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 APPELLEES

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IN THE SUPREME COURT OF VIRGINIA
At Richmond

Record No. 131162

PATRICIA KOHN, *etc.*,

Appellant,

v.

BRUCE P. MARQUIS, *et al.*,

Appellees.

BRIEF OF APPELLEES

Appellees Bruce P. Marquis, Sharon Chamberlin, Leldon Sapp, Stephen Bailey, Michael Reardon and L.L. Tessier, by counsel, submit the Brief of Appellees.

STATEMENT OF THE CASE

Defendants/appellees agree with most of the Appellant's Statement of the Case, but write to clarify one part of it. Appellant says, "The trial court granted the widow's demand to have the plea decided by a jury." Brief of Appellant at 1. Defendants maintained throughout that the jury could not properly decide questions or conclusions of law but would be limited to questions of fact.

By the order entered May 21, 2012, the court below determined, on plaintiff's motion, that it would convene a jury "to hear and determine only the disputed issues of material fact" presented by the plea in bar regarding the question of jurisdiction under the Workers' Compensation Act. (Circuit Court Record at 236, not printed in Appendix.) Appellant assigns no error to the entry of this order or the language in it.[1]

FACTS

Defendants/appellees agree that on review of the grant of summary judgment the Court must view the facts in the light most favorable to the non-moving party. Plaintiff says that the facts recited on her brief come from "the complaint, the medical examiner's report, and the widow's responses to requests for admission." [Brief of Appellant at 2.] However, she omits most of what was established by admission, so defendants here restate the facts. Included among the things a court considers on a motion for summary judgment are admissions. Rule 3:20.

John Kohn was in training as a police recruit at the Norfolk Police Department's Police Academy from September 20, 2010, through December 9, 2010. [App. 3, ¶¶ 10, 11.] There is no dispute that Kohn and

[1] Neither does she assign error to the ruling that the issues regarding the plea in bar would be tried to a separate jury from the jury trying the liability case, if any.

the six defendants were employees of the City of Norfolk at all relevant times. [App. 2, ¶¶ 3-9; App. 26-27, 31, ¶¶ 2, 3, 4.] Given plaintiff's allegations and admissions, there is no dispute that his injury and death arose out of and in the course of Kohn's employment with the City.

On December 9, 2010, Mr. Kohn had a head-to-head collision with another recruit while he was engaged in Police Academy activities. [App. 31, ¶ 6.] Also on December 9, 2010, Kohn suffered several blows to his head while he was engaged in a defensive training exercise at the Police Academy with defendant Officer Sapp. [App. 31-32, ¶¶ 7, 8.] In argument in support of her request for jury trial on the Workers' Compensation bar, plaintiff told the court:

> [O]n December 9, 2010 Officer Leldon Sapp repeatedly struck Plaintiff's decedent in the head with his fists to the point where Plaintiff's decedent was no longer able to defend himself from Officer Sapp. At this point, Officer Sapp suspended his attack and shortly thereafter Mr. Kohn was transported to Sentara Leigh Hospital and then to Sentara Norfolk General Hospital. Nine days later he died of trauma to the head.

[App. 15.]

In response to Requests for Admission, plaintiff admitted that:

> [T]he medical record indicates that Mr. Kohn arrived at Sentara Leigh Hospital on December 9, 2010 at 5:24 p.m. It is likewise admitted that he was transported to this location from a training exercise at the Norfolk Police Academy during which he began demonstrating serious neurological deficits. Upon evaluation at Sentara Leigh Hospital the medical record indicates that he

> "collapsed" at the Police Academy. He was documented to have a Glasgow coma scale of 3 upon arrival. A CT Scan done there was reported to show bilateral subdural hematomas with midline shift.

[App. 37-38, ¶ 8.]

Plaintiff alleged that recruit Kohn suffered many blows to the head throughout his police training - September 20 through December 9, 2010 - causing a brain hemorrhage, subdural hematoma and death. [App. 3, ¶¶ 10-11; App. 32, ¶ 10-11]. In argument on summary judgment, for support for the proposition that the blows to the head occurred throughout his academy training, she relied on the allegations of her Complaint. [App. 42 ("repetitive traumas over the course of fifty [sic] days"); App. 52 l.18-20.] Other than the events of December 9, 2010, there appears of record evidence of only one other head blow, on December 7, 2010. [App. 31, ¶ 5; See App. 15, first full paragraph.]

On brief, plaintiff relies on language quoted from the autopsy[2] in defendants' brief, filed in October 2011, to the effect that the medical examiner "believes that the head to head collision may have played a significant role in Mr. [K]ohn's terminal event, but other blows to the head

[2] The medical examiner's report is not in the record. Plaintiff relies on quotations from it that first appeared in a brief filed by defendants in October 2011. [App. 13.]

prior to this event cannot be excluded as contributing to his terminal head injury." [Brief of Appellant at 3; App. 13.]

At the hearing on summary judgment, after hearing plaintiff's less than accurate paraphrase of the autopsy report ("it's not possible to determine which one of these cumulative traumas was the precipitant cause of death," App. 52, ll.3-5), Judge Hall responded that in the light of the facts established by the requests for admissions, "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 one blow versus an aggregation of blows." [App. 55, l.9-14.] Plaintiff contends this shows that the court shifted the burden of proof to the plaintiff. [Brief of Appellant at 8.]

On Brief, appellant says, "the widow did not admit that the blows on December 7 or 9 proximately caused the death." [Brief of Appellant at 7.] To the contrary, in the Complaint, it is alleged that defendants Sapp, Bailey, Tessier and Reardon were instructors at the Police Academy [App. 2, ¶¶ 5-8], that from September 20, 2010, through December 9, 2010, they "repeatedly and violently struck" Mr. Kohn in the head [App. 3, ¶ 11], that the repeated blows to the head "ultimately resulted in a brain hemorrhage which created a subdural hematoma which proximately caused plaintiff's decedent's death on or about December 18, 2010," [App. 3, ¶ 12] and that

the negligent, grossly negligent and willful acts of the instructor defendants "proximately resulted" in Mr. Kohn's death [App. 4, ¶¶ 18, 21] or "proximately caused" it. [App. 5, ¶ 25.] Defendants cannot read these allegations for anything but to include an allegation that the blows to Mr. Kohn's head on December 9 contributed to cause his death, which means that while there may be a dispute about their being the proximate cause, there is no dispute that plaintiff alleged them to be a proximate cause of his death. If appellant now asserts that the head blows of December 9 did not contribute to cause the subdural hematoma, that will change the complexion of this case, but such an assertion would contradict the Complaint and appellant's admissions described above.

As far as plaintiff was aware, Mr. Kohn had not before December 9, 2010, sought or received medical treatment for injuries experienced during his training as a police recruit. [App. 39, ¶¶ 19, 20.]

STANDARD OF REVIEW

Defendants agree that the Court reviews this case *de novo*.

ARGUMENT

This appeal presents either a harmonization of two lines of authority in this Court, or a collision of them, depending on the Court's ruling. Both involve the determination of what is and what is not an "injury by accident"

compensable under the Workers' Compensation Act [the "Act"]. One line of authority holds that when an employee's underlying condition is aggravated, exacerbated, or accelerated by an "injury by accident," this injury is compensable and falls under the exclusivity of the Act, just like any other "injury by accident." The other line of authority holds that a gradually-incurred injury caused by cumulative or repetitive trauma is not compensable as an "injury by accident," as there has been no identifiable incident which is the cause of an obvious sudden mechanical or structural change in the body. Defendants contend that the record on summary judgment demonstrates an identifiable incident occurred on December 9, 2010, which caused the sudden change in Mr. Kohn's body, and that the Act therefore applies. Despite Plaintiff's Complaint allegations and subsequent admissions, Plaintiff asserts that there was no "injury by accident," as the definition of injury by accident "excludes injury from repetitive traumas," Brief of Appellant at 5.

It is submitted that the court should treat cumulative or repetitive trauma conditions no differently than any other pre-existing condition that may predispose a worker to an injury. That is, while those underlying conditions may or may not be compensable under the Act, when an identifiable accident causing a sudden change in the body occurs involving

the aggravation, exacerbation or acceleration of the pre-existing condition, there has been an "injury by accident" covered under the Act.

In the case of an employee suffering an injury by accident, the Workers' Compensation Act provides the exclusive remedy, barring personal injury lawsuits against the employer and co-workers. Virginia Code § 65.2-307; Ferrell v. Beddow, 203 Va. 472, 125 S.E.2d 196 (1962). The Act, as the Court has noted many times, represents a societal balance between employee and employer. It is an Act for the benefit of injured employees. Byrd v. Stonega Coke & Coal Co., 182 Va. 212, 221, 28 S.E.2d 725, 729 (1944). The General Assembly balanced the needs of employers and employees by guaranteeing to the injured worker compensation for his injury and relieving him of proving common law negligence and countering traditional defenses available in negligence actions, while limiting his recovery as compared to full tort damages. Low Splint Coal Co. v. Bolling, 224 Va. 400, 406, 297 S.E.2d 665, 668 (1982). As a remedial Act, it is to be liberally construed in favor of the worker, Barker v. APCO, 209 Va. 162, 166, 163 S.E.2d 311, 314 (1968), by which is meant, liberally construed in favor of benefits for the worker under the Act. These societal balances are cemented in place by the exclusivity provision of Code § 65.2-307. The Act provides coverage for every worker

injured in an accident as a broad policy protecting the entire class of workers. An individual worker who believes he or she may do better with a common law tort action does not have that option.

The Act covers "injury or death by accident arising out of and in the course of employment." Virginia Code § 65.2-300(A). Plaintiff relies on the definition of injury by accident as "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, 326 S.E.2d 702, 703 (1985) (quotes and citations omitted), quoted in Brief of Appellant at 5. Defendants contend the record before the Circuit Court met exactly this test.

It is fundamental to Workers' Compensation law that the employer takes the claimant as it finds him, so that the fact that the employee suffering an injury by accident had a pre-existing condition, work-related or not work-related, or a predisposition to a particular injury, does not excuse the employer from liability under the Act. An identifiable incident that aggravates, exacerbates or accelerates a pre-existing condition is still an injury by accident. Combs v. Virginia Power, 259 Va. 503, 508-09, 525 S.E.2d 278, 281-82 (2000); Imperial Trash Service v. Dotson, 18 Va. App. 600, 604, 445 S.E.2d 716, 719 (1994); Kemp v. Tidewater Kiewit, 7 Va.

App. 360, 364, 373 S.E.2d 725, 727 (1988); Russell Loungewear v. Gray, 2 Va. App. 90, 95, 341 S.E.2d 824, 826 (1986); Jewell Ridge Coal Corp. v. McGlothin, 2 Va. App. 294, 298, 343 S.E.2d 94, 96-7 (1986).

The inquiry for the court below was not whether the blow or blows to the head suffered by Mr. Kohn on December 9, 2010, were the sole cause of his death, the issue was whether he had suffered an injury by accident on December 9, 2010, that was a cause of his death. See the comments by the court below at App. 52, ll. 8-10, and App. 53, l. 21 through App. 54, l. 2.

The facts established in support of the motion for summary judgment show very clearly that Mr. Kohn suffered "an identifiable incident that occurred at some reasonably definite time," Lane, supra. He suffered several blows to his head on December 9, 2010, while he was engaged in a defensive training exercise at the Police Academy with defendant Leldon Sapp. [App. 31-32, ¶¶ 7, 8.] The same day, he collided head-to-head with another recruit.

And the evidence leaves no doubt that the head blows caused "an obvious sudden mechanical or structural change in the body." Lane, supra. He began demonstrating serious neurological deficits during the training exercise. Upon evaluation the medical record indicated that he "collapsed"

at the Police Academy. He was comatose and a CT Scan showed bilateral subdural hematomas with midline shift. [App. 37-38, ¶ 8.]

Plaintiff's characterization of this event was that Sapp repeatedly struck Mr. Kohn in the head to the point Kohn could no longer defend himself, and that shortly thereafter he was transported to the hospital. [App. 15, third full paragraph.]

A person hit in the head who collapses, demonstrates neurological deficits and is carried to a hospital in a coma where it is revealed he has a bilateral subdural hematoma has obviously suffered a sudden mechanical or structural change in the body. The fact that he may have come to work that day with a pre-existing condition that made him more susceptible to serious injury from blows to the head does not change the fact that on December 9 he suffered injury by accident. If he did have a pre-existing condition that morning, the accident aggravated, exacerbated or accelerated it.

And although Lane speaks of an "identifiable incident," it has not been required that the incident be an instantaneous event, only that it be bounded with temporal precision. Morris v. Morris, 238 Va. 578, 385 S.E.2d 858 (1989). See Combs v. Virginia Power, supra (aggravating injury from two to three hours of neglect in attending to ill employee);

Southern Express v. Green, 257 Va. 181, 509 S.E.2d 836 (1999) (chilblains from four hours working in a walk-in cooler an identifiable incident); Byrd v. Stonega, supra (death from exposure to heat for eleven hours at coke ovens).

The Complaint makes clear that blows to the head on December 9 were a cause of Mr. Kohn's death. [Complaint, ¶¶ 11-12, 18, 21, 25; App. 3-5.] And plaintiff's argument in support of her motion for jury trial on the plea in bar suggests her evidence at that trial would emphasize the blows to the head delivered by Officer Sapp on December 9. See App. 15, third full paragraph.

The quotation from the medical examiner's report is not probative of anything. The events of December 9, head blows followed by neurological deficits and collapse, and the Complaint's allegations of causation, make out a case of injury by accident. That the medical examiner was quoted as saying that other causes may have contributed is not enough to overcome it. Even if the quotation is taken as probative of something, it certainly is not an opinion that Kohn's death resulted from an injury from cumulative and repetitive trauma. Many injuries may have multiple underlying causes reaching back in time, but that does not change the conclusion of injury by accident in this case.

Plaintiff cites Lane, supra; Aistrop v. Blue Diamond Coal Co., 181 Va. 287, 24 S.E.2d 546 (1943); and Morris, supra, to make a case of injury by repetitive trauma. In none of those cases could an incident which caused injury be identified. E.g., Aistrop (gradual poisoning and suffocation by noxious gases); Lane (strenuous work followed by back pain without identifiable specific known injury or cause); Morris (Morris - heart attack some time after strenuous work with pre-existing heart disease; Hood - ruptured cervical disc found weeks after strenuous work; Totten - heart attack during break after two and one half hours of installing ceiling tiles).

In Morris, this Court held that "injuries resulting from repetitive trauma, continuing mental or physical stress, or other cumulative events" do not meet the definition of "injuries by accident" because they cannot be traced to an identifiable incident resulting in "an obvious sudden mechanical or structural change in the body." 238 Va. at 589, 385 S.E.2d at 865.

In none of the Morris cases could the claimant show that "the cause of his injury was an identifiable incident or sudden precipitating event and that it resulted in an obvious sudden mechanical or structural change in the body." Id. Here, the blows to the head on December 9, 2010, are the identifiable incident which resulted in the mechanical or structural change in

Mr. Kohn's body and the resultant injury. The court correctly awarded defendants summary judgment.

Appellant emphasizes that she was denied the constitutional right to a jury trial on the plea in bar. Appellees do not think appellant means to argue that Rule 3:20, which permits summary judgment when no material facts are in dispute, is unconstitutional. Indeed, although Art. I, § 11 of the constitution says that the right to jury trial is to be held "sacred," nevertheless, the constitution is not offended by a rule allowing the early end to litigation when there is no fact for the jury to decide. W.S. Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S.E. 15 (1921). Moreover, if the constitutional right to a jury trial somehow permits a party a jury trial even when no material fact is genuinely in dispute, that right was waived in this case, when the circuit court entered the order of May 21, 2012, providing that it would convene a jury "to hear and determine only the disputed issues of material fact" presented by the plea in bar (Circuit Court Record at 236-39, not printed in Appendix), and when appellant let that order stand without assigning error to it.

Plaintiff says that summary judgment is "disfavored" and "drastic," citing Slone v. General Motors Corp., 249 Va. 520, 522, 457 S.E.2d 51, 53 (1995).

This Court has said in Slone and a number of other cases that summary judgment is a drastic remedy, but the undersigned does not think the Court has said that it is "disfavored."[3] Indeed, in Slone itself, the Court affirmed a summary judgment granted to one of two defendants, and two justices would have affirmed the grant of summary judgment to the other defendant. 249 Va. at 528-30.

In another case cited by plaintiff for the proposition that she was entitled to all reasonable inferences from her pleadings, Carson v. LeBlanc, 245 Va. 135, 427 S.E.2d 189 (1993), the Court also affirmed an award of summary judgment to a defendant on the circuit court's determination that the pleadings and admissions showed that plaintiff was contributorily negligent as a matter of law. 245 Va. at 142, 427 S.E.2d at 193. The Carson Court noted that the summary judgment and discovery rules were adopted to allow to bring litigation to an end at an early stage when it clearly appears that one of the parties is entitled to judgment as made out by the pleadings and admissions. 245 Va. at 140, 427 S.E.2d at 192

[3] A Westlaw search will reveal a few Circuit Court opinions suggesting that this Court has said that summary judgment is disfavored. E.g., Turrisi Companies, LLC v. Cole Holdings Corp., 86 Va. Cir. 211 (Fairfax Co. 2013). Turrisi cites Smith v. Smith, 254 Va. 99, 487 S.E.2d 212 (1997). In Smith, this Court reiterated that summary judgment is a drastic remedy, but did not say it is "disfavored." See 254 Va. at 103-04, 487 S.E.2d at 215.

(citations omitted). Of course, these rules, like all the Rules, were adopted by this Court.

This Court has affirmed other summary judgments. See, e.g., Thurmond v. Prince William Professional Baseball Club, Inc., 265 Va. 59, 574 S.E.2d 246 (2003); Leslie v. Nitz, 212 Va. 480, 184 S.E.2d 755 (1971); Schluderberg-Kurdle Co. v. Trice, 198 Va. 85, 92 S.E.2d 374 (1956).

The question in this case is whether a genuine dispute existed as to a material fact, not whether summary judgment is disfavored. Defendants would say, and they hope the Court would say, that the rules allowing an early end to litigation where there is no fact to be decided by the jury are salutary rules and that summary judgment, when granted in a proper case, would be favored, not disfavored.

This Court has said that a party is entitled to reasonable inferences but not to inferences that are "strained, forced, or contrary to reason." Bloodworth v. Ellis, 221 Va. 18, 23, 267 S.E.2d 96, 99 (1980) (citations omitted). The facts of what occurred on December 9, 2010, at the Police Academy are without dispute. In a short time, plaintiff's decedent suffered head blows, collapsed, went into a coma and was found to have a bilateral subdural hematoma. This resulted in his death nine days later. Once these facts are established, they demonstrate an injury by accident on

December 9, and no other fact is material. To conclude that the head blows on December 9 were not the precipitating cause of Mr. Kohn's injury and death would be "strained, forced, and contrary to reason" and also contrary to the allegations in the Complaint. The legal effect of the facts follows. The court properly granted the defendants' motion for summary judgment.

CONCLUSION

WHEREFORE, defendants/appellees pray the Court will affirm final judgment for them.

BRUCE P. MARQUIS,
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Of Counsel for Appellees

CERTIFICATE

I hereby certify that on this 2nd day of May, 2014, fifteen printed copies of this Brief of Appellees, together with one electronic copy on CD-ROM in Adobe Acrobat PDF format, have been hand-filed with the clerk of this Court; that three printed copies of this Brief plus one copy on CD-ROM have been served, via UPS Ground Transportation, upon James C. Lewis, Esq., Shapiro, Lewis, Appleton & Duffan, P.C., 1294 Diamond Springs Road, Virginia Beach, VA 23455 and L. Steven Emmert, Esq., Sykes, Bourdon, Ahern & Levy, P.C., Pembroke One Building, 5th Floor, 281 Independence Blvd., Virginia Beach, VA 23462, both counsel for appellant; and that there has been compliance with Rule 5:26.

Wayne Ringer
Chief Deputy City Attorney