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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000118-MR

MARY ANN QUINN APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHTERTY, JUDGE
ACTION NO. 15-CI-00090

SYLVIA D. OGDEN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, MAZE AND STUMBO, JUDGES.

COMBS, JUDGE: In this action for damages for personal injury, Appellant, Mary Ann Quinn (Quinn), appeals a Summary Judgment dismissing her claim against Appellee, Sylvia D. Ogden (Ogden). The trial court held that Quinn's cause of action was barred by the exclusive remedy provision of the Workers' Compensation Act, KRS[1] Chapter 342. Finding no error, we affirm.

[1] Kentucky Revised Statutes.

On the morning of April 26, 2013, Quinn was going to her job as a school bus monitor for the Jessamine County Board of Education (the school board). She parked her car in the parking lot on the school board's property. As she was walking toward the bus garage office at approximately 6:15 a.m., Quinn was struck by a car driven by Ogden, who was also employed by the school board as a bus monitor and was also going to work. Kentucky Employers' Mutual Insurance, the school board's workers' compensation carrier, paid workers' compensation benefits to Quinn following the accident.

On February 12, 2015, Quinn filed a Verified Complaint in Jessamine Circuit Court alleging that she was injured as a direct and proximate result of Ogden's negligence. In her Answer, Ogden raised the exclusive remedy of the Workers' Compensation Act (the Act) as a defense. Ogden subsequently moved for summary judgment. On November 16, 2015, the trial court entered Summary Judgment for Ogden, reciting in relevant part, as follows:

> [T]he Court having concluded that there is no genuine issue of material fact, the accident giving rise to this suit having occurred on the operating premises of the Jessamine County Board of Education, and having involved the plaintiff and defendant who are fellow employees of the Jessamine County Board of Education; and the Court being otherwise sufficiently advised;
>
> IT IS HEREBY ORDERED AND ADJUDGED that defendant, Sylvia Ogden, is entitled to summary judgment as a matter of law, all civil claims of the plaintiff being barred by the exclusive remedy provisions of the Kentucky Workers' Compensation Act, KRS 342.690. All claims of the plaintiff, Mary Ann Quinn,

> are hereby dismissed with prejudice. There being no just reason for delay, this judgement is final and appealable.

On November 25, 2015, Quinn filed a Motion to Vacate pursuant to CR[2] 59.05, which the trial court denied by order entered on December 23, 2015. On January 20, 2015, Quinn filed her Notice of Appeal to this Court.

On appeal, Quinn argues that Ogden was not engaged in work-related activities at the time of the accident; therefore, she is not immune from liability in tort. Because this is a question of law, our review is *de novo*. *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky. App. 2000).

We begin our analysis with a brief overview of the applicable Workers' Compensation law. "[U]nder . . . the 'going and coming rule,' injuries that occur during travel to and from work generally are not compensable. An exception to the rule permits compensation if an injury occurs on the employer's 'operating premises.'" *Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29, 31 (Ky. 2004) (citations omitted). The courts have defined "operating premises" as follows: "The 'operating premises' rule must be applied on a case by case basis. . . . What we are saying is that 'operating premises' constitute a part of the work area, and an employee, under those conditions, receiving a work-related injury is in a 'work connected activity.'" *K-Mart Discount Stores v. Schroeder*, 623 S.W.2d 900, 902 (Ky. 1981).

[2] Kentucky Rules of Civil Procedure.

In general, an injured worker is limited to recovery based on workers' compensation benefits alone and is not at liberty to pursue a claim in civil litigation for negligence.

> [U]nless a worker has expressly opted out of the workers' compensation system, the injured worker's recovery from the employer is limited to workers' compensation benefits. The injured worker is not entitled to tort damages from the employer or its employees for work-related injuries.

Beaver v. Oakley, 279 S.W.3d 527, 530 (Ky. 2009). The exclusive remedy provision of the Act, KRS 342.690(1), provides in relevant part:

> **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** . . . . **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, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director.

(Emphasis added).

Thus, an injured worker is barred from filing an action at law against a fellow employee "unless the fellow employee, *i.e.*, the alleged tortfeasor, committed a 'willful and unprovoked [act of] physical aggression' against the injured worker." *Haines v. BellSouth Telecommunications, Inc*., 133 S.W.3d 497,

500 (Ky. App. 2004). Since a willful or criminal act cannot be anticipated in the normal course of an employment environment, immunity does not provide a shield:

> [T]he immunity provisions of KRS 342.690 are not applicable to a fellow employee whose actions are so far removed from those which would ordinarily be anticipated by the employer that it can be said that the employee causing the injury has removed himself from the course of his employment or that the injury did not arise out of the employment.

Kearns v. Brown, 627 S.W.2d 589, 591 (Ky. App. 1982). Thus, barring the narrow exceptions for deliberate wrongdoing, the test for fellow employee immunity is whether each of the employees involved would have been entitled to Workers' Compensation benefits for an injury suffered in the incident. *Id.* at 590; *Jackson v. Hutchinson*, 453 S.W.2d 269, 270 (Ky. 1970) ("In extending workmen's compensation coverage to the 'operating premises' of the employee, we have necessarily extended fellow-employee immunity to that same area.").

Quinn acknowledges that Ogden had driven on to the school board's premises on the injury date. Nonetheless, Quinn argues that Ogden is not immune from liability in tort under KRS 342.690(1) because ***Ogden*** was not engaged in work-related activity when the accident occurred. Quinn bases her argument on the fact that Ogden was still "en route to her place of employment and had not yet parked her car and begun her work day." Quinn also asserts that Ogden's negligent conduct – hitting a pedestrian in a roadway – removed her from the course or scope of her employment. We disagree.

Kentucky law does not require that an employee first park and exit her personal vehicle in order to trigger application of the operating premises exception. In *Warrior Coal*, 151 S.W.3d 29, an operating premises case, our Supreme Court upheld an award of workers' compensation benefits to an employee who drove off an access road on his employer's premises into a ditch after he fell asleep at the wheel en route to report to work. The Court was not persuaded that the claimant's falling asleep shortly before his shift began was a substantial deviation from the scope of his employment. "[A] worker's negligence . . . is not a factor in determining whether an injury is work-related." *Id.* at 31.

In *Caldwell v. Hubble*, 2009-CA-001512-MR, 2010 WL 2428121 (Ky. App. June 18, 2010), both parties were headed back to work at their employer's warehouse after working out at an on-site gym. Caldwell was walking, and Hubble was driving – as many employees chose to do. En route, Hubbell drove over Caldwell's foot. Caldwell sued Hubble in negligence. The circuit court granted summary judgment for Hubble on ground that Workers' Compensation was Caldwell's exclusive remedy. Although *Caldwell* was analyzed as a recreational activity case, this Court applied the fellow-employee immunity test set forth in *Jackson v. Hutchinson*, 453 S.W.2d 269, and in *Kearns v. Brown*, 627 S.W.2d 589, and concluded that Hubble was indeed immune from tort liability. "Unintentional acts and acts of ordinary negligence are clearly within the purview of the exclusive remedy doctrine." *Id.* at *3.

Therefore, we affirm entry of Summary Judgment in this case.

ALL CONCUR.

BRIEF FOR APPELLANT:
Kirtley B. Amos
Lexington, Kentucky

BRIEF FOR APPELLEE:
C. Randall Raine
Lexington, Kentucky