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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 22, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 3-15-07 ELA GTOWN P.C.

NO. 2006-SC-000621-MR

MARTIN COUNTY COAL CORPORATION;
MASSEY COAL SERVICES, INC.;
DAVID CANTERBURY; AND ED CHAFIN — APPELLANTS

V.

APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE DANIEL R. SPARKS, JUDGE
CIVIL ACTION NO. 02-CI-00005

HONORABLE DANIEL R. SPARKS,
JUDGE, MARTIN CIRCUIT COURT;
PHILLIP C. CRUM, BY HIS GUARDIAN,
JOHN F. CRUM (REAL PARTY IN INTEREST);
CRUM MOTOR SALES, INC.
(REAL PARTY IN INTEREST);
SAFETY NATIONAL CASUALTY CORPORATION
(REAL PARTY IN INTEREST); AND
PHILLIP CRUM, A MINOR, BY HIS GUARDIAN
AND NEXT FRIEND, REGINA TRIPLETT AND
AMELIA CRUM (REAL PARTY IN INTEREST) — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants, Martin County Coal Corporation; Massey Coal Services, Inc.; David Canterbury; and Ed Chafin, appeal from the denial of their petition for a writ to prohibit the Martin Circuit Court from proceeding further in an action that they argue is

barred by the exclusive remedy provisions of Kentucky's Workers' Compensation Act. We affirm because we conclude that the Court of Appeals properly denied the writ.

The appellants should know from the outset that our review of this case is hampered because the record they have brought us does not contain key portions of the circuit court record. For example, neither Crum's complaint nor the appellants' answer(s) appears in the record provided to us. Generally, an appellant bears the burden to ensure that an appellate court is presented with the portion of the record necessary to ensure meaningful appellate review.[1] So we must presume that the omitted portions of the record support the decision of the lower court.[2]

According to the parties' briefs, Phillip Crum was employed by Crum Motor Sales, Inc., which had a service contract with Martin County Coal for its light duty vehicles. Crum came to one of Martin County Coal's mining sites on a service call. He entered Martin County Coal's property where David Canterbury picked him up to transport him to the vehicle needing service. While Crum and Canterbury were en route to that vehicle, a large boulder fell from a wall and injured Crum. Following an investigation of the accident by state and federal authorities, Martin County Coal received citations for violating safety regulations.

Crum drew workers' compensation benefits from his employer's carrier. And he filed suit against Martin County Coal; Canterbury; Ed Chafin (Martin County Coal's safety director); and Massey Coal Services, Inc. (collectively "appellants"). Appellants filed a motion for summary judgment, contending that Crum's action was

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[1] *See, e.g.,* Fanelli v. Commonwealth, 423 S.W.2d 255 (Ky. 1968).

[2] *See, e.g.,* Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985).

barred by Kentucky Revised Statutes (KRS) 342.690(1), the so-called exclusive remedy provision of the Kentucky Workers' Compensation Act. Judge Daniel Sparks of the Martin Circuit Court denied the motion for summary judgment. Appellants then filed an original action in the Kentucky Court of Appeals seeking a writ of prohibition barring the circuit court from conducting further proceedings in Crum's civil action. According to appellants, the circuit court lacked jurisdiction over Crum's action because of the exclusive remedy provision found in KRS 342.690(1). The Court of Appeals denied the writ, after which appellants filed this appeal.

Before we may examine appellants' petition for a writ on its merits, we must first establish the scope of our review on appeal. There are two categories of writ cases: (1) where the lower court is allegedly acting outside of its jurisdiction; or (2) where the lower court is preparing to act erroneously, though within its jurisdiction, and there is no adequate remedy via appeal.[3] Generally, the decision of whether to issue a writ lies within the discretion of the court.[4] But the nature of our appellate review depends upon which category the petition for a writ falls under.[5] As we construe it, appellants' petition for a writ falls within the first category because they do not contest any relevant facts; they argue only that the Martin Circuit Court had no jurisdiction over Crum's action because of the exclusive remedy provision. And since jurisdiction is a

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[3] Haight v. Williamson, 833 S.W.2d 821, 823 (Ky. 1992); Grange Mutual Ins. Co. v. Trude, 151 S.W.3d 803, 808 (Ky. 2004).

[4] Haight, 833 S.W.2d at 823.

[5] Trude, 151 S.W.3d at 810.

question of law, we use a de novo standard to review the decision of the Court of Appeals.[6]

The crux of this appeal is whether KRS 342.690(1) bars Crum's action against appellants. That subsection, often referred to as the "exclusive remedy" provision, provides, in relevant 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. . . . For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. . . . 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. . . .

According to appellants, Martin County Coal is a contractor, meaning that Crum's suit was improper because appellants' sole liability toward Crum would be the payment of workers' compensation benefits. So our main task is to determine whether Martin County Coal is a contractor as that term is statutorily defined.

Under KRS 342.610(2)(b), in order to be a contractor, a person must contract with another to "have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person[.]"[7]

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[6] *Id.* ("De novo review will occur most often under the first class of writ cases, i.e., where the lower court is alleged to be acting outside its jurisdiction, because jurisdiction is generally only a question of law.").

[7] Additionally, an entity must show that it has worker's compensation coverage in order to be entitled to the benefit of the exclusive remedy provision. Gordon v. NKC Hospitals, Inc., 887 S.W.2d 360, 362 (Ky. 1994). When Martin County Coal filed its motion for summary judgment before the trial court, the trial court found that Martin County Coal had "provided no evidence it had secured [w]orkers' [c]ompensation for Phillip Crum." But after filing its petition for a writ, Martin County Coal provided an affidavit from its chief engineer, Randall

Appellants contend that Martin County Coal is a contractor because the repair and servicing of its light duty vehicles is a regular and recurring part of its business. In support of that contention, appellants rely upon an affidavit of Randall Johnson, who avers that "[t]he repair, maintenance and servicing of light duty vehicles is a regular and reoccurring part of Martin County Coal Corporation's business and occupation of mining, processing and selling of coal and is an activity which can be undertaken directly by Martin County Coal Corporation's employees or through the hiring of independent contractors such as Crum Motor Sales, Inc."

As the Court of Appeals noted, however, even though this action had been pending in circuit court for over two years at the time the motions for summary judgment were filed, the only evidence presented to us on the issue of whether servicing and maintaining vehicles is a "regular and recurrent" part of Martin County Coal's coal-mining business is Johnson's self-serving affidavit. And as the Court of Appeals aptly observed, Johnson's statement does nothing more than parrot an unsupported legal conclusion. We place no reliance upon Johnson's statement because courts refuse to recognize and rely upon pure legal conclusions contained in an affidavit.[8] Unfortunately for appellants, they have presented no other proper evidence to show that servicing and maintaining vehicles is a regular and recurring part of Martin County Coal's coal mining business. So we find that appellants have failed to present sufficient evidence to show that they meet the statutory definition of a contractor.

Johnson, averring that Martin County Coal provided workers' compensation insurance to its employees and that Crum would have fallen within that coverage.

[8] *See, generally,* 2A C.J.S. *Affidavits* § 39 (2006) ("It is improper for affidavits to embody legal arguments, and legal arguments and summations in affidavits will be disregarded by the courts.").

We also agree with the conclusion of the Court of Appeals that the circuit court had the ability and the right to determine whether Crum's action fell within its jurisdiction. And we reject appellants' argument that the circuit court erred when it undertook the necessary determination of whether Crum's civil action was barred by KRS 342.690. Having determined that the circuit court had the authority to determine whether it had jurisdiction to decide an active case on its docket, we now turn our attention to determining whether the Court of Appeals correctly determined that this case was not appropriate for the issuance of a writ based upon an allegation of lack of jurisdiction.

In order to determine subject matter jurisdiction, "the pleadings should be taken at face value and so long as the 'kind of case' identified in the pleadings is within the court's jurisdiction, one claiming a legal bar must plead it affirmatively."[9] We cannot definitively conclude whether Crum's action was the type of case normally within the circuit court's jurisdiction because his complaint has not been made a part of the record before us. Likewise, we cannot definitively state whether appellants answer(s) raised the affirmative defense of the exclusive remedy provision, as is required.[10] In fact, Crum contends on page 4 of his brief that appellants did not plead the exclusive remedy provision as an affirmative defense. Regrettably, the record before us is insufficient for us to make a conclusive determination of whether appellants timely and properly raised the exclusive remedy provision before the trial court. However, no party takes issue

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9 Gordon, 887 S.W.2d at 362.

10 *Id.* at 363 ("From the language of the statutes, the nature of the rights created, the manner in which such rights must be asserted, and the broad constitutional grant of authority to circuit courts, we have no doubt that the matters claimed to protect appellee [*i.e.*, the exclusive remedy provision] are affirmative defenses which were required to have been pleaded and proven, the failure of which amounts to a waiver.").

with the Court of Appeals' statement that it had "glean[ed] from the trial court's decision that Crum has made claims of breach of duty; negligence *per se*; and strict liability." Those types of claims are certainly the kinds of claims that fall squarely within the circuit court's general subject matter jurisdiction.

We also reject any argument that our decision in Shamrock Coal Co. v. Maricle[11] requires the issuance of a writ. Instead, we believe this case falls more closely under our holding in Gordon v. NKC Hospitals, Inc.[12]

In Gordon, an employee of a painting company was injured in a fire while painting the property of a hospital. The injured painter obtained workers' compensation benefits from his employer and brought a negligence action against the hospital. The hospital did not raise the exclusive remedy provision as a possible defense until after judgment had already been rendered against it. The central question before us on appeal was whether the failure to raise the exclusive remedy provision in a more timely fashion deprived the hospital from later relying upon it as a defense. We held that the hospital's failure to raise the exclusive remedy provision timely was tantamount to a waiver of that potential defense, reasoning that the trial court would have had no reason to know of any possible application of the exclusive remedy provision because neither the injured worker's complaint nor the hospital's answer "could be construed as providing even a clue that the Workers' Compensation Act had anything to do with the

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[11] 5 S.W.3d 130 (Ky. 1999).

[12] 887 S.W.2d 360.

case" because the complaint was the "kind of case" over which the circuit court had jurisdiction.[13]

Shamrock Coal Co., on the other hand, involved a civil suit by former employees against their former employer in which the former employees contended that they contracted occupational diseases due to their former employer's negligence and intentional violation of safety protocols.[14] The employer relied upon the exclusive remedy provision as a defense; and we held that the exclusive remedy provision applied because, unlike Gordon, "the plaintiffs brought suit under the Workers' Compensation Act. Therefore, Shamrock, on the face of the complaint, was entitled to the protection of the exclusive liability provision. Consequently, the Leslie Circuit Court has no subject matter jurisdiction over this case and the writ is appropriate."[15] Even though we came to a different ultimate outcome, we did not overrule Gordon's central tenet: that when jurisdiction is questioned, a court must focus upon whether the complaint and answer, taken at face value, present the type of case over which the court normally would have jurisdiction.[16]

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[13] Gordon, 887 S.W.2d at 361-62.

[14] 5 S.W.3d at 132.

[15] *Id.* at 133.

[16] *Id.* ("Gordon is distinguishable from the instant case because the claim in Gordon was not pled as a workers' compensation claim. Rather, it was pled as a premises liability claim, which was not patently within the purview of the Workers' Compensation Act. Thus, absent the issue being raised by the defendant, the trial court had no way of knowing that the defendant was exempt from liability as an up-the-ladder employer of Gordon. . . . Because the cause of action was not against Gordon's employer but against the hospital where the injury occurred, the hospital, on the face of the complaint, was not entitled to the protection of the exclusive liability provision of KRS 342.690(1). Thus, the trial court in Gordon had subject matter jurisdiction over 'this kind of' non-workers' compensation case.").

In the case at hand, Crum did not sue his employer directly, as in Shamrock Coal Co. Rather, his suit was against the entity upon whose premises he was working when he was injured, as in Gordon. So this case is far closer factually to Gordon than to Shamrock Coal Co. And each case counsels us to focus on whether Crum's complaint [and appellants' answer(s)] presents a patent worker's compensation issue.

Although the lack of the complaint and answer(s) in the record before us prevents us from definitively answering the patent workers' compensation question, no party disagrees with the Court of Appeals' statement that Crum's complaint was based on negligence, breach of duty, and strict liability. Each of those causes of action, on their face, is the type of case over which the Martin Circuit Court would have jurisdiction. Thus, we agree with the Court of Appeals' ultimate conclusion that appellants have not shown that the circuit court was acting outside its jurisdiction. We conclude that the issuance of a writ would be improper.

For the foregoing reasons, the decision of the Court of Appeals to deny the writ of prohibition is affirmed.

All concur. Scott, J., not sitting.

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