



**In the
Missouri Court of Appeals
Western District**

**STACI M. LEWIS, AND MCCARTNEY
M.E. LEWIS, A MINOR, BY AND
THROUGH HER NEXT FRIEND,
BURLE BROWN,**

Appellants,

DOT TRANSPORTATION, INC.,

Appellant,

v.

**NATHAN R. GILMORE AND BUDDY
FREEMAN,**

Respondents.

WD72629 and WD72654

OPINION FILED:

April 12, 2011

**Appeal from the Circuit Court of Linn County, Missouri
The Honorable Gary E. Ravens, Judge**

Before Cynthia L. Martin, P.J., James Edward Welsh, and Gary D. Witt, JJ.

Stacey M. Lewis and her daughter, McCartney M.E. Lewis, appeal the circuit court's grant of summary judgment in favor of Buddy Freeman in regard to the Lewises' wrongful death action. DOT Transportation, Inc., also appeals the circuit court's grant of summary judgment in favor of Freeman. The circuit court found that the Lewises had made an election of remedies when they obtained a workers' compensation award against DOT Transportation and that they were not entitled to maintain a civil action against Freeman. The Lewises and DOT

Transportation contend that the circuit court erred in granting summary judgment because section 287.280.1, RSMo 2000, allowed the Lewises to proceed in a civil action against Freeman as a result of his failure to insure his liability under the Missouri workers' compensation laws.

We agree.

When considering an appeal from a summary judgment, we review the record in the light most favorable to the party against whom judgment was entered, and we afford that party the benefit of all reasonable inferences. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). We review the circuit court's granting of a summary judgment de novo. *Id.* "The propriety of summary judgment is purely an issue of law." *Id.* Because the circuit court's judgment is based on the record submitted and the law, we need not defer to the circuit court's order granting summary judgment. *Id.* We will affirm the circuit court's grant of summary judgment if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* at 380.

The record established that the Lewises filed a wrongful death suit against Nathan Gilmore and Buddy Freeman for the death of Lonnie R. Lewis (Staci Lewis's husband and McCartney Lewis's father). Lonnie Lewis died on March 27, 2004, when the tractor trailer in which he was riding as a passenger overturned and killed him. The driver of the truck, Nathan R. Gilmore, was operating the tractor trailer in the course of his employment with Freeman, and Lewis was also in the course of his employment with Freeman at the time of the accident.

Freeman operated his tractor trailer pursuant to a contract with DOT Transportation. Freeman did not carry any workers' compensation insurance on his employees.

Simultaneous to the filing of the wrongful death lawsuit, the Lewises also filed a claim for workers' compensation in the name of Lonnie Lewis against Buddy Freeman and DOT

Transportation with the Department of Labor and Industrial Relations.¹ The circuit court stayed the wrongful death action until a determination was made by the Department of Labor and Industrial Relations as to whether Lonnie Lewis's death occurred out of and in the course of his employment. On February 5, 2010, a Division of Workers' Compensation Administrative Law Judge for the Department of Labor and Industrial Relations entered an award in favor of Lonnie Lewis's dependents. The ALJ found that Lonnie Lewis was an employee of Freeman but that Freeman did not carry workers' compensation insurance even though Missouri law required him to carry such insurance. Thus, the ALJ looked to whether another entity could be deemed to be a statutory employer and therefore liable for workers' compensation benefits. The ALJ determined that DOT Transportation was Lonnie Lewis's statutory employer and ordered DOT to pay death benefits and funeral benefits. The ALJ noted, however, that DOT Transportation "may be able to seek indemnity from Buddy Freeman[.]" In regard to Freeman, the ALJ stated:

I make no findings and/or rulings as to the legal rights of claimants and/or [DOT Transportation] as to Buddy Freeman . . . as such rights are to be determined by the statutory and case law of the State of Missouri, other than what I have ruled in the Award pursuant to the Missouri Workers' Compensation Act.

After the entry of the workers' compensation award, DOT Transportation sought to intervene and was allowed to intervene in the Lewises' wrongful death action. Thereafter, Gilmore and Freeman moved for summary judgment. On May 18, 2010, the circuit court granted summary judgment in favor of Gilmore and Freeman, finding that the Lewises had made an election of remedies when they obtained a workers' compensation award against DOT Transportation and that the Lewises could not maintain their civil action against Freeman and

¹The Lewises dismissed Freeman as a party in the workers' compensation claim, but DOT Transportation brought Freeman back into the workers' compensation claim in his capacity as the employer of Lonnie Lewis.

Gilmore. The Lewises and DOT Transportation filed separate appeals from the circuit court's grant of summary judgment.² We have consolidated the appeals.

Both the Lewises and DOT Transportation contend that the circuit court erred in granting summary judgment because section 287.280.1 allowed the Lewises to proceed in a civil action against Freeman as a result of his failure to insure his liability under the Missouri workers' compensation laws even though the Lewises obtained a workers' compensation award against DOT Transportation as the statutory employer. This appears to be a matter of first impression in Missouri.

Section 287.280.1 provides:

Every employer subject to the provisions of this chapter shall, on either an individual or group basis, insure his entire liability thereunder, except as hereafter provided, with some insurance carrier authorized to insure such liability in this state, except that an employer or group of employers may themselves carry the whole or any part of the liability without insurance upon satisfying the division of their ability so to do. . . . If the employer or group of employers fail to comply with this section, an injured employee or his dependents may elect after the injury either to bring an action against such employer or group of employers to recover damages for personal injury or death and it shall not be a defense that the injury or death was caused by the negligence of a fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury or death was caused to any degree by the negligence of the employee; or to recover under this chapter with the compensation payments commuted and immediately payable; or, if the employee elects to do so, he or she may file a request with the division for payment to be made for medical expenses out of the second injury fund as provided in subsection 5 of section 287.220.

This section provides an exception to the usual rule that workers' compensation is the exclusive remedy of an employee or his dependents against his employer for injury or death occurring in

²Although the circuit court granted summary judgment in favor of both Gilmore and Freeman, the Lewises' and DOT Transportation's points relied on complain only about the circuit court's grant of summary judgment in favor of Freeman. Contentions not set forth in points relied on are not preserved for appeal. *Comm. for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 511 n. 7 (Mo. banc 2006). Thus, we do not decide whether the circuit court properly granted summary judgment for Gilmore.

the course of employment. 6 Larson's Workers' Compensation Laws §102.02[2] (2010). Under section 287.280.1, when an employer refuses or fails to insure his liability for workers' compensation insurance, an employee or his dependents may (1) bring an action against the employer to recover damages for the personal injury or death, (2) recover under the workers' compensation law, or (3) file a request for payment to be made for medical expenses out of the second injury fund. In this case, the Lewises opted for option one--filing an action against Freeman to recover damages for Lonnie Lewis's death.

Freeman asserts that, because the Lewises chose to file a claim for workers' compensation and obtained an award of workers' compensation against Freeman as the employer and DOT Transportation as the statutory employer, the Lewises are precluded from filing this wrongful death action against Freeman. Freeman, however, seemingly believes that the ALJ's award for workers' compensation was entered against both him and DOT Transportation. Freeman asserts, "Simply put, [the Lewises] recovered a workers' compensation award against Respondents[, i.e. Freeman and Gilmore,] for the death of Lewis[,] and they cannot now seek a successive civil judgment against Respondents for the death of Lewis." The Lewises, however, never recovered a workers' compensation award against Freeman. Indeed, the ALJ emphatically said she was making "no findings and/or rulings as to the legal rights of claimants and/or [DOT Transportation] as to Buddy Freeman . . . as such rights are to be determined by the statutory and case law of the State of Missouri[.]" The workers' compensation award was against DOT Transportation--not Freeman.

Indeed, Freeman and DOT Transportation are separate entities, and each had the responsibility to secure workers' compensation insurance. Section 287.280.1 says, "*Every employer . . . shall . . . insure his entire liability[.]*" The mere fact that DOT Transportation as the

statutory employer complied with section 287.280.1 should not and does not excuse Freeman from its obligation to secure insurance.³ The legislature expressly directs every employer to obtain workers' compensation insurance and further even penalizes any employer who fails to insure his workers' compensation liability. § 287.128.7, RSMo. Moreover, pursuant to section 287.280.1, the consequences for an employer's not securing workers' compensation insurance is that the employee or his dependents may file a civil action against the employer. This is exactly what the Lewises did. To hold that the Lewises could not file a civil action would take away one of the options that the General Assembly gave an employee to seek redress against an employer who has done nothing to secure workers' compensation insurance for his employees. Clearly, the statute gives the employee or his dependents this option.

Freeman asserts, however, that a civil suit and a claim for workers' compensation based on the same wrongful death are inconsistent remedies and the election to pursue one is a bar to any suit upon the other. We disagree. By not complying with the workers' compensation law, Freeman subjected himself to being sued in a civil case. As previously noted, section 287.280.1 gave the Lewises the right to pursue such action. The workers' compensation award and the civil action are not inconsistent remedies because they are against two separate employers. Nothing in the Workers' Compensation Act prohibits an employee or his dependents from recovering workers' compensation from one employer and tort damages from another employer who failed to secure workers' compensation insurances for its employees. In fact, the plain language of

³See *Baldwin v. Wrecking Corp. of Am.*, 464 F.Supp. 185, 188-89 (W.D.Va. 1979) (Virginia Workers' Compensation Act "demands that [e]very employer insure the compensation of employees," and "the mere fact that plaintiff had a statutory employer who has complied with the Act does not excuse a subcontractor employer from its duty to secure insurance") and *Zocco v. U.S. Dept. of Army*, 791 F.Supp. 595, 604 (E.D.N.C 1992) (North Carolina Workers' Compensation Act requires every employer to "secure the payment of compensation to his employees," and any employer who refuses or neglects to secure such compensation shall be liable either for compensation or at law at the election of the injured employee).

section 287.280.1 allows it. In so ruling, we do not suggest that the Lewises would be entitled to keep both the workers' compensation award from DOT Transportation and any damages recovered from Freeman in the civil action for the same injury. Such double recovery is an evil to be avoided. *See Maryland Cas. Co. v. Gen. Elec. Co.*, 418 S.W.2d 115, 117 (Mo. banc 1967). Any recovery by the Lewises in the civil action would be subject to the subrogation rights of DOT Transportation; therefore, no double recovery would be had for the same injury.

The circuit court erred as a matter of law in concluding that the Lewises had made an election of remedies when they obtained a workers' compensation award against DOT Transportation and that the Lewises were not entitled to maintain a civil action against Freeman. We, therefore, reverse the circuit court's grant of summary judgment as to Freeman and remand for further proceedings.

James Edward Welsh, Judge

All concur.