No. 34804 - *Kyle D. Ramey and Trina Ramey v. Contractor Enterprises, Inc.*

FILED
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Workman, Justice, dissenting:

Few legal principles in West Virginia jurisprudence are as well-settled as the axiom that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Equally well-established is the requirement that this Court "draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994). Nevertheless, the majority in this action has ignored these fundamental principles in affirming the circuit court's grant of summary judgment in favor of the defendant. After drawing all permissible inferences in the light most favorable to the plaintiffs, sufficient evidence exists to raise a genuine issue of material fact with regard to each element of the plaintiffs' deliberate intent claim. Therefore, I respectfully dissent.

The majority concludes that the assertions contained in the Kennedy affidavit are insufficient to establish a genuine issue of material fact as to whether Contractor Enterprises had "actual knowledge" of the specific unsafe working condition that led to the injuries in this case. In so finding, however, the majority fails to draw any inferences in

favor of the plaintiffs. For example, in addressing the fact that the supervisor to whom Kennedy complained is not named in the affidavit, the majority states that, "even if an unnamed supervisor of Contractor Enterprise became aware of work being done dangerously close to the edge of the highwall, Mr. Kennedy's statement would only establish that some unidentified person was informed [of Mr. Kennedy's concerns]." Thus, the majority implies that the lack of identification of the supervisor undermines the significance of Mr. Kennedy's complaint. A permissible inference that could be drawn from this statement, however, is that Mr. Kennedy specifically informed a company supervisor that equipment was being operated dangerously close to the edge of the highwall, thus indicating that the defendant had actual knowledge of the unsafe working condition.

Similarly, the majority fails to draw inferences in favor of the plaintiffs from Mr. Kennedy's sworn statement that, while employed by the defendant, he had personally witnessed highwall drilling machines placed so close to the edge of the highwall that the curtains of the machines could be seen from below. While, as the majority points out, Mr. Kennedy's affidavit does not indicate that he described this specific situation to his supervisor, the statement indicates that workers were routinely using highwall drilling machines unsafely by placing them much too close to the edge of the highwall. A court could reasonably infer that such repeated unsafe use would have been witnessed by

supervisors, thereby putting the company on notice that such unsafe working conditions existed.

Moreover, the majority actually draws inferences in favor of the defendant, not the plaintiff, with respect to Mr. Kennedy's affidavit. Because Mr. Kennedy's affidavit describes his complaint to his supervisor as stating that "the company was working people too close to the highwall edges without any regard to safety," the majority infers that Kennedy failed to specifically inform the supervisor of the specific danger of *highwall drilling machines* being placed too close to the edge of the highwall. Thus, the majority concludes that no evidence exists that the Company had actual knowledge of such unsafe condition. This is certainly one inference that can be drawn from these facts, but it is not the inference most favorable to the plaintiffs, which this Court is required to draw by well-settled law.

As the majority points out in footnote thirteen, "actual knowledge" is the equivalent of the employer's "subjective realization" and "appreciation" of the existence of the specific unsafe working condition. This Court has previously held that an employer cannot be found to have "subjective realization" and "appreciation" of an unsafe condition by evidence merely indicating that the employer "reasonably should have known" of the condition; rather the employer must have "actually possessed such knowledge." *Blevins v.*

Beckley Magnetite, Inc., 185 W. Va. 633, 641, 408 S.E.2d 385, 393 (1991). In the instant case, however, the plaintiffs presented evidence, in the form of Mr. Kennedy's affidavit, that the defendant was specifically informed only a few weeks before the accident that men were working dangerously close to the edge of the highwall. At the very least, this evidence is sufficient to raise a genuine issue of material fact as to whether the defendant "actually possessed" knowledge of the unsafe working condition. Moreover, if the defendant was, in fact, aware of the unsafe working condition but still directed Mr. Ramey to operate his drilling machine along the highwall without any additional safety instructions or training, then a genuine issue of material fact would also exist with regard to whether the defendant intentionally exposed Mr. Ramey to that condition.

To be clear, my position is not that the plaintiffs' evidence proves that Contractor Enterprises possessed actual knowledge of the dangerous condition or that it did intentionally expose Mr. Ramey to that condition. Indeed, other evidence, such as the ground control plan that included a drill pattern to keep the drill operator and drill at least four feet from the highwall's edge, clearly weighs in favor of Contractor Enterprises's position in this case. Rather, the evidence presented by the plaintiffs, viewed in light of the reasonable inferences that can be drawn in their favor, presents genuine issues of material fact that should be decided by a jury. As such, this case is inappropriate for disposition on summary judgment and, therefore, I dissent.