In The

Supreme Court of Virginia

RECORD NO. 131162

PATRICIA KOHN,
Administrator of the Estate of JOHN KOHN, deceased,

Appellant,

v.

BRUCE P. MARQUIS, SHARON CHAMBERLIN, LELDON DIONNE SAPP, STEPHEN BAILEY, MICHAEL REARDON, and L. L. TESSIER,

Appellees.

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case presents an unmistakable and highly visible violation of the constitutional right to trial by jury. The appellant is a widow who is the administrator of her late husband's estate. She filed a wrongful-death action, claiming that her husband had been killed while in training to become a police officer in the City of Norfolk.

The defendants, who were police supervisors or officers, filed a special plea raising the bar of the Workers' Compensation Act. While the fatal injuries arose out of and in the course of his employment, the parties differed sharply over whether there was an injury by accident. The widow pleaded that death resulted from a series of head traumas over a period of several weeks. The defendants argued that the death was a result of a single, identifiable event. The application of the statutory bar turned on this disputed fact, since repetitive-trauma injuries are not within the Act. *Morris v. Morris*, 238 Va. 578, 589 (1999).

Instead of allowing a jury to resolve this dispute, as Art. I, §11 commands, the trial court cut the litigation short by granting summary judgment on this disputed fact issue. This appeal presents a question far more important than whether the fatal injury was or was not within the Act: It involves whether this Court will permit trial courts to take genuine factual disputes away from Virginia juries.

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STATEMENT OF THE CASE

This is an appeal of a final judgment of the Norfolk Circuit Court in a wrongful-death action. Patricia Kohn, administrator of the estate of her late husband, John Kohn, sued Norfolk's Chief of Police and five other police officers. She contended that her husband, a police recruit, sustained repeated head injuries while training to become a police officer; the injuries eventually resulted in his death.

The defendants filed a plea in bar, contending that the Workers' Compensation Act was the exclusive remedy for the decedent's injury. The trial court granted the widow's demand to have the plea decided by a jury. But in a later hearing, the court granted the defendants' motion for summary judgment on the plea, and dismissed the action with prejudice. This Court awarded the widow an appeal on February 28, 2014.

ASSIGNMENT OF ERROR

1. The trial court erroneously granted summary judgment despite the existence of a disputed material fact in the case. Specifically, the question whether the death resulted from injury by accident presented a jury issue, and the trial court violated the widow's constitutional right to trial by jury by granting summary judgment. (Preserved at A. 41-42, 50-55.)

FACTS

Since the trial court granted summary judgment to the defendants, this Court views the facts in the light most favorable to the widow. *Klaiber v. Freemason Associates*, 266 Va. 478, 481-82 (2003). No evidence was taken in support of the plea, so the facts recited here are based on the complaint, the medical examiner's report, and the widow's responses to requests for admission, which were the only sources relied upon below. *Lee v. City of Norfolk*, 281 Va. 423, 427 (2011).

John Kohn entered the Norfolk Police Academy as a recruit on September 20, 2010. A. 3, §10. On various

dates thereafter, including December 7 and 9, 2010 (A. 27, 35-37, responses #5, 7), he sustained numerous traumatic blows to his head, delivered by defendants Leldon Dion Sapp, Stephen Bailey, Michael James Reardon, and L. L. Tessier, each of whom served as an instructor at the academy. A. 2-3, §§5-8, 11.

As a result of these repeated, violent blows to the head over this span of time, Kohn suffered a cerebral hemorrhage and a subdural hematoma, proximately causing his death on December 18, 2010. A. 3, §12. A medical examiner noted that Kohn sustained a head-to-head collision on December 9, 2010 that may have played a role in his death, "but other blows to the head prior to this event cannot be excluded as contributing to his terminal head injury." A. 13, 15.

ARGUMENT

Standard of Review

This Court reviews de novo a grant of summary judgment. *Transp. Ins. Co. v. Womack*, 284 Va. 563, 567 (2012). The Court also reviews do novo the question whether a disputed material fact exists, granting all reasonable inferences in favor of the nonmoving party. *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 351 (2003).

Discussion

The dispositive question in the trial court was whether the decedent's death was due to an injury by accident. The dispositive question in this appeal is whether a factual dispute exists as to that point.

Given the language of the complaint, which alleges repetitive traumas over a period of many days, and the medical examiner's report, which cannot exclude those repetitive traumas as a cause of death, the second question

must be answered in the affirmative, and this judgment must be reversed.

A. Injury by accident

The primary disputed issue below was whether the death resulted from an injury by accident. If that question is ultimately answered in the affirmative, then the claim is within the Workers' Compensation Act, and a suit such as this one is barred by Code §65.2-307. If it is answered in the negative, then the defendants may be liable in tort.

Not every work-related injury is an injury by accident. Such an injury must feature "an identifiable incident that occurs at some reasonably definite time, which is the cause of an obvious sudden mechanical or structural change in the body." *The Lane Co. v. Saunders*, 229 Va. 196, 199 (1985) (internal quotation marks omitted).

This definition excludes injury from repetitive traumas. This Court has consistently so held. *See*, *e.g.*, *Aistrop v. Blue Diamond Coal Co.*, 181 Va. 287, 293 (1943) (injury "caused by the cumulative effect of many acts done . . . no

one of which can be identified as the cause of the harm, is definitely excluded from compensation."); *Morris v. Morris*, 238 Va. 578, 589 (1999) ("injuries resulting from repetitive trauma . . . or other cumulative events . . . are not 'injuries by accident.'")

One common example of repetitive-trauma injury is carpal-tunnel syndrome. This Court held in *Stenrich Group v. Jemmott*, 251 Va. 186 (1996) that such injuries were not compensable under the Act because they did not constitute injury by accident. The General Assembly then amended the Act to permit recovery for carpal-tunnel syndrome in certain circumstances, as an ordinary disease of life. 1997 Va. Acts ch. 15; *Steadman v. Liberty Fabrics, Inc.*, 41 Va. App. 796, 803 (2003) (noting statutory change and listing conditions of compensability).

The legislature has not created a similar exemption for brain injuries caused by repetitive traumas, so those claims still fall outside the Act.

B. The factual dispute in this case.

The complaint states that the decedent "was repeatedly and violently struck in the head" on various dates over a 2½ month period, and that these repeated blows proximately caused his death. A. 3, ¶¶11-12. A medical examiner noted that a head-to-head collision on the last day of training may have played a role in the death, "but other blows to the head prior to this event cannot be excluded as contributing to his terminal head injury."

In response, the defendants showed the trial court the widow's answers to requests for admission. Those answers (A. 35-38, requests 5, 7, and 9) agreed that Kohn sustained blows on December 7 and 9, 2010, and that he collapsed on the 9th. The requests do not address traumas on other dates, and the widow did not admit that the blows on December 7 or 9 proximately caused the death.

Upon this sparse record – there was no evidentiary hearing on the plea – the trial court purported to resolve the question whether the death was due to repeated trauma or

a single, identifiable incident. In doing so at A. 55, the court evidently applied federal standards for summary judgment:

> . . . I can't find any support for the notion that there's no injury by accident here because the autopsy can't – can't conclusively say it was this one blow versus an aggregation of blows.[1]

Virginia judges may not do this. In federal courts, summary judgment is a favored remedy; a nonmovant may not simply rest on pleadings, but must go beyond them by pointing to evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). In the courts of this Commonwealth, where summary judgment is a disfavored and drastic remedy, *Slone v. General Motors Corp.*, 249 Va. 520, 522 (1995), reliance on pleadings is perfectly proper to establish a disputed, triable fact. *McNew v. Dunn*, 233 Va. 11, 14-15 (1987) ("The denials in Dunn's answer as originally filed put material facts genuinely in

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[1] This finding wrongly placed the burden on the widow to prove that the Act did not apply. Where a party seeks to bring an injury within the Act's coverage, that party bears the burden of proof. *Hilton v. Martin*, 275 Va. 176, 179-80 (2008).

dispute, and it clearly appears, therefore, that McNew was not entitled to summary judgment on the pleadings.")

Summary judgment is not appropriate where disputed issues of material fact exist. Rule 3:20. In evaluating such a motion, allegations in pleadings are sufficient to create a triable issue. *O'Brien v. Snow*, 215 Va. 403, 405 (1974) (party has no duty to fully develop claim in discovery; averments and denials in pleadings require resolution by jury). And the widow was entitled to all reasonable inferences from her allegations. *Carson v. LeBlanc*, 245 Va. 135, 139-40 (1993). In this case, that includes an inference that the death resulted from repetitive trauma, so the statutory bar cannot be said to apply as a matter of law.

Whether a jury will ultimately find that the death was caused by a single, identifiable event or by multiple traumas in unknowable at this point. But the widow has a constitutional right to present her case to such a jury, rather than having a trial judge take that right away.

CONCLUSION

The issue in this appeal is not whether the decedent died as a result of injury by accident. The issue here is who decides that question. Where a genuine dispute exists as to the events that caused the death, the Constitution commands that the decisionmaker must be a jury.

This Court should reverse the judgment below and remand this case to the trial court for a jury trial on the special plea and the merits of this action.

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of the Estate of JOHN KOHN,
deceased

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CERTIFICATE

I hereby certify that on this 7th day of April, 2014, pursuant to Rules 5:26(h) and 5:32(a)(3)(ii), fifteen paper copies of the foregoing Brief of Appellant and ten paper copies of the Appendix, along with 10 copies on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. The required copies of the Brief and Appendix, along with one copy on CD-Rom, have been served, via UPS Ground, upon:

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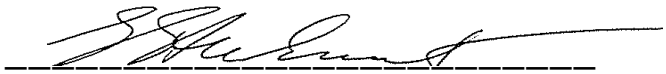

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