled to workmen's compensation benefits for any disabling injury suffered in the accident.[3]

We agree with KFB that Davis would have been entitled to benefits for injuries suffered in the accident, and thus is immune from her fellow employee's negligence suit.

First, in light of the compensation act's liberal goal of protecting injured workers, "course of employment" for compensation purposes has long been construed to have a wider scope than "the work [the employee] was employed to perform." There are many cases

> in which employees had gone beyond the scope of the particular duties they were employed to perform, both under orders and voluntarily, when injured, and it was held that as they were serving their masters their injuries arose out of their employment and in the course thereof.[4]

---

[2] 453 S.W.2d 269 (Ky. 1970).

[3] 453 S.W.2d at 270. *Larson's* calls this the more satisfactory test, because "[a]fter all, there are troubles and complications enough administering one course of employment test under the act, without adding a second." *Larson's Workers' Compensation Law,* § 111.03(3) (2004).

[4] Nugent Sand Company v. Hargesheimer, 254 Ky. 358, 71 S.W.2d 647, 649 (1934).

Thus, the fact that Davis may have departed somewhat from her job description when she drove Durfee to Winchester would not have barred her claim.

Second, as a general rule, "an injury sustained in performing an act for the benefit of a coemployee is compensable where the effect of such act is to advance the employer's work."[5] This rule has been held to apply even outside normal working hours where the injured employee was not serving any interest of her own but was in good faith solely serving the employer's interest, or where the co-employee requesting the aid was a superior.[6] Here, Durfee was Davis's superior, and at the time of the accident, which was during the course of Davis's normal work day, Davis was not pursuing any purpose of her own but intended, in good faith, to further her employer's interest. In these circumstances, the fact that Davis had taken herself off the clock did not place her outside the course of her employment or remove her from the protection of the compensation act.

Because Davis would have been entitled to compensation benefits for any disabling injury suffered in the accident, she is also entitled to the immunity from Durfee's negligence suit that KRS 342.690 provides. The trial court erred by ruling

[5] Department of Parks v. Howard, 445 S.W.2d 438, 439 (Ky. 1969).

[6] Commonwealth of Kentucky, Office of the Jefferson County Clerk v. Gordon, 892 S.W.2d 565 (Ky. 1994); Servantez v. Shelton, 81 P.3d 1263 (Kan.App. 2004).

otherwise. Accordingly, we reverse the May 12, 2004, judgment of the Rowan Circuit Court, and remand for entry of a new judgment in favor of KFB.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John J. Ellis
Dehner & Ellis, PSC
Morehead, Kentucky

BRIEF FOR APPELLEE:

Paul E. Craft
McBrayer, McGinnis, Leslie & Kirkland
Greenup, Kentucky