

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Jannell Williams, as the Personal Representative
of the Estate of Kenneth Williams,
Plaintiff Below, Petitioner**

and

**Cheryl Rutledge, Personal Representative of the
Estate of Quentin Rutledge,
Defendant and Cross-Claimant Below, Petitioner**

vs) No. 12-0847(Ohio County 09-C-419)

**Werner Enterprises, Inc. and Drivers Management, LLC,
Defendants Below, Respondents**

FILED

June 24, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CORRECTED MEMORANDUM DECISION

Petitioners Jannell Williams, as personal representative of the Estate of Kenneth Williams, and Cheryl Rutledge, as personal representative of the Estate of Quentin Rutledge, by counsel Anthony J. Majestro, Christopher Heavens, and Frank P. Bush Jr., appeal the Circuit Court of Ohio County's order granting, in part, and denying, in part, Respondent Werner's motion for partial summary judgment, entered on October 17, 2011, and the circuit court's order clarifying its rulings, entered on October 24, 2011. Respondents Werner Enterprises, Inc. ("Werner") and Drivers Management, LLC ("Drivers Management"), by counsel Mary H. Sanders and Cindy D. McCarty, filed a response. Petitioners filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

This case arises out of a tractor-trailer accident occurring on January 12, 2009, wherein Kenneth Williams and Quentin Rutledge were both killed. Rutledge was driving a truck owned by Werner when he veered off a snowy road in Lewis County, crashing over an embankment. Williams was in the sleeper cab of the truck at the time of the accident. A fire quickly consumed the vehicle. Petitioners and respondents disagree as to whether the fire killed both decedents or whether one or both were killed upon impact. The decedents at the time were directly employed by Drivers Management, a subsidiary of Gra-Gar, LLC ("Gra-Gar"), which is a subsidiary of Werner. Werner and Drivers Management had a contract whereby Drivers Management provided

drivers to Werner. Drivers Management was voluntarily dismissed by petitioners at the hearing on the motion for partial summary judgment.

Crawford and Company was hired to investigate the accident immediately thereafter. Werner was advised that the tractor-trailer was unsalvageable and therefore Werner authorized destruction of the vehicle on January 14, 2009. By letters dated February 11, 2009, and February 18, 2009, Werner was advised that the decedents' survivors had hired counsel and Werner was asked to preserve the vehicle. Werner first responded that it was attempting to locate the vehicle, and then on March 4, 2009, advised that it had decided to dispose of the vehicle as there was no issue of negligence under the Workers' Compensation Act. Subsequent to the decedents' deaths, petitioners have received workers' compensation payments under the name of Drivers Management through a sweep account¹ maintained by Werner.

Petitioners filed suit on December 9, 2009, alleging various claims, including negligence, deliberate intent, wrongful death, and negligent and intentional spoliation of evidence against Werner. On September 27, 2011, Werner filed a motion for partial summary judgment, claiming that the claims for negligence, deliberate intent, and wrongful death are all precluded by the Nebraska Workers' Compensation Act based on Werner's contention that the contract for employment with the decedents was entered into in Nebraska. Werner also argued that it was an employer of the decedents. A hearing was held on respondents' motion for summary judgment on October 7, 2011. By order dated October 17, 2011, the court granted partial summary judgment in favor of Werner, finding that Werner was the employer of the decedents based on Werner's control of the decedents' work. The court applied the workers' compensation laws of Nebraska, where decedents' employment originated, and found that respondents are entitled to immunity. As to the spoliation claim, the court found that it was the only remaining stand-alone cause of action, and that there are genuine issues of material facts regarding this claim. Therefore summary judgment on this issue was denied.

On October 21, 2011, the circuit court entered an order clarifying its order on the spoliation claims, and found that any negligent spoliation claims are barred against Werner and Gra-Gar based on workers' compensation immunity. Therefore, the court found that petitioners are barred from arguing that Werner disposed of the tractor-trailer with knowledge of a potential civil action claim for both negligent and intentional spoliation of evidence against Gra-Gar, Werner, or any subsidiary of Werner. However, the court ruled that petitioners can argue in relation to their intentional spoliation of evidence claim that Werner disposed of the tractor-trailer with knowledge of a potential civil action claim for defective product of the subject vehicle. The court also allowed evidence of other Freightliner² accidents and settlements against Freightliner Corporation Inc. to rebut the opinions of Werner's experts that the design of the subject tractor and other models of tractor were reasonably safe and not defective. Both this

¹A sweep account is a banking arrangement wherein a checking account balance is automatically transferred to an interest-bearing account at the end of each business day. Only the amount needed to cover withdrawals or debits is kept in the account on a daily basis.

²Freightliner Corporation, Inc. is the company that manufactured the tractor involved in this incident. It is not involved in this appeal but was named as a defendant below.

order and the October 17, 2011, order were certified as final orders by order entered on June 15, 2012.³

We review a summary judgment order under a *de novo* standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 2, *Id.* (citation omitted). This Court has held that “the party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence’ and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor. *Anderson [v. Liberty Lobby, Inc.]*, 477 U.S. [242] at 252, 106 S.Ct. [2505] at 2512, 91 L.E.2d [202] at 214 [1986].” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 (1995).

On appeal, petitioners first argue that the circuit court erred in granting partial summary judgment on the deliberate intent, negligence, wrongful death, and negligent spoliation of evidence claims by finding that Werner was an employer of the decedents and therefore entitled to workers’ compensation immunity. Petitioners also argue that the circuit court erred in applying the Nebraska Workers’ Compensation Act and Nebraska law. Petitioners argue that the circuit court also erred in granting partial summary judgment in favor of Werner on petitioners’ claim for negligent spoliation of evidence which would be used in a claim against a third-party, as this claim is a stand-alone tort that does not fall within any immunity afforded by an applicable workers’ compensation scheme. Finally, petitioners argue that the circuit court erred in precluding them from arguing a potential claim of negligent vehicle maintenance in connection with their spoliation of evidence claims on the basis that the entity responsible for vehicle maintenance, Gra-Gar, LLC, a subsidiary of Werner, was also an employer of the decedents and thereby entitled to workers’ compensation immunity. As to each of these arguments, this Court finds no error.

A review of the record below shows that the circuit court addressed each of these issues at length. As to workers’ compensation immunity, the circuit court properly found that because Werner exercised control over the decedents’ work and held itself out as the employer, Werner was in fact a joint employer and therefore entitled to workers’ compensation immunity. Moreover, the circuit court properly applied Nebraska Workers’ Compensation law to this claim, as Werner is a Nebraska corporation, the employment relationship was entered into in Nebraska, and the beneficiaries received workers’ compensation benefits from Werner pursuant to Nebraska law. The rulings on the spoliation claim were correct, as the circuit court found that spoliation of evidence is not a stand-alone tort when the spoliation is a result of negligence. Additionally, we agree with the circuit court that the evidence shows that Gra-Gar, LLC is a subsidiary of Werner and therefore, under the facts of this case, entitled to immunity under the same theory that Werner is entitled to immunity. Having reviewed the circuit court’s “Order” entered on October 17, 2011, and “Order” entered on October 24, 2011, we hereby adopt and incorporate the circuit court’s well-reasoned findings and conclusions as to the assignments of

³The June 15, 2012, order also certified four questions in the event this case would be remanded on appeal for further proceedings. The Court declines to address these questions.

error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 24, 2013

CONCURRED IN BY:

Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis