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RENDERED: MAY 21, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000347-MR

FINAL

DATE 6/11/09 Kelly Klaben D.C.
APPELLANTS

H & D MINING, INC. AND
RANDALL FLEMING

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000049-OA
HARLAN CIRCUIT COURT NO. 07-CI-00168

HON. R. CLETUS MARICLE, SPECIAL
JUDGE, HARLAN CIRCUIT COURT; AND

APPELLEE

STELLA MAE MORRIS, INDIVIDUALLY;
STELLA MAE MORRIS, ADMINISTRATRIX OF
THE ESTATE OF DAVID SHERMAN MORRIS, JR.;
AND STELLA MAE MORRIS, PARENT AND NEXT
FRIEND OF LANDEN JAYCOB MORRIS, A MINOR

REAL PARTY IN INTEREST

AND

2008-SC-000357-MR

GARY W. BENTLEY

APPELLANT

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000048-OA
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MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is before us from the denial of a petition for writ of prohibition by the Court of Appeals. Appellants, H & D Mining, Inc. and Randall Fleming, sought a writ to bar the Harlan Circuit Court from proceeding without jurisdiction in a tort action related to a workers' compensation claim. The circuit court did not adjudicate petitioners' motions for summary judgment, but provided six additional months to conduct discovery. Appellant, Gary W. Bentley, in a separate writ petition, also sought to bar the Harlan Circuit Court from proceeding in that action. The parties filed a motion to consolidate the petitions, which was granted by the Court of Appeals. The Court of Appeals then denied the writ.

Background

The facts as developed thus far in this case, when matched with the applicable statutory language, appear on the surface to raise serious questions about the lower court's jurisdiction to litigate the claims.

David Morris, Jr. ("Bud") worked as a shuttle car operator for H & D Mining, Inc. (hereinafter H & D). On December 30, 2005, Bud was working on the "Number 3" mine. As he stood by his own shuttle car, Bud was struck from behind by a coal hauler that was overloaded with coal. The car was driven by fellow mine worker, David Allen. The coal on Allen's car was piled so high that he did not see Bud before impact. Allen was under the influence of illegal drugs at the time the accident occurred. The impact from the collision severed both of Bud's legs beneath the knees.

Immediately after the accident, the mine owner and Mine Emergency Technician (“MET”), Gary W. Bentley, was called to the accident scene. An ambulance was also called. Bentley, despite being the only MET on site, did not administer any aid to Bud. Rather, two non-trained mine workers attempted to administer aid to Bud. They tied makeshift tourniquets on Bud’s legs in an attempt to stop the bleeding, but as they had no medical training, Bud continued to bleed excessively. Bentley did not touch Bud or instruct the other mine workers on how to tie the tourniquets. The mining crew put Bud in a buggy and drove him to the mine’s surface. The ambulance company was called again. As they waited for the ambulance to arrive, it became clear that Bud was bleeding to death.

The crew, desperate to do something, put Bud in the back of a pickup truck and began to drive towards the hospital. Once they reached the bottom of the hill outside the mine, they saw the ambulance. The ambulance stopped and the crew put Bud on a stretcher and he was transported to the hospital. Bud was pronounced dead just seventeen minutes after arriving at the hospital. The complaint alleges that the emergency room doctor stated Bud’s life could have been saved if basic first-aid treatment had been provided to him in a timely manner.

The decedent’s family filed an action in the Harlan Circuit Court alleging negligence on the part of H & D (and its officers and directors); negligence on the part of Gary W. Bentley; and negligence on the part of the ambulance company (Johnson Life Care). The complaint also alleges wrongful death, loss of parental consortium, and loss of consortium. The family also claims that the

ambulance company did not treat the call as an emergency. It is alleged that the paramedic at Johnson Life Care who took the call instructed the ambulance crew to deliver a patient for a routine medical appointment before driving to the mine. The complaint further states that illegal drug use occurred regularly at the mine, and that management was aware of, and even condoned the drug use. Apparently, drug use was so rampant at the mine that one of the buildings at the mine was referred to as “the crack house.”

The negligent acts or omissions of all the defendants were characterized in the complaint as grossly negligent, reckless, wanton, and/or willful.

Analysis

The Appellants ask this Court to reverse the denial of the writ by the Court of Appeals. We review the Court of Appeals’ denial of the writ for abuse of discretion, while we review the questions of law *de novo*. Fletcher v. Graham, 192 S.W.3d 350, 356 (Ky. 2006). Before addressing the merits, we note that writs of prohibition and mandamus are extraordinary in nature. Bender v. Eaton, 343 S.W.2d 799, 800 (Ky. 1961). Our courts “have always been cautious and conservative both in entertaining petitions for and in granting such relief.” Id.

Upon review of a writ claim, we must first determine whether the writ remedy is available. Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). A writ of prohibition *may* be granted where (1) the lower court is acting outside of its jurisdiction and there is no remedy readily available through application to an intermediate court; or (2) the lower court is acting erroneously, although within its jurisdiction, and there is no remedy by appeal. Id. This second class of

writs requires that great injustice and irreparable injury occur if the petition is denied. *Id.* The Court is not *compelled* to grant a writ in either circumstance. *Id.* Appellants claim that this case falls under the first class of writs (lack of jurisdiction). They argue that the circuit court had no jurisdiction to hear the decedent's family's tort claims because the family is receiving workers' compensation benefits.

Exclusive Remedy Provision

The Kentucky Workers' Compensation statute (KRS 342.0011 *et. seq.*) provides the exclusive remedy to employees injured in the workplace. KRS 342.690(1) states 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, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages

However, an exception to the exclusive remedy provision is as follows:

[T]he 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. KRS 342.690(1) (emphasis added).

Thus, employers are not provided the protections of the Workers' Compensation Act where an injury is caused by "willful and unprovoked physical aggression." KRS 342.690(1).

The trial court abstained from ruling on the summary judgment motions until the discovery process had been completed. This writ action makes its way to this Court under the claim that the trial court was acting outside its jurisdiction. Appellants claim that KRS 342.0011 strips the trial court of its

subject matter jurisdiction under the facts of this case. They filed summary judgment motions arguing the trial court had no jurisdiction (subject matter) to hear the case. The judge declined to rule on the motions until further discovery was done. Apparently, because the complaint alleged willful or reckless conduct (notice pleading), the judge felt that he could not decide the jurisdiction question until some discovery was done to establish whether the plaintiff could prove “unprovoked physical aggression.” This is proper since on summary judgment the facts of record must be viewed in the light most favorable to the non-moving party. He could have denied the motion for summary judgment at that time. At any rate, he has jurisdiction to rule on the jurisdiction question, and has not yet done so.

It is premature for us to address the merits of the summary judgment motions challenging jurisdiction which are still pending in the circuit court. It is not beyond the realm of possibilities that, through a reasonably timed discovery process, other facts may be fleshed out which would substantially affect the issue of subject matter jurisdiction under KRS 342.690(1).

Often, if not always, a determination as to whether a trial court has subject matter jurisdiction is one of fact-finding. Such is the case here. Trial courts must give cases an opportunity to breathe before they are declared dead. Therefore, we find that the trial court did not abuse its discretion in allowing some discovery prior to making its ruling on the summary judgment motions. Lastly, we are mindful that whether to grant any writ is discretionary under Section 110(2)(a) of the Kentucky Constitution. We essentially hold today that granting the writ in this instance would be premature.

For all the foregoing reasons, we affirm the Court of Appeals' denial of the writ.

All sitting. All concur.

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