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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000866-MR

SCHNEIDER ELECTRIC USA, INC.,
F/K/A SQUARE D COMPANY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN E. REYNOLDS, JUDGE
ACTION NO. 16-CI-01842

PAUL WILLIAMS; COLBY WILLIAMS BY
AND THROUGH HIS PARENT, GUARDIAN,
AND NEXT FRIEND, PAUL WILLIAMS;
UNION CARBIDE CORPORATION; AND PAUL
WILLIAMS, EXECUTOR OF THE ESTATE OF
VICKIE WILLIAMS — APPELLEES

OPINION
AFFIRMING

BEFORE: GOODWINE, NICKELL, AND SPALDING, JUDGES.

GOODWINE, JUDGE: Vickie Williams' ("Williams") father worked for Schneider Electric USA, Inc. (f/k/a Square D Company) ("Square D") for many years, during which time she purportedly encountered asbestos brought home on her father's clothing. Williams also worked for Square D for a few months as a

teenager. Williams sued Square D, alleging asbestos exposure at its facility led to her mesothelioma. Square D contends Williams' summer job at Square D as a teenager triggers the exclusive remedy provisions of the Kentucky Workers' Compensation statutes whereby her only potential recourse is via a workers' compensation claim. As did the trial court, we disagree.

BACKGROUND

In her May 2016 unverified complaint, Williams asserted that she was directly exposed to asbestos when working at Square D's facility in 1978 and was indirectly exposed to asbestos fibers from her father's clothing.[1] Square D's answer invoked the exclusive remedy provisions. Specifically, KRS[2] 342.690(1) provides in relevant part that "[i]f 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 . . . ."

Williams died in February 2017, and her husband/executor was substituted as named plaintiff. Square D moved for summary judgment initially and after the close of discovery. The trial court denied the motion, concluding

[1] Williams also sued sundry manufacturers and sellers of products containing asbestos, including Appellee Union Carbide Corporation.

[2] Kentucky Revised Statutes.

KRS 342.690 applied only to workplace injuries and there was no evidence that Williams' mesothelioma was caused by her having worked for Square D.[3] This appeal followed.

ANALYSIS

A. Procedural Propriety of Appeal

Before we may address the merits, we must quickly resolve Williams' argument that the appeal should be dismissed as interlocutory.[4] Although orders denying summary judgment are routinely interlocutory, Williams' argument runs contrary to our holding in *Ervin Cable Construction, LLC v. Lay*, 461 S.W.3d 422, 423 (Ky. App. 2015), that "the denial of a substantial claim of immunity is an exception to the finality rule that interlocutory orders are not immediately appealable." Accordingly, we decline to dismiss the appeal.

B. Standards of Review and Judicial Admissions

Turning to the merits, summary judgment is appropriate "when, as a matter of law, it appears that it would be impossible for the respondent to produce

[3] Briefly, we reject Square D's argument that the trial court's decision must be reversed because it adopted a proposed order tendered by Williams. The court asked both Williams and Square D for proposed orders and later adopted Williams' tendered draft. Such a procedure is not impermissible. *See, e.g., Prater v. Cabinet for Human Resources, Commonwealth of Kentucky*, 954 S.W.2d 954, 956 (Ky. 1997).

[4] A motion panel of this Court has already summarily rejected this argument, but a merits panel generally may revisit a motion panel's decision. *Commonwealth Bank & Trust Co. v. Young*, 361 S.W.3d 344, 350 (Ky. App. 2012).

evidence at the trial warranting a judgment in his favor." *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 189 (Ky. App. 2006). As summary judgments do not involve questions of fact, our review is *de novo*. *Id.*

Square D alleges Williams made judicial admissions that her claim is based (at least in part) on direct exposure to asbestos during her brief employment with Square D, and so this action is barred by the exclusive remedy provision. Square D's argument relies mainly on the complaint, Williams' deposition testimony and her expert disclosure list. None of those three items, separately or together, constitute judicial admissions.

A judicial admission is a "conclusive[,] . . . formal act done in the course of judicial proceedings which waives or dispenses with the necessity of producing evidence by the opponent and bars the party himself from disputing it . . . ." *Sutherland v. Davis*, 286 Ky. 743, 151 S.W.2d 1021, 1024 (1941). The determination of whether a party has made a judicial admission is a question of law we review *de novo*, bearing in mind that judicial admissions should be narrowly construed. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 448 (Ky. App. 2006).

First, Williams' complaint does raise direct and indirect exposure allegations.[5] However, unverified complaints "are not generally regarded as competent evidence of an admission or confession against the party on whose behalf such pleadings are drafted." *Ford Motor Co. v. Zipper*, 502 S.W.2d 74, 78 (Ky. 1973). Square D asserts *Zipper* has been superseded by the adoption of the Kentucky Rules of Evidence but cites to no authority to buttress that assertion (or to the specific applicable evidentiary rule(s)). In any event, we are strictly bound to follow the holdings of the Kentucky Supreme Court and its predecessor court. Kentucky Rules of the Supreme Court (SCR) 1.030(8)(a). Consequently, the complaint is not a judicial admission, though better practice would have been for Williams to seek to amend it to eliminate the direct exposure allegations.[6]

Second, we agree with Square D that statements made by a party under oath in a pretrial deposition may sometimes be deemed judicial admissions. *Moore v. Roberts By and Through Roberts*, 684 S.W.2d 276, 277 (Ky. 1982). However, we disagree that Williams made such admissions in the cited portions of her testimony. Williams generally testified at her deposition that her working

[5] Accordingly, the complaint facially presents at least some claims which would fall within the trial court's jurisdiction because they would not involve the workers' compensation system. Thus, we reject Square D's argument that the face of the complaint shows the trial court wholly lacked jurisdiction.

[6] The complaint's allegations of direct and/or indirect exposure is an alternative pleading, not a binding judicial admission. *See, e.g., Huddleston By and Through Lynch v. Hughes*, 843 S.W.2d 901, 904-05 (Ky. App. 1992).

conditions at Square D were dusty. Crucially, however, Square D's briefs do not cite to Williams stating the workplace dust contained asbestos. Obviously, asbestos is not found in all dust and we will not sift through the record to search for evidence. *See*, *e.g.*, *Parker v. Commonwealth*, 291 S.W.3d 647, 676 (Ky. 2009). We decline to turn Williams' dust molehill into an asbestos mountain.

Finally, Square D quotes lengthy excerpts from Williams' expert witness disclosure but does not cite to any authority holding that an expert witness disclosure may be deemed a judicial admission. An expert witness disclosure is not a pleading under CR[7] 7.01. In addition, CR 26.02(4)(a)(i) requires an expert witnesses disclosure to "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Obviously, since an expert disclosure is sent prior to the expert's deposition, the listing party cannot know with absolute certainty what an expert's exact testimony will be. Or, in other words, expert witness disclosures are necessarily based in good faith upon an expert's *anticipated* testimony, which may sometimes differ from the expert's *actual* testimony.[8]

[7] Kentucky Rule of Civil Procedure.

[8] This situation differs from that in *Meade v. Dvorak*, 571 S.W.3d 585, 588 (Ky. App. 2018) in which we held that "CR 26.02 requires disclosure of facts already known and opinions already formed and not anticipated facts or opinions." The plaintiff in *Meade* disclosed a doctor as an expert before the doctor had examined the relevant medical records. Thus, there was no non-

Judicial admissions are proper "only where the statements are unequivocal and must be considered to be deliberately true or false." *George M. Eady Co. v. Stevenson*, 550 S.W.2d 473, 473-74 (Ky. 1977) (emphasis added). There is no indication of deliberate certitude or bad faith here and an expert witness disclosure made in good faith is not generally a proper basis for a judicial admission, as evidenced by the fact that Square D cites to no case to support its position. Moreover, it is not inherently improper for a party's theories of liability, or defenses thereto, to evolve during discovery.[9]

C. Exclusive Remedy

Square D's overarching argument is that since Williams was its employee for a few months her sole remedy lies with the workers' compensation system. In other words, the fact that Williams worked for Square D would mean any non-work-related injuries she may have suffered due to her father's

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speculative basis for the plaintiff to list the doctor's expected testimony. Here, there is no indication that Williams listed experts without first providing them the relevant materials upon which to form opinions. We interpret *Meade* as standing for the unremarkable proposition that a party may not properly list an expert in a disclosure if the expert has not had a chance to form an informed opinion. We did not hold in *Meade* to hold that a party's good faith expert witness disclosure constitutes a judicial admission. Any discrepancies or changes over time in Williams' experts' opinions may be fodder for cross-examination.

[9] Square D also refers to unnamed discovery responses from Williams which it argues are judicial admissions but has not specified what the responses' contents are or where they may be located in the record. We will not scour the massive record to find unnamed responses allegedly containing unspecified content which may support Square D's position.

employment at Square D are not compensable. Because the workers' compensation system is designed to address work-related injuries, we disagree.

An "injury" is defined in the workers' compensation arena as a "work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism . . . ." KRS 342.0011(1).[10] In other words, "[w]orkers' compensation was designed to be an exclusive avenue of recovery for *injured workers*, an avenue that does not require the worker to prove the employer's negligence but rather just the *work-related nature of the injury*." *American General Life Insurance Company v. DRB Capital, LLC*, 562 S.W.3d 916, 927 (Ky. 2018) (emphasis added). The exclusive remedy provision thus would apply to any injuries Williams sustained while employed at Square D but would not apply to her non-work-related injuries allegedly stemming from her father's exposure to asbestos during his employment with Square D.

"The right of every individual in society to access a system of justice to redress wrongs is basic and fundamental to our common law heritage, protected by Sections 14, 54 and 241 of our Kentucky Constitution." *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). We decline to foreclose Williams

[10] Though KRS 342.0011 has been amended during the pendency of this litigation, the relevant portions of the definition of "injury" have remained constant.

from seeking redress for alleged non-work-related injuries merely because she might, in theory, also have incurred some degree of work-related injuries during summer employment as a teenager.

D. Indivisible Injury

Square D also argues Williams' injuries are indivisible and unapportionable. That argument has two main flaws. First, Square D has not pointed us to evidence showing that Williams was exposed to asbestos during her passing tenure as a Square D employee. To the contrary, an expert retained by Union Carbide—Dr. James Crapo—testified in a deposition that he did not find a "likely source of significant exposure" during that employment. R. at 6567.[11] Indeed, Square D disputes, or at least does not concede, any such workplace exposure by Williams. Nonetheless, to account for the possibility that the evidence at trial would permit a finding that Williams' injuries were caused in part by her employment at Square D, the trial court appropriately stated it would permit jury apportionment between the work-related and non-work-related injuries.[12]

[11] Other experts similarly testified that they did not have information that Williams was exposed to asbestos as a Square D employee. For example, industrial hygienist Robert Adams, who was retained by Union Carbide, testified that he did not have "any reason to believe that [Williams] was occupationally exposed," though he could not say definitively that she was not. R. at 6564. Dr. David Egilman, an internal medicine physician and epidemiologist, testified that he did not have "any evidence" that Williams was exposed to asbestos as a Square D employee. R. at 7662.

[12] We take no position on the matter since the issue is not before us, but the parties seem to agree that Williams is barred from seeking workers' compensation benefits via application of the twenty-year statute of repose set forth in KRS 342.316(4)(a). We also note that the jury may

And second, our Supreme Court has provided a pathway for how to apportion damages in these types of cases. Specifically, the Court held as follows:

> To summarize, if distinct causes produce distinct harms, or if distinct causes produce a single harm and the evidence presented at trial provides a reasonable basis for determining the contribution of each cause to the single harm, a trial court should instruct the jury to apportion the damages to the distinct causes without resorting to comparative fault. If, however, as is the case here, the evidence does not permit apportionment of the damage between separate causes, then comparative fault principles apply, and the trial court should instruct the jury to apportion damages according to the proportionate fault of the parties.

Owens Corning Fiberglas Corp., 58 S.W.3d at 479.

Square D contends this case falls outside those principles because Williams' injuries cannot be apportioned between Square D's two roles (Williams' employer and her father's employer). Square D's position would essentially immunize it from any fault it had as Williams' father's employer simply because Williams herself briefly worked at Square D. Such immunization would result in a potential windfall for Square D, which comparative liability is explicitly designed

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apportion fault to Square D in its role as Williams' employer only if it "first finds that the party was at fault; otherwise, the party has no fault to allocate." *Owens Corning Fiberglas Corp. v. Parrish*, 58 S.W.3d 467, 471, n.5 (Ky. 2001). In other words, there must be evidence from which a jury could reasonably conclude Williams' injuries stemmed at least in part from her employment at Square D before any apportionment is proper. We express no opinion at this stage of the case as to whether apportionment is proper.

to avoid. *See Hilen v. Hays*, 673 S.W.2d 713, 718 (Ky. 1984) (holding that comparative negligence "eliminates a windfall for either claimant or defendant . . . ."). Indeed, Square D cites to no cases supporting its theory that an employer is immune from liability for non-work injuries simply because a plaintiff also was once that same entity's employee. We instead conclude, upon presentation of proper evidence,[13] the apportionment procedures in *Owens Corning Fiberglas Corp*. should be followed, the only difference being Square D would be listed in the instructions in its role as Williams' employer and as her father's employer.

"Above all else, court-made law must be just." *Hilen*, 673 S.W.2d at 718. Allowing Square D to evade all liability for its actions/inactions regarding Williams' mesothelioma simply because Williams herself worked for Square D one summer forty years ago would be a perfect example of a small tail unjustly wagging a large dog. Fundamental fairness dictates that Williams' estate should have an opportunity to recover for her non-work-related injuries.

CONCLUSION

For the foregoing reasons, we affirm the Fayette Circuit Court's order denying summary judgment to Square D.

ALL CONCUR.

[13] To wit: evidence of proof of exposure to asbestos, causation based on that exposure and breach of duty. *CertainTeed Corp. v. Dexter*, 330 S.W.3d 64, 78-79 (Ky. 2010).

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE PAUL WILLIAMS INDIVIDUALLY AND AS EXECUTOR OF ESTATE OF VICKIE WILLIAMS AND AS GUARDIAN AND NEXT FRIEND OF COLBY WILLIAMS:

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