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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000889-MR
and
NO. 2012-CA-001209-MR

KEITHA DURHAM, Individually,
and as Executrix of THE ESTATE
OF O. DAVID DURHAM APPELLANTS/CROSS-APPELLEES

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 09-CI-009756

FORD MOTOR COMPANY APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING
AS TO APPEAL AND
CROSS-APPEAL

** ** ** ** **

BEFORE: COMBS, DIXON, AND VANMETER, JUDGES.

COMBS, JUDGE: Keitha Durham, individually, and as Executrix of the Estate of O. David Durham (David), appeals the orders of the Jefferson Circuit Court which granted summary judgment and partial summary judgment to Ford Motor

Company. Ford has filed a cross-appeal with respect to the order of partial summary judgment. After our review, we affirm as to both the appeal and the cross-appeal.

David Durham began working as an electrician in 1959 and worked for forty-four years until he retired in 2003. He was a member of the International Brotherhood of Electrical Workers (IBEW), and he was employed by many electrical contractors to perform work at various sites throughout Kentucky and Indiana. Pertinent to this appeal, David worked at Ford Motor Company's Kentucky Truck Plant (KTP) and Louisville Assembly Plant (LAP) during Ford's bi-annual shutdowns and major renovation projects. He was also involved in original construction of KTP.

In 2009, David was diagnosed with asbestos-induced mesothelioma. On September 24, 2009, David and his wife, Keitha, filed a complaint alleging negligence. Ford was one of many defendants named in the complaint. The complaint included a premises liability claim against Ford, charging that David had been exposed to asbestos in both Ford plants. It also asserted a products liability claim arising from David's use of brakes manufactured by Ford. David passed away on June 23, 2010, and Keitha proceeded with the lawsuit, representing David's estate.

Ford filed a motion for summary judgment on June 27, 2011. In response to the premises liability claim, Ford argued that it did not have a duty to warn David of asbestos exposure. As for the products liability claim, Ford asserted that Keitha

had failed to produce any substantive evidence of exposure. The trial court ruled on the motion in three separate orders. On November 3, 2011, the trial court granted that portion of the motion for summary judgment pertaining to the products liability claim. On April 20, 2012, the trial court granted partial summary judgment as to Ford's defense of up-the-ladder immunity in the workers' compensation context. Finally, in its order of May 1, 2012, the court determined that Keitha did not present sufficient evidence to show whether the several contractors who directly employed David had possessed actual knowledge of the presence of asbestos on Ford's premises. Therefore, it granted summary judgment. This appeal and cross-appeal follow.

Summary judgment is a device utilized by the courts to expedite litigation. *Ross v. Powell*, 206 S.W.3d 327, 330 (Ky. 2006). It is a "delicate matter" because it "takes the case away from the trier of fact before the evidence is actually heard." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482 (Ky. 1991). The movant must prove that no genuine issue of material fact exists and "should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." *Id*.

The trial court must view the evidence in favor of the non-moving party. *City of Florence v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001). In order to overcome a motion for summary judgment, the non-moving party must present "at least some affirmative evidence showing the existence of a genuine issue of material fact." *Id*. *See also* Kentucky Rule[s] of Civil Procedure (CR) 56.03. On

appeal, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because summary judgments do not involve fact finding, we review *de novo*. *Pinkston v. Audubon Area Community Services, Inc*., 210 S.W.2d 188, 189 (Ky. App. 2006).

Keitha first argues that the trial court incorrectly determined that Ford did not have a duty to warn David of the hidden danger of asbestos. The Supreme Court has provided a basic test to determine when employers are liable for injury to independent contractors. *Brewster v. Colgate-Palmolive Co*., 279 S.W.3d 142 (Ky. 2009). Like David, Brewster had worked for several contractor-employers at various work sites owned by various companies. After he contracted asbestosis, he sued the premises owners. The Supreme Court held that the premises owner had a duty to warn independent contractors of the presence of asbestos only if "the premises owner [had] actual knowledge of the danger and contractor [had] neither actual nor constructive knowledge of the danger[.]" *Id*. at 149.

The trial court found – and Ford does not dispute – that Ford had actual knowledge that asbestos was in its plant and that it posed a danger to employees. Therefore, Keitha satisfied the first prong of the *Brewster* test. However, the court found that Keitha did not satisfy the second prong. Because David did not identify the contractor for whom he had worked during his time at Ford, the court held that it was impossible to determine whether his direct employer lacked actual or

constructive knowledge of the presence of asbestos – an essential element under *Brewster.*

Keitha argues that the court and Ford are ignoring evidence that she produced to the contrary. She cites testimony from David's former co-workers, who related that their employers never warned them of asbestos. Keitha also relies on testimony from expert Dr. William Ringo. She cites a portion of Dr. Ringo's testimony that is attached to her brief as an exhibit. She has not cited to the location of the brief in the record, but we have examined the voluminous record and could not find that portion of Dr. Ringo's deposition. CR 76.12(4)(c)(vii) sets forth that "materials and documents not included in the record shall not be introduced or used as exhibits in support of briefs." Therefore, we could not consider the portions of the briefs which refer to depositions that were not included in the appellate court record. *See Commonwealth v. Crum*, 250 S.W.3d 347 (Ky. App. 2008).

The trial court directly determined that if David could not identify who employed him to work at Ford, it is impossible to prove what knowledge his employer may or may not have possessed regarding asbestos or anything else. Keitha contends that this reasoning improperly shifts the burden of proof to her. However, our Supreme Court has specifically held that the plaintiff carries the burden of proof – not the premises owner. *Brewster v. Colgate-Palmolive Co*., 279 S.W.3d at 149-50. Thus, we must conclude that the trial court did not err in granting summary judgment regarding Ford's duty to warn.

Keitha next argues that the trial court erred in determining that Ford was entitled to partial immunity from tort liability based on the doctrine of up-the-ladder immunity. In its cross-appeal, Ford asserts that the trial court failed to go far enough with its findings and that it should have granted total immunity for the tort claims. We will address both contentions together.

Kentucky Revised Statute[s] (KRS) 342.690 provides that workers' compensation provides the exclusive remedy for recovery for injuries received during the course of employment. It also applies to contractors. KRS 342.690(1). According to the statutory scheme, a *contractor* is defined as "[a] person who contracts with another . . . to have work performed of a kind which is a regular or recurrent part of the trade, business, occupation, or profession of such person[.]" KRS 342.610(2)(b). Therefore, if premises owners are "deemed to be 'contractors,' the owners, like any other employers, are immune from tort liability with respect to work-related injuries[.]" *General Electric Co. v. Cain*, 236 S.W.3d 579, 585 (Ky. 2007).

In *Cain*, the Supreme Court of Kentucky provided a test for judging whether work is regular and recurrent:

> Stated simply, KRS 342.610(2)(b) refers to work that is customary, usual, normal, or performed repeatedly and that the business or a similar business would perform or be expected to perform with employees.

Id. at 589. The court also acknowledged that:

> [t]he test is relative, not absolute. Factors related to the 'work of the . . .business,' include its nature, size, and

> scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform.

Id. at 588 (quoting Larson's Workers' Compensation Law, § 70.06[5] (2006)).

The trial court discussed three types of work that David performed at Ford: 1) maintenance during KTP's bi-annual shutdowns; 2) renovation projects at KTP and LAP; and 3) new construction at KTP and construction of an addition called the Lake Erie addition. It found that Ford was immune from tort liability for David's work during the bi-annual shutdowns and for work during renovations and changeovers that did *not* require *specialized skills*. On the other hand, the trial court found that Ford was indeed liable for David's exposure to asbestos during the new construction of KTP, the Lake Erie addition, and the work performed during renovations and changeovers that did require specialized skills. The court defined work ***not*** requiring special skills as pulling wire, working with distributions and switchgears, and installing fixtures and switches.

The trial court determined that the maintenance work during the bi-annual shutdowns was regular and recurrent. George Kormanis, the former plant manager of KTP, described the work during the shutdowns as "all things that Ford-employed electricians would do on a regular basis at the KTP."[1] Additionally, the trial court found that:

[1] The trial court also relied on a deposition of Melvin Browning, a Ford employee. However, we are unable to locate that deposition in the voluminous record comprising approximately nineteen boxes of documents. Therefore, we must assume that the record supports the trial court's decision. *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985).

> The work performed during the shutdowns was regular or recurrent because Ford follows the same pattern year after year and the work performed is necessary to ensure it can continue to manufacture automobiles. It shuts down its facility for two to three weeks in or around January and July and performs repair, maintenance, and some capital improvement projects. Additionally, the work performed is normal to the business of automobile manufacturing. A common understanding of manufacturing automobiles indicates that the process requires heavy machinery that is subjected to enormous amounts of stress. Time and materials, and therefore money, may be lost if there is a shutdown of production due to malfunctioning machinery. Therefore, Ford chooses to conduct bi-annual shutdowns to perform regular maintenance and repairs. This minimizes shutdowns during the rest of the year.

Keitha does not present any argument to refute these findings. Therefore, we must affirm the summary judgment as it pertains to the bi-annual shutdowns. *See Milby v. Mears*, 580 S.W.2d 724 (Ky. App. 1979).

The trial court also granted summary judgment to Ford for the portion of David's work during renovations that did not require specialized skills. It found that Ford employees routinely performed such tasks, and contractors were only utilized if Ford's employees were otherwise engaged. Again, Keitha has not supported her contention that the trial court erred. Her discussion of summary judgment based on up-the-ladder immunity is based on the "special tasks" performed. However, the trial court distinguished specialized work from routine maintenance and properly denied Ford a summary judgment as to the specialized work. Conversely, the trial court did not err when it granted summary judgment relating to renovation work that did not require specialized skills.

In its cross-appeal, Ford contends that the trial court erred in denying summary judgment based on the renovation work which required special skills and new construction of KTP and the Lake Erie addition. The court defined that work as needing heightened skills, such as high voltage projects and installation of underground piping. Ford seeks to refute the trial court's finding by reciting a portion of a deposition of a Ford employee. However, the deposition is not in the record. It was cited in a motion by Ford, but we cannot verify its contents because of its omission from the record. We are compelled to assume that the record supports the findings of the trial court. *Thompson, supra*.

Keitha's final argument is that it was improper for the trial court to refuse to allow her to continue to prosecute her products liability claim. She contends that David was exposed to asbestos when he replaced the brakes on his personal vehicles. The plaintiff bears the burden of proving that the faulty product caused his injuries. *Holbrook v. Rose*, 458 S.W.2d 155, 157-58 (Ky. 1970).

In this case, the trial court relied on David's testimony regarding the brakes:

> Mr. Durham admitted that with respect to his '78 Ford truck[,] he used only parts provided by local parts houses and that it would be impossible to know who manufactured those brakes. In regard to his 89' [*sic*] Ford van, he testified he twice purchased "Mopar" brakes from Ford dealers. However, Ford confers [*sic*] it never manufactured anything with the name "Mopar," and even if Mr. Durham did purchase brakes from a Ford dealer, it would have been in the 90's or early 2000's; [*sic*] a time when, even Mr. Durham admits, Ford was likely not making asbestos brakes.

Once again, we have closely examined the record. David's deposition supports the findings of the trial court. Keitha has not presented evidence to the contrary. She offers proof that some Ford brakes at one time contained asbestos. However, that evidence does not indicate that David worked with brakes which Ford manufactured. Therefore, she has failed to establish a probability that brakes made by Ford were the cause of David's mesothelioma. We cannot conclude that the trial court erred when it granted Ford's motion for summary judgment on the products liability claim.

We affirm the judgment of the Jefferson Circuit Court as to both the appeal and the cross-appeal.

ALL CONCUR.

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