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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002221-MR

ELEANOR JEAN HUNTON,
INDIVIDUALLY AND AS EXECUTRIX
OF THE ESTATE OF BOBBY GENE HUNTON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 02-CI-01373

DETREX CORPORATION;
CUTLER-HAMMER, INC., A
DIVISON OF EATON CORPORATION;
AND GOODRICH CORPORATION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DYCHE[1] AND HENRY, JUDGES.

HENRY, JUDGE: The estate of Bobby Gene Hunton appeals the Warren Circuit Court's grant of summary judgment in favor of Hunton's former employers: Detrex Corporation, Goodrich Corporation, and Cutler-Hammer, Inc. We affirm the trial court's decision.

[1] This opinion was completed and concurred in prior to Judge R. W. Dyche, III's retirement effective June 17, 2006.

Bobby Gene Hunton worked as a service manager at the B.F. Goodrich tire store in Bowling Green, Kentucky from 1956 to 1958. In the course of his employment at Goodrich, Hunton changed brakes, which his estate claims contained asbestos. From 1958 to 1965, Hunton worked for Detrex Corporation and handled insulation materials, which his estate claims also contained asbestos. From 1965 to 1977, Hunton worked for Cutler-Hammer, Inc., where he also handled insulation materials, which his estate again claims contained asbestos. As a result of Hunton's alleged occupational exposure to asbestos, his estate contends that he contracted mesothelioma, a deadly form of cancer. After his cancer diagnosis, Hunton brought a products and premises liability suit against his former employers as well as numerous other parties. During the course of the litigation, Hunton died. The circuit court has allowed Hunton's widow to continue as the plaintiff in this action in her capacity as the executrix of his estate.

After a period of pretrial discovery governed by the trial court's litigation management plan, Hunton's three former employers moved for summary judgment. The circuit court granted summary judgment to the employers on the ground that the estate's claims are barred by the exclusive remedy provision of

the Kentucky's Workers' Compensation Act, KRS[2] 342.011 through .796.

On appeal, Hunton's estate assigns three claims of error. First, it contends that his claims against his former employers fall under the intentional act exception to the Workers' Compensation Act and, therefore, are not barred by the exclusive remedy provision contained in KRS 342.690. Second, it contends that summary judgment is premature here, as further pretrial discovery could yet buttress his claims. Third, it contends that the Workers' Compensation Act's exclusive remedy provision, even if it applies here, violates Kentucky's constitutional jural rights doctrine. We review a grant of summary judgment to determine whether an issue of material fact exists and whether the moving party is entitled to judgment as matter of law. Sexton v. Taylor County, 692 S.W.2d 808, 809-10 (Ky.App. 1985).

Hunton's estate does not dispute that, ordinarily, his exclusive remedy for a work-related illness would be a workers' compensation claim - not a civil action for damages. Instead, he contends that "Detrex, Cutler-Hammer, and Goodrich exposed Hunton to asbestos with the knowledge that exposure could cause disease, including cancer and mesothelioma, and continued to use asbestos products with such knowledge"; thus, a civil cause of

[2] Kentucky Revised Statutes.

action for damages is cognizable under the intentional act exception of the Act. KRS 342.690(1). Hunton's estate supports this theory with the deposition of a pathologist, who indicates that, by 1943, Hunton's employers either knew or should have known about the dangers of asbestos in the work place due to prevalent medical evidence linking asbestos with disease. The flaw in the estate's claim, however, is that, even assuming that (1) Hunton contracted his fatal disease from exposure to asbestos during his employment with Detrex, Goodrich, and Cutler-Hammer; and (2) his employers knew or should have known about the dangers of occupational asbestos exposure but did nothing about it, any claim still falls within the of the Workers' Compensation Act's exclusive remedy provision as a matter of law.

Indeed, in Fryman v. Electric Steam Radiator Corp., 277 S.W.2d 25, 27 (Ky. 1955), our predecessor Court rejected the employee's theory that the intentional act exception can be triggered by an employer's failure to warn employees about known and dangerous working conditions. Rather, the Court reasoned that a showing of determined and specific intent to injure is required. Likewise, in McCray v. Davis H. Elliot Co., 419 S.W.2d 542, 544 (Ky. 1967), the Court held that the allegation that the decedent's employer had directed him to work on a tall pole in a hazardous area - close to highly charged electrical

lines – while knowing that the employee lacked the requisite experience and safety equipment, fell within the exclusive remedy provision of the Workers' Compensation Act.

We also note that, in 1972, the General Assembly enacted the current version of the Workers' Compensation Act, which specifies that the only exception to its exclusive remedy provision is an instance "where the injury or death [of an employee] is proximately caused by the willful and unprovoked physical aggression" of an employee, officer or director of an employer or an employer's workers' compensation insurance carrier. 1972 Ky. Acts Ch. 78, sec. 9, codified at KRS 342.690(1) (Emphasis supplied). Moreover, in Shamrock Coal Co. v. Miracle, 5 S.W.3d 130, 135 (Ky. 1990), the Supreme Court of Kentucky continued to narrowly construe the intentional act exception. In Shamrock, the Court held that a coal miner's claim that his employer was reckless in its mining operations and had even intentionally violated safety regulations was insufficient to maintain a civil action under the intentional act exception to the Workers' Compensation Act. The Court explained that "the legislature has specified that the only exception to the exclusive-remedy [provisions] is for . . . willful and unprovoked physical aggression." Id. at 135. Consequently, Kentucky's consistent workers' compensation jurisprudence makes clear that, short of injuries inflicted by

an unprovoked act of physical aggression directed against an employee with the deliberate and specific intent of causing harm, the exclusive remedy for workplace maladies lies under the rubric of the Workers' Compensation Act - not in a civil action for damages. An allegation of inferred or constructive intent, which is the essence of Hunton's estate's claim, is simply insufficient to trigger the Act's intentional act exception clause. Moore v. Environmental Constr. Corp., 147 S.W.3d 13, 18-20 (Ky. 2004).

Moreover, in light of the narrow scope of the intentional act exception to the exclusive remedy provision of the Workers' Compensation Act, we are also persuaded that, for two reasons, additional discovery from Hunton's employers would not help Hunton's estate to establish a case under the intentional act exception to the Act. First, the claims against Hunton's employers have never been pled as intentional torts involving deliberate acts of physical aggression with the specific intent of harming Hunton. To the contrary, Hunton's estate offered no affidavit indicating that the employers had engaged in direct physical violence on Hunton's person or that further discovery would likely lead to such proof. On appeal, the estate still makes no such allegations of deliberate physical aggression by Hunton's employers. Second, Hunton's own deposition, taken shortly before his death, is completely

inconsistent with any claim of an act of deliberate physical aggression by his employers with specific intent to cause harm. Indeed, Hunton's deposition instead supports an ordinary occupational disease claim, which lies exclusively within the rubric of the Workers' Compensation Act - not in a civil action for damages.

In sum, no reason exists to believe that any amount of discovery is ever going to lead to proof that Hunton's employers engaged in unprovoked physical aggression on Hunton's person, thereby causing his cancer. Hence, summary judgment for the employers is appropriate, as Hunton's estate cannot possibly prove to a trier of fact that the intentional act exception to the Workers' Compensation Act applies here. Steelvest, Inc. v. Scansteel Service Center, 807 S.W.2d 476, 482 (Ky. 1991); City of Florence v. Chipman, 38 S.W.3d 387, 390 (Ky. 2001).

Finally, Hunton's estate contends that, because the statute of repose has run on any Workers' Compensation Act claim, he must be allowed to proceed with a civil action against his employers under Kentucky's constitutional jural rights doctrine, which protects citizens from the legislative abrogation of common-law claims. See generally Thomas P. Lewis, Jural Rights under Kentucky's Constitution: Realities Grounded in Myth, 80 Ky. L.J. 953 (1991-92) (explaining and critiquing Kentucky's constitutional jural rights doctrine). We are

unpersuaded, however, because the Supreme Court of Kentucky has already rejected a similar argument. In Shamrock Coal, 5 S.W.3d at 134, the Court stated that "the fact that a remedy for a work-related injury is unavailable under the Workers' Compensation Act does not authorize bringing a civil action for damages" and that such a situation does not violate the jural rights doctrine. Because Hunton voluntarily accepted[3] Workers' Compensation Act coverage during his working tenure, along with its no-fault benefits, he cannot now escape its statute of repose. A worker must either accept or reject Workers' Compensation Act coverage in its entirety and not just those portions which inure to his benefit.

The trial court did not err in granting summary judgment to the late Mr. Hunton's former employers. Consequently, we affirm the judgment of the Warren Circuit Court.

ALL CONCUR.

[3] As a matter of law, a worker who fails to affirmatively reject coverage under KRS Chapter 342 is deemed to have accepted it. Adkins v. R & S Body Co., 58 S.W.3d 428, 430 (Ky. 2001).

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