Opinion, Case No.23570 Sue Ellen Costilow v. Elkay Mining Company, et al.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1997 Term

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No. 23570

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SUE ELLEN COSTILOW,

ADMINISTRATRIX OF THE ESTATE OF

DAVID LEE JETT, DECEASED,

Plaintiff Below, Appellant

v.

ELKAY MINING COMPANY,

A WEST VIRGINIA
CORPORATION;

CECIL L. WALKER MACHINERY CO.,

A WEST VIRGINIA CORPORATION;

CATERPILLAR TRACTOR CO., A

CALIFORNIA
CORPORATION; AND

INDIANA MILLS
& MANUFACTURING, INC.,

AN INDIANA CORPORATION,

Defendants Below, Appellees

Appeal from the Circuit Court of Logan County

Honorable Eric H. O'Briant, Judge

Civil Action No. 93-C-531

REVERSED AND REMANDED

Submitted: February 5, 1997

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This Opinion was delivered PER CURIAM.

JUSTICE STARCHER, deeming himself disqualified, did not participate in the decision of this case.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "A plaintiff may establish 'deliberate intention' in a civil action against an employer for a work related injury by offering evidence to prove the five specific requirements provided in W.Va. Code, 23-4-2(c)(2)(ii) [1983]." Syl. pt. 2, Mayles v. Shoney's, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990).

2. "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. pt. 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994).

3. "Given the statutory framework of W.Va. Code 23-4-2(c)(2)(i) and (ii), (1983, 1991) which equates proof of the five requirements listed in W.Va. Code 23-4-2(c)(2)(ii) with deliberate intention, a plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by

such specific unsafe working condition. This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge." Syl. pt. 3, Blevins v. Beckley Magnetite, Inc., 185 W. Va. 633, 408 S.E.2d 385 (1991).

Per Curiam:

This action is before this Court upon an appeal from the final order of the Circuit Court of Logan County, West Virginia, entered on December 6, 1995. The action concerns the work-related death of David Lee Jett and is based upon the statutory "deliberate intention" exception to the immunity of employers from civil liability provided by the West Virginia workers' compensation system. W. Va. Code, 23-4-2(c)(2) [1991]. The appellant, Sue Ellen Costilow, Administratrix of the Estate of David Lee Jett, contends that the circuit court committed reversible error in granting the motion of Jett's employer, Elkay Mining Company, for summary judgment.

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons stated below, this Court is of the opinion that the appellant submitted sufficient evidence to the circuit court to demonstrate the existence of a genuine issue of material fact with regard to the statutory exception. Accordingly, the final order is reversed, and this action is remanded to the circuit court for trial.

It should be noted that the appellant's claims against the other named appellees, Cecil I. Walker Machinery Co., Caterpillar Tractor Co. and Indiana Mills & Manufacturing, Inc., have been resolved or settled. Consequently, those appellees are no longer involved in this action.

I

The accident resulting in David Lee Jett's death occurred on August 8, 1991, at Elkay's Rum Creek Coal Preparation Plant in Logan County. Jett, a bulldozer operator with seventeen years of experience, was an eleven-year employee of Elkay at the plant, and his duties included the maintenance of various refuse piles located on Elkay's premises. On August 8, Jett was scalping vegetation with his bulldozer from the top of a steep slope for the purpose of obtaining soil for a nearby refuse pile. While on the slope, Jett lost control of the bulldozer, and it overturned, falling down a 67% grade and resulting in fatal, crushing injuries to Mr. Jett. As the record indicates, Jett had been a safety-conscious employee who regularly attended training and safety meetings.

It is undisputed that no one at Elkay instructed Jett to ascend the particular slope where the accident occurred. Moreover, although various non-supervisory employees of Elkay observed Jett at the top of the slope, no one witnessed the accident. Mr. Jett and the bulldozer were found thereafter. Nevertheless, the record indicates that scalping slopes or embankments was part of Jett's customary duties as an Elkay employee, and, in fact, he had scalped slopes of similar steepness and of similar vegetation in the past.

Moreover, the record indicates that Jett performed his work for Elkay in a virtually unsupervised manner. As Elkay's plant superintendent, John C. Bell, Jr., explained:

David Lee Jett received less supervision than many other Elkay Mining employees. I was given the impression by upper management that specific supervision was not necessary because he was the employee at the Rum Creek Preparation Plant most knowledgeable about the operations of the upper and lower refuse piles and the proper and necessary functions of a dozer operator in maintaining those refuse piles.[(1)]

In fact, although the accident of August 8, 1991, occurred during regular working hours, Jett possessed a key to the plant gate and, at times, worked alone. As Jett's widow, Ester Jett, stated in an affidavit dated September 14, 1995:

Prior to David Jett's death, he had his own key to the refuse area where he was killed. He could work at anytime he desired to do so. . . . Prior to David Jett's death, he did on numerous occasions work on Sundays and other times when he was not scheduled to do so and worked by himself at the refuse area. . . . David Jett was not required to obtain permission from Elkay to enter the area and work. I personally observed him working on the refuse area alone, with absolutely no one else present.

In June 1993, this action was instituted, and the appellant based her claim against the Elkay Mining Company upon the statutory "deliberate intention" exception to employer immunity found in W. Va. Code, 23-4-2(c)(2) [1991]. Specifically, W. Va. Code, 23-4-2(c)(2)(ii) [1991], states that immunity from suit may be lost by an employer where the following facts are shown:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such

specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.[2]

Following the taking of various depositions and the submission of other documents to the circuit court, Elkay filed a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, asserting that the appellant failed to present sufficient evidence upon the above five requirements to establish a "deliberate intention" action. The circuit court conducted a hearing upon the motion and granted summary judgment for Elkay pursuant to the final order of December 6, 1995.

As reflected in the transcript of the hearing upon the motion, the circuit court found that the appellant failed to present sufficient evidence under W. Va. Code, 23-4-2(c)(2)(ii) [1991], with regard to requirement (B), concerning a subjective realization by the employer of a specific unsafe working condition, and requirement (D), concerning the intentional exposure of an employee to such condition. With regard to both requirements, the circuit court emphasized that Elkay had neither instructed Jett to work upon, nor exposed him to, the particular slope where the accident occurred. Upon the entry of summary judgment, this appeal followed.[3]

II

As the petition for appeal indicates, the appellant relies upon Mayles v. Shoney's Inc., 185 W.Va. 88, 405 S.E.2d 15 (1990), a case involving a "deliberate intention" action under W. Va. Code, 23-4-2(c)(2). In Mayles, a restaurant employee was severely burned in a fall while carrying a large container of hot grease down a grassy slope to a disposal unit. In upholding a jury verdict in the amount of $220,000 for the employee, this Court determined, in Mayles, that the evidence sufficiently supported the verdict upon each of the five requirements of the statute.

In particular, we noted, in Mayles, that the specific unsafe working condition was the manner in which the hot grease was taken from the restaurant, i.e., by carrying it in an open container down the grassy slope to the disposal unit. Moreover, the subjective realization by the employer requirement of the statute was satisfied by the fact that company managers were aware of the unsafe manner used to dispose of the hot grease, and of the potential risks involved, yet failed to take remedial action. We further noted, in Mayles, that the violation of a safety rule or standard requirement was satisfied by evidence to the effect that industry standards mandated that hot grease be transported in a tightly sealed container. The intentional exposure to the unsafe working condition requirement was satisfied by evidence that the company failed to take remedial action, even though another employee had been similarly injured in the past and even though employee complaints about the practice used to dispose of grease had been received. Finally, with regard to the requirement concerning proximate cause, this Court noted, in

Mayles, that the employee had presented sufficient evidence linking his injuries to the unsafe working condition.

Thus, in syllabus point 2 of Mayles, this Court held: "A plaintiff may establish 'deliberate intention' in a civil action against an employer for a work related injury by offering evidence to prove the five specific requirements provided in W. Va. Code, 23-4-2(c)(2)(ii) [1983]." See also syl. pt. 2, Sias v. W-P Coal Company, 185 W. Va. 569, 408 S.E.2d 321 (1991); syl. pt. 2, Blevins v. Beckley Magnetite, 185 W. Va. 633, 408 S.E.2d 385 (1991).

In contrast to the circumstances in Mayles, however, involving a jury trial, the appellant herein asks this Court to review the granting of a summary judgment. The appellant contends that the summary judgment was inappropriate because, having established a prima facie case with regard to requirements (A), (C) and (E) of W. Va. Code, 23-4-2(c)(2)(ii) [1991], see n. 3, supra, the appellant also established such a case with regard to requirements (B) and (D). Specifically, the appellant asserts that this action should be remanded for trial because the record contains evidence indicating (1) that Jett's customary duties included the scalping of slopes and embankments with a bulldozer, (2) that Elkay knew that Jett had, in the past, scalped slopes of similar steepness and of similar vegetation to the slope involved in the accident and (3) that Jett was allowed to work virtually unsupervised to the extent that Elkay, through a pattern of acquiescence, failed to account for his safety, in spite of the obvious hazards. According to the appellant, therefore, the evidence of record established questions of fact under both requirement (B), concerning subjective realization, and requirement (D), concerning intentional exposure, of W. Va. Code, 23-4-2(c)(2)(ii) [1991].

Elkay contends, on the other hand, that, inasmuch as it had no knowledge that Jett had ascended the slope in question and placed himself in danger, the accident was not foreseeable. Thus, according to Elkay, no case of "deliberate intention" was established.

In syllabus point 1 of Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994), this Court held that "[a] circuit court's entry of summary judgment is reviewed de novo." See also syl. pt. 9, Riffe v. Armstrong, ___ W.Va. ___, 477 S.E.2d 535 (1996); syl. pt. 1, Koffler v. City of Huntington, 196 W. Va. 202, 469 S.E.2d 645 (1996). More specifically, syllabus point 4 of Painter states:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

See also syl. pt. 1, Schultz v. Consolidation Coal Company, 197 W. Va. 375, 475 S.E.2d 467 (1996), cert. denied, 117 S. Ct. 767 (1977); syl. pt. 3, Miller v. Whitworth, 193 W. Va. 262, 455 S.E.2d 821 (1995).

In Cline v. Jumacris Mining Company, 177 W. Va. 589, 355 S.E.2d 378 (1987), a "deliberate intention" action was brought under W. Va. Code, 23-4-2, and the employer moved for summary judgment. The trial court granted the motion. This Court reversed, however, and remanded the action for a jury trial. As the Cline opinion states: "This Court believes that in the case now under consideration further development of the facts relating to the character of the employer's knowledge and conduct is desirable before a final resolution of the appellant's claim is appropriate." 177 W. Va. at 591, 355 S.E.2d at 380.

Similarly, in Bell v. Vecellio & Grogan, Inc., 191 W. Va. 577, 447 S.E.2d 269 (1994), a "deliberate intention" action brought specifically under W. Va. Code, 23-4-2(c)(2)(ii) [1991], this Court reversed a directed verdict granted in favor of the employer. In Bell, a construction worker was severely injured in an accident involving a defective boom-crane. This Court held that the directed verdict was precluded because the injured worker had "sufficiently satisfied" the five requirements of the statute. 191 W. Va at 583, 447 S.E.2d at 275. Specifically, with regard to both requirement (B), concerning subjective realization, and requirement (D), concerning intentional exposure, this Court, in Bell, emphasized the fact that the record included evidence indicating that the employer's supervisory personnel were "well aware of the crane's defects." 191 W. Va. at 583, 447 S.E.2d at 275.

In syllabus point 3 of Blevins v. Beckley Magnetite, 185 W. Va. 633, 408 S.E.2d 385 (1991), this Court held:

Given the statutory framework of W.Va. Code 23-4-2(c)(2)(i) and (ii), (1983, 1991) which equates proof of the five requirements listed in W.Va. Code 23-4-2(c)(2)(ii) with deliberate intention, a plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge.[(4)]

(footnote added).

Here, a review of the record demonstrates that the appellant presented sufficient evidence to establish a question of fact under both requirement (B), concerning a subjective realization by the employer of a specific unsafe working condition, and requirement (D), concerning the intentional exposure of an employee to such condition. The appellant's evidence indicates that, even if Elkay did not know that Jett had ascended the slope in question, it did consider the scalping of slopes and embankments with a bulldozer part of Jett's customary duties. Moreover, the appellant's evidence

indicated that Elkay had actual knowledge that Jett had, in the past, scalped slopes of similar steepness and of similar vegetation to the slope involved in the accident. As Billy Ronald Cline, a foreman for Elkay, testified:

Q. Had you ever seen Mr. Jett scalping an embankment of a similar grade or steepness with similar vegetation on it prior to this task he was doing when he got killed?

A. I probably had.

Q. Can you give me an idea where on this refuse area?

A. Yes, on the refuse area.

Q. Where on the refuse area had he performed scalping in a similar circumstance?

A. From the head of the hollow down.

In addition, the record contains evidence to the effect that Jett was allowed to work virtually unsupervised, even to the extent that he possessed a key to the plant gate which enabled him to work alone at various times. That evidence, especially in view of the longevity of Jett's employment with Elkay, results in a reasonable inference that Jett, who was not a part of management, was permitted to work at the plant with unrestrained judgment. As the September 27, 1995, affidavit of John C. Bell, Jr., quoted above, stated: "I was given the impression by upper management that specific supervision was not necessary[.]"

Clearly, under the circumstances of this action, the appellant should be permitted to include, as part of her "deliberate intention" theory, an argument to a jury that Elkay, through a pattern of acquiescence, failed to account for Jett's safety, in spite of the obvious hazards. Specifically, in the narrow context of reviewing the propriety of summary judgment, this Court is of the opinion that the appellant has satisfied requirements (B) and (D) of the statute through evidence to the effect that Elkay knew of Jett's unsafe working conditions and of the high degree of risk involved and, nevertheless, continued in that knowledge for a significant period of time without taking remedial action. The evidence of the appellant as to Elkay's knowledge, as thus represented in the above testimony of Billy Ronald Cline, goes to requirement (B) of the statute, concerning subjective realization. The showing of a pattern of acquiescence and the failure to take remedial action goes to requirement (D) of the statute, concerning intentional exposure. See Mayles, supra.

Accordingly, this Court is of the opinion that the circuit court committed error in concluding that the appellant failed to present sufficient evidence under requirement (B), concerning subjective realization, and requirement (D), concerning intentional exposure, with regard to the motion of Elkay for summary judgment. Rather, the evidence demonstrates a question of fact as to both of those requirements. As noted above, the remaining requirements of W. Va. Code, 23-4-2(c)(2)(ii) [1991], i.e., (A), (C)

and (E), are not before this Court. Upon all of the above, therefore, the final order of the Circuit Court of Logan County, entered on December 6, 1995, is reversed, and this action is remanded to that court for trial.

Reversed and remanded.

1. [1]The above statement of John C. Bell, Jr. is contained in his affidavit of September 27, 1995. In a prior affidavit dated January 3, 1995, Bell stated, in part: "Mr. Jett worked without supervision. I was given the impression by upper management that Mr. Jett was not to be supervised."

2. [2]Although W. Va. Code, 23-4-2 was amended in 1994, those amendments are not relevant to this action. In any event, the specific language of W. Va. Code, 23-4-2(c)(2)(ii) [1991], set forth above, has remained unchanged.

3. [3]Pursuant to W. Va. Code, 23-4-2(c)(2)(iii)(B) [1991], summary judgment is authorized where a circuit court finds that "one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist." As stated above, the circuit court found that the appellant failed to present sufficient evidence with regard to requirements (B) and (D) of W. Va. Code, 23-4-2(c)(2)(ii) [1991].

However, indicating that the scalping procedure used upon the slope in question was unsafe, the circuit court determined that there was a genuine issue of material fact with regard to requirement (A) of the statute, concerning the existence of a specific unsafe working condition. Moreover, with regard to requirement (C), concerning the violation of a safety rule or industry standard, the circuit court stated: "There would be a genuine issue of fact with regard to element No. 3 as to whether or not operating that dozer under those circumstances would be a violation of [a] safety statute or practice common within the industry."

Although the circuit court did not elaborate upon the latter determination, the evidence submitted by the appellant suggested that, in view of the steepness of the slope where the accident occurred, industry standards indicated that the vegetation should have been pre-cut prior to the use of the bulldozer for the collection of soil for the refuse pile. Industry standards also indicated that, under the circumstances, Jett's bulldozer could have been "anchored" to another bulldozer while working upon the slope.

Finally, the circuit court made no determinations with regard to requirement (E) of the statute, concerning serious injury or death being proximately caused by the specific unsafe working condition.

Accordingly, of the five requirements of W. Va. Code, 23-4-2(c)(2)(ii) [1991], only requirements (B) and (D) are before this Court.

4. [4]In Blevins, this Court discussed requirement (B) of the statute, concerning subjective realization. In Blevins, an employee, cleaning up ore spillage, was injured when his arm was caught in a moving conveyor-pulley system. In setting aside a jury verdict for the employee, this Court noted that requirement (B) had not

been satisfied because, inter alia, the evidence indicated that the employer had instructed its workers to turn the system off before entering the area to clean up spillage. 185 W.Va. at 640, 408 S.E.2d at 392.