

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Holik v. Consolidation Coal Co.

214 W. Va. 458 (2003) · Decided November 21, 2003

SUMMARY

The West Virginia Supreme Court of Appeals affirmed a judgment on a jury verdict finding Consolidation Coal Company not liable for injuries sustained during the dismantling of a coal tippie. The court upheld summary judgment rejecting the plaintiffs’ negligent-selection claim and concluded that they had a fair opportunity to present claims concerning Consol’s monitoring, supervision, and control of the dismantling process. The court also upheld the transfer of the case to Monongalia County.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per Curiam
JURISDICTION	West Virginia
DECIDED	November 21, 2003
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiffs appealed from a circuit court judgment entered on a jury verdict finding Consolidation Coal Company not liable for negligence that proximately caused the decedents' injuries. Plaintiffs challenged partial summary judgment on their negligent-selection claims and the transfer of venue.
STANDARD OF REVIEW	Summary judgment orders are reviewed de novo. Summary judgment is proper only when there is no genuine issue of fact to be tried and further factual inquiry is not necessary to clarify the application of law.
PRECEDENTIAL VALUE	published opinion
PARTIES	Edward Holik, Jr., administrator of the estate of Edward Holik, deceased, D. Paulette Byers, administratrix of the estate of Robert Moon, deceased v. Consolidation Coal Company

TOPICS

- negligence
- summary judgment
- venue
- standard of review
- appellate procedure

PRACTICE AREAS

torts

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the circuit court properly granted Consolidation Coal summary judgment on plaintiffs' negligent-selection claims.
2. Whether plaintiffs received a fair opportunity at trial to present evidence that Consolidation Coal was negligent in monitoring, supervising, and controlling the demolition.
3. Whether the transfer of the case from Mingo County to Monongalia County was a proper exercise of the circuit court's discretion.

HOLDINGS

1. The circuit court did not err in granting Consolidation Coal summary judgment on the negligent-selection claims. Although West Virginia law had recognized the possibility that a selecting party might owe a duty of due care to an employee of a negligently selected contractor in some circumstances, the record did not establish circumstances warranting such a claim here.
2. Plaintiffs received a fair trial because the general negligence question, the evidence presented, and the jury instructions concerning Consolidation Coal's duty to provide a safe place to work allowed the jury to consider Consolidation Coal's responsibility in connection with the dismantling and removal process.
3. The transfer of the case to Monongalia County, where the accident occurred, was a proper exercise of the circuit court's discretion.

KEY QUOTATIONS

“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.” (at 460)

“We therefore conclude that the circuit court did not err in granting summary judgment on the negligent selection claim, and that the appellants received a fair trial.” (at 460)

FACTUAL BACKGROUND

Consolidation Coal Company contracted with Iron & Steel Processing to dismantle and remove a coal tippie owned by Consolidation Coal in Monongalia County, West Virginia. Edward Holik was injured and Robert Moon was killed when the tippie collapsed during demolition. Plaintiffs alleged that Consolidation Coal negligently selected Iron & Steel Processing and negligently monitored, supervised, and controlled the dismantling operation.

PROCEDURAL HISTORY

The decedents, employees of Iron & Steel Processing, were injured when a coal tippie owned by Consolidation Coal Company collapsed during demolition. Plaintiffs sued Consolidation Coal and several other defendants in Mingo County; the case was transferred to Monongalia County. The circuit court granted Consolidation Coal

partial summary judgment on negligent-selection claims, denied summary judgment on claims concerning Consolidation Coal's conduct during demolition, and entered judgment for Consolidation Coal after a jury found no proximate negligence. The Supreme Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)
- Russell v. Bush & Burchett, 210 W. Va. 699, 559 S.E.2d 36 (2001)
- Bagley v. Insight Communications, 658 N.E.2d 584 (Ind. 1995)
- Sievers v. McClure, 746 P.2d 885 (Alaska 1987)
- Peneschi v. National Steel Corp., 170 W. Va. 511, 295 S.E.2d 1 (1982)
- Kerns v. Slider Angering, 202 W. Va. 548, 505 S.E.2d 611 (1997) (per curiam)

OPINION

PER CURIAM.

PER CURIAM: In this case we affirm a jury verdict finding that a coal company was not liable for injuries to persons demolishing a coal tipple on the company's property. I. In the instant case the appellants are Edward Holik, Jr., administrator of the estate of Edward Holik, deceased; and D. Paulette Byers, administratrix of the estate of Robert Moon, deceased.

In 1995, the appellee Consolidation Coal Company ("Consol") contracted with Felicia & Jeffrey Locke, dba Iron & Steel Processing ("I & S"), to dismantle and remove a coal tipple that was owned by — and located on land in Monongalia County, West Virginia owned by — Consol.

The appellants' decedents were I & S employees. In April of 1996, Mr. Holik was injured and Mr. Moon was killed when the tipple collapsed while they were dismantling it. As a result of the injuries to their decedents, the appellants filed suit, in Mingo County, West Virginia, against the Lockes, I & S, two other I & S employees, and Consol, setting forth a number of separately denominated causes of action.

The circuit court transferred the case to Monongalia County, West Virginia. The Monongalia County Circuit Court subsequently granted summary judgment for Consol on the two counts of the complaint that claimed that Consol's negligence in selecting I & S to demolish the tipple gave rise to liability by Consol (the "negligent selection claim").

In support of their negligent selection claim, the appellants offered expert opinion to the effect that Con-sol should have more carefully investigated I & S in the process of selecting a party to dismantle and remove the tipple.

The appellants also asserted claims that Consol had been negligent in its dealings with I & S during the dismantling and removal process, and that this conduct by Consol was a proximate cause of the appellants' decedents' injuries.

The circuit court denied summary judgment to Consol on these claims. Apparently because the other defendants filed for bankruptcy, the case went to trial against Consol alone. In November of 2001, a jury returned a verdict answering the following question: Q: Do you find by a preponderance of the evidence that [Consol] was guilty of negligence which proximately caused damages to the Plaintiffs?

A: No. The jury found for Consol and against the appellants, and the circuit court entered judgment on the verdict. The appellants appeal, urging this Court to reverse the jury-verdict and order a new trial, because the jury was not permitted to consider the appellant's negligent selection claim; and because the case was improperly transferred to Monongalia County.

II. "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." Syllabus Point 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

We review summary judgment orders de novo. Upon review of the briefs in the instant case and researching the issue in our case law, we believe that the circuit court was correct in its observation — and Consol is correct in its argument — that this Court has not in any case upheld an award to an injured employee based on a claim against another party who had allegedly negligently selected the injured person's employer.¹ This Court has recognized the possibility that a selecting party might in some circumstances have a duty of due care in selection that could run to an employee of a negligently-selected party, see *Russell v. Bush & Burchett*, 559 S.E.2d 36, 43 n. 11, 210 W.Va.

699, 706 n. 11 (2001), citing *Bagley v. Insight Communications*, 658 N.E.2d 584 (Ind.1995); see also *Sievers v. McClure*, 746 P.2d 885 (Alaska 1987). But we have never had presented to the Court any factual or legal circumstances under which such a claim was approved.² Nothing in the record or arguments before us suggests that allowance of such a claim was appropriate in the instant case.

Consol, while not conceding that the negligent selection claim was in any fashion a viable one, also argues that the submission to the jury of the general negligence question in the jury verdict form, the evidence at trial, and the instructions to the jury regarding Consol's duty to provide a safe place to work for the I & S employees, effectively allowed the jury to consider issues of negligent selection.

The appellants point to nothing in the record that counters this argument by Con-sol. The appellants have not directed our attention to any evidentiary proffer or ruling that excluded them from presenting any evidence of negligence by Consol in connection with the dismantling and removal of the tipple.³ We agree, based on the record before us, that the appellants had a fair opportunity to assert Consol's responsibility for their decedents' injuries in connection with their claims that Consol had failed to properly monitor, supervise, and control the dismantling and removal process.

We therefore conclude that the circuit court did not err in granting summary judgment on the negligent selection claim, and that the appellants received a fair trial.⁴ III. For the foregoing reasons, we affirm the circuit court's order entering judgment on the jury's verdict. Affirmed.. This Court has specifically rejected a claim where a party's asserted liability to an employee of a contractor was premised on a strict liability theory.

See Syllabus Point 2, *Peneschi v. National Steel Corp.*, 170 W.Va. 511, 295 S.E.2d 1 (1982).. In *Kerns v. Slider Angering*, 202 W.Va. 548, 556, 505 S.E.2d 611, 619 (1997) (per curiam), we held that an injured employee who induced a party to select the company that employed the employee could not assert a negligent selection claim against the selecting party..

Neither the appellants nor Consol have designated the trial transcript in this case as part of the record before this Court, so it is impossible for us to review the trial itself in evaluating the effect of the circuit court's ruling granting Con-sol's partial summary judgment motion..

We have reviewed the appellants' arguments regarding the propriety of the circuit court's action in transferring the case to Monongalia County, where the accident took place. We agree with Consol that this was a proper exercise of the circuit court's discretion under W.Va.Code, 56-1-1(b) [1986],