RENDERED: September 26, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1673-MR

MARSHALL KELLEY, ADMINISTRATOR
OF THE ESTATE OF
MARY FRANCES KELLEY, DECEASED — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE GARLAND W. HOWARD, JUDGE
CIVIL ACTION NO. 94-CI-001437

ROGER D. CARPENTER;
DICKIE SWIFT, INDIVIDUALLY;
DICKIE SWIFT, d/b/a
DICKIE SWIFT INSURANCE AGENCY;
and SHELTER INSURANCE COMPANIES — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, DYCHE and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. This is an appeal by Marshall Kelley (Kelley), administrator and personal representative of the estate of Mary Frances Kelley, deceased, of a summary judgment entered by the Daviess Circuit Court. For the reasons discussed herein, we affirm.

On May 24, 1994, a van operated by appellee, Roger D. Carpenter (Carpenter), struck the automobile being operated by Ms. Mary Frances Kelley. Carpenter was operating his van in the course of his business as a refrigeration repairman and

electrician. As a result of injuries sustained in the accident, Ms. Kelley was hospitalized for almost four months. Less than one week after being released from the hospital, Ms. Kelley died. The cause of death was listed as heart attack on the death certificate, possibly from a blood clot (embolism) which migrated to her heart.

On December 2, 1994, Kelley filed suit against Carpenter and 3-C Electric Company, a business in which Kelley believed Carpenter owned an interest. Kelley gave notice of the filing of the lawsuit, pursuant to KRS 411.188, to Travelers Insurance Company in order that the company might protect its subrogation rights for medical and hospital benefits paid on behalf of Ms. Kelley prior to her death.

On January 23, 1995, 3-C Electric Company was dismissed as a party to the lawsuit after Carpenter and his wife had been deposed, because Carpenter had sold his interest in the business prior to the accident. However, during the depositions it was also discovered that a regular part of Carpenter's business included using his van for the transportation, removal, recovery and storage of Freon, a federally and state regulated hazardous material. Carpenter also testified that his insurance agent, appellee, Dickie Swift, d/b/a Swift Insurance Agency (Dickie Swift), had recommended "the maximum" of one hundred thousand ($100,000.00) dollars in automobile liability insurance coverage to Carpenter for his business van which amount was ultimately

purchased through appellee, Shelter Insurance Companies (Shelter), and in force on the day of the accident.

On May 23, 1995, Kelley filed a separate complaint against Swift for negligence in recommending an automobile liability policy of insurance for Carpenter less than the one million ($1,000,000.00) dollar minimum required by KRS 281.665(6) for common carriers of hazardous materials. This complaint also sought a declaratory judgment against Shelter to prohibit it from issuing similar policies with less than one million ($1,000,000.00) dollars in coverage and seeking reformation of Carpenter's automobile liability policy to provide one million ($1,000,000.00) dollars in coverage for the accident.

Also on May 23, 1995, Travelers Insurance Company, as health claims administrator for an ERISA benefit plan which provided approximately $42,415.59 in medical and hospital benefits to Ms. Kelley prior to her death, filed yet another suit against Carpenter to recover the amounts paid on her behalf. Subsequently, all three cases were consolidated. By agreed order of dismissal entered July 26, 1995, Travelers Insurance v. Carpenter was settled and dismissed with prejudice. By order entered September 22, 1995, Shelter and Dickie Swift were joined as third-party defendants and Kelley's third-party complaint was filed.

On January 4, 1996, Shelter and Dickie Swift filed a motion for summary judgment with supporting memorandum arguing that all claims against them should be dismissed because the

claims were based on theories of liability not supported by fact or law. The parties filed memoranda setting forth their respective positions and on May 29, 1996, the Daviess Circuit Court entered an interlocutory summary judgment which was made final and appealable pursuant to CR 54.02(1). Kelley appeals.

The sole issue presented by this appeal is whether or not a genuine issue of material fact exists as to whether an air conditioning repair person or an electrician, in private business for himself who transports less than fifty pounds of Freon (chlorofluorocarbon) in a company vehicle, which the owner operates, is required to carry automobile liability insurance with limits of no less than one million ($1,000,000.00) dollars pursuant to KRS 281.655(6).

We agree with the Daviess Circuit Court that they are not. The statute in question, KRS 281.655(6) states:

> Any person, firm or corporation operating or causing to be operated any vehicle for the transportation of hazardous materials as defined in KRS 174.405, . . . shall have on each vehicle single limits liability insurance coverage of not less than one million dollars ($1,000,000) for all damages whether arising out of bodily injury or damage to property as a result of any one (1) accident or occurrence.

KRS 174.405(2) defines "hazardous material" by reference to the Federal Hazardous Materials Transportation Act (49 USC § 1801, et. seq.), which lists "hazardous materials" in appendix A of 49 CFR, § 172.101. There is no dispute that Freon, the trade name for chlorofluorocarbon, is a listed hazardous material.

Nevertheless, Kelley's claim must fail because KRS 281.605, ("Exemption of motor vehicles used for certain purposes") exempts from all the provisions of Chapter 281, except safety regulations:

> (6) Motor vehicles owned in whole or in part by any person and used by such person to transport commodities of which such person is the bona fide owner, lessee, consignee, or bailee, provided however, that such transportation is for the purpose of sale, lease, rent, or bailment, and is an incidental adjunct to an established private business owned and operated by such person within the scope and in furtherance of any primary commercial enterprise of such person other than the business of transportation of property for hire; ... .

Kelley's argument that Carpenter is a "carrier for hire" is without merit. KRS 281.011(1) defines "Motor Carrier" as "[a] person who owns, controls, manages, or leases . . . any vehicle for the transportation of person or property for hire . . ." (emphasis added).

This definition has previously been examined by this Court in Brown v. Blanton, 297 Ky. 389, 180 S.W.2d 288, 290 (1944), wherein it was held that a sawmill operator who contracted to deliver lumber was transporting property 'for hire' because "[t]he transportation of lumber was a substantial part of his business, as substantial and important as the logging or sawing end . . . [and he] was as primarily engaged in transportation as he was in the other features of his business." Id. The Court continued, "[i]t is not to be thought that by

combining a transportation business with another industry one may escape [liability under the statute]." Id.

Here, the converse is true, Kelley attempts to characterize an electrical and air conditioning/refrigeration repair business as a transportation business to make the hazardous material statute apply. His goal is to impose increased liability upon Carpenter and his insurer, Shelter, through that statute.

Kelley submits Carpenter's testimony that "disposal of used or bad freon is a necessary and indispensable part of [his] business." But it is not a primary part of the business. Carpenter uses a freon recovery machine, which is a portable system that stores the material in a special tank of fifty pounds or less. The machine is carried in the van to and from the job location when working on refrigeration or air conditioning units. The primary and most substantial part of Carpenter's business is the service he provides to his customers, i.e, the restoration of a broken air conditioner or refrigeration unit to operable condition. The services Carpenter provides require experience and/or training, the appropriate parts (hardware), and various supplies or "commodities" such as freon. Further, on the day of the accident, Carpenter was on his way to perform electrical repairs and neither the portable freon recovery unit nor any freon was in the van.

The transportation, removal, recovery and storage of freon by Carpenter is a necessary, but incidental accompaniment

to air conditioning and refrigeration service and repair. Carpenter's use of the portable freon recovery unit in the van does not make him a common carrier, i.e., "primarily engaged in the business of transportation." The law applicable to common carriers is peculiarly rigorous, and it ought not be extended to persons who have not expressly assumed that character. Senters v. Ratliff's Adm'r., 278 Ky. 290, 128 S.W.2d 724, 725 (1939).

In conclusion, Carpenter's van is expressly exempted from regulation as a "Motor Carrier" under KRS Chapter 281 by KRS 281.605. This exemption precludes application of KRS 281.655(6) and its requirement of a minimum of one million dollars ($1,000,000.00) in automobile liability insurance coverage. Therefore, as a matter of law, Kelley cannot prevail against Dickie Swift or Shelter under this theory of liability. Summary judgment was appropriate.

The judgement of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

William D. Tingley
Louisville, KY

BRIEF FOR APPELLEE:

W. Mitchell Deep
King, Deep and Branaman
Henderson, KY