

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-247

MAGOFFIN COAL, INC.,

PLAINTIFF,

VS:

J U D G M E N T

CAN SOL TAYLOR,

DEFENDANT

Magoffin Coal Company originally filed its complaint on this matter in the Johnson Circuit Court, from which it was removed to this court by defendant Taylor. It is now lodged here under the authority of 28 U.S.C. §1442 (a)(1).

Plaintiff is a Kentucky corporation doing business as a coal mining firm in Magoffin County, and was so engaged on 3 June 1981. On that date defendant Taylor, a United States coal mine inspector whose duties required and permitted him to inspect operations such as plaintiff was conducting, closed, because of plaintiff's mining violations, a public roadway leading to plaintiff's job site. This was the principal outlet from the job site to the public roads and commerce for plaintiff. Plaintiff alleges that its closure has caused loss of coal production and other damages.

Defendant admits going to the job site and closing the road leading to it, but he asserts he was doing so in the normal scope of his employment as a Federal coal mine inspector, and that he is immune thereby from personal liability for his acts.

Plaintiff's claim was described as an action for trespass to property and for malfeasance in office based on defendant's closure acts. Plaintiff asserts the closure was outside his scope of authority. In later argument, plaintiff expands the inferences to be drawn from the foregoing facts to complaint of the tort of interference with its business relations.

Plaintiff's claim based on trespass theory clearly cannot stand in face of the uncontested material facts.

Before one can successfully bring an action for trespass, the defendant must be a "trespasser", one who enters onto or remains upon land in the possession of another and without the possessor's consent. Bradford v. Clifton, 379 SW2 249 (Ky. 1964). It has not been shown here that plaintiff was in possession of the roadway, or even that he could have been in possession of a public way, actual or constructive, or that plaintiff's consent was even required. Ellis v. Beech Creek Coal Co., 467 SW2 132 (Ky. 1971). By no material fact herein has defendant been shown to be a trespasser, and any claim for damages under this theory cannot be sustained. Garrett v. Young, 423 SW2 526 (Ky. 1968).

Plaintiff invites the court's attention to Louisville & Nashville R.R. v. Williams, 53 SW2 75 (Ky. 1932) in support of its alternate theory. This case affirms that a cause of action based on interference with one's business affairs can arise from facts similar to the present, but gives only glancing support to plaintiff's case. In L&NN, similar circumstances involved a railroad, a private party,

which permanently closed a public roadway and thereby adversely affected the coal business of the adjoining landowner. Here, the offending party is the agent of the United States government, whose closing acts only temporarily restricted the plaintiff's use of the particular roadway.

Defendant asserts he was operating within the scope of the authority granted to him under the provisions of 30 U.S.C.801, et seq, Federal Mine Safety and Health Act of 1977. Section 813 of this Act directs authorized representatives of the Secretary - such as defendant here - to make health and safety inspections of coal operations such as those of plaintiff, and Section 814 of the Act requires that operators violating the Act be cited promptly and, on follow-up inspections, requires that "all persons . . . be withdrawn from, and to be prohibited from entering, such area . . .". This, defendant asserts, is the extent of his closure of the subject road, and his acts were clearly authorized by the Act. Defendant asserts that they were not.

Case law supports the defense of the Defendant here.

It appears from the court's review of the record that the acts of which plaintiff complains are those authorized by the Mine Safety and Health Act, supra. Old Ben Coal Corp. v. Interior Board of Mine Op. Appeals, 523 F.2d 25 (CA7, 1975), affirms the authority of a mine inspector to do just as defendant has done here - temporarily shut down a coal operation where the inspector has reason to believe such is necessary to carry out the intent and purpose of the Act.

That mine inspectors have broad powers to so enforce the Act was recognized by the Sixth Circuit Court of Appeals in United States v. Consolidation Coal Co, 566 F.2d 214 (1977).

Bernitsky v. United States, 620 F.2d 948 (CA3, 1980), is clearly in point and affirms that defendant's acts fall within the scope and intent of the Act also. In Bernitsky, the court held that acts identical to those of this defendant fell within the scope of his discretionary function as they advanced the public interest. And the Sixth Circuit Court of Appeals in Raymer v. United States, 660 F.2d 1136 (1981), has held that similar performance in regulating activities do not constitute the sort of acts that are actionable in tort.

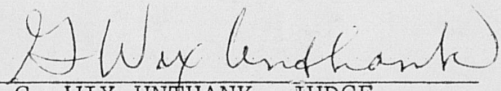
here acts such as those described and attributed to defendant are so clearly within the ambit of the law, he cannot be held liable in tort for the damages they might have caused the plaintiff. Barr v. Mateo, 360 U.S. 564 (1959). Accordingly, and the court being duly advised,

IT IS HEREBY ADJUDGED, DECREED AND ORDERED:

1. That defendant's motion for summary judgment in his favor is SUSTAINED.

2. That the complaint herein and this matter are DISMISSED and STRICKEN from the docket.

The 17th day of August, 1983.


G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 82-247

MAGOFFIN COAL, INC.,

PLAINTIFF,

VS:

O R D E R

CAN SOL TAYLOR,

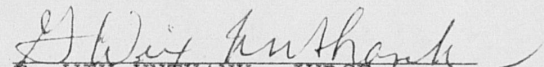
DEFENDANT

The court has reviewed the pleadings, motions and memoranda herein and has reconsidered defendant's motion for judgment on the pleadings. Accordingly, the court's order of 11 February 1983 is set aside, and, the court being sufficiently advised,

IT IS HEREBY ORDERED:

1. That defendant's motion for judgment on the pleadings is converted into a motion for summary judgment under Rule 12(b)(6), Federal Rules of Civil Procedure.
2. The parties are given 30 days to submit motions for summary judgment with supporting memoranda, and 10 days thereafter to respond to opposing motions.
3. At the end of which time, the Clerk of the Court shall submit this matter to the court for consideration.

The 22nd day of June 1983.


G. WIX UNTHANK, JUDGE

TO: Judge
FROM: Donald
DATE: 12-30-82
RE: 82-247
Magoffin Coal, Inc., vs. Can Sol Taylor

PC, Monday, 1-3-83, at 9:00 a.m.

Synopsis: Defendant is a Federal mine inspector. He inspected plff's mine on 5-15-81 and found a violation concerning a mine access road. A meeting was held and the parties thought the matter was resolved.

On 6-3-81, defendant re-inspected the mine and found that the violation had not been corrected. He then issued a withdrawal order to close the mine access road. The order was vacated the next day.

Plff's action is against defendant individually seeking \$3,210.00 in compensatory damages and \$100,000 in punitive damages.

Issues:

1. Whether def. was acting w/in the scope of his official employment.
2. Whether these actions are cognizable as tort actions.
3. Whether def. is immune from tort damages.

Pending Motions:

1. #5 - Defendant's Motion for Judgment on the Pleadings.
2. #8 - Plff's Motion for Enlargement of Time.

Comments:

1. Both parties have filed their PC memos.
2. Defendant's PC memo is very thorough. At first blush, my impression is that def. is entitled to judgment on the pleadings.
3. Plff, in his memo, states that the 6th Cir. has held that a mine inspector is NOT protected by the discretionary exception provided in 28 U.S.C. §2680(c); however, plff does not cite a case to support that statement.

HALL, ALBERTSON & JONES

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E. FORREST JONES, JR.

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OF COUNSEL

REPLY TO:
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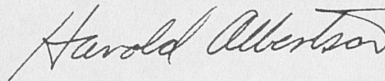
December 23, 1982

G. Wix Unthank
Judge
U.S. District Court
Eastern District of Kentucky
P.O. Box 278
Pikeville, Kentucky 41501

Dear Judge Unthank,

We are enclosing for filing the plaintiff's Motion to Enlarge Time Period. A true copy has been mailed to Charles L. Dause, counsel for defendant.

Very truly yours,



Harold S. Albertson, Jr.

HSAjr/jbe
Enclosure