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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000742-MR

RUTH BLASKO — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 07-CI-00705

MERCY HEALTH PARTNERS-
LOURDES, INC., d/b/a
LOURDES HOSPITAL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: Appellant, Ruth Blasko, brought a common-law personal injury claim against Appellee, Mercy Health Partners-Lourdes, Inc., d/b/a Lourdes Hospital, alleging that Lourdes' negligence resulted in the injuries she sustained in

a fall on Lourdes' premises. Lourdes moved for summary judgment, asserting that Blasko's tort claim was barred by the exclusive remedy provision of Kentucky's Workers' Compensation Act, Kentucky Revised Statute (KRS) 342.690(1). In a March 27, 2009 order, the McCracken Circuit Court granted summary judgment in favor of Lourdes. We affirm.

Ruth Blasko worked as a certified perfusionist. During her deposition, Blasko described this position:

> Blasko: Basically, during surgery, the surgeon needs a still field, so—
>
> Q: A still field?
>
> Blasko: Yeah. Something that's not moving—
>
> Q: Okay.
>
> Blasko: --because the surgery is very delicate, you know, working on the heart. So, we have to reroute the blood from the heart to the machinery, the heart-lung machine. And you can't have the lungs on the ventilator, you know, breathing back and forth because it's in his way, you need everything still. So, we basically clamp the heart and lungs out of circulation and reroute the blood from the patient to the machine, and then basically the machine acts like the heart and the lungs and keeps the patient alive during surgery.
>
> Q: Okay. And I guess this would be cardiac surgery or —
>
> Blasko: Yes.
>
> Q: --open-heart surgery?
>
> Blasko: Yes.

Q: Would you be responsible for actually clamping part of the physical body of the patient?

Blasko: No. The surgeon does that.

Q: Okay. Would it be fair to say that your job, then, was machinery oriented?

Blasko: Yes.

Q: Okay. And it was called a heart-lung machine?

Blasko: Um-hum. Or the bypass machine. There's other machinery, as well, that we use; heater/coolers, ACT machines, cell savers, balloon pumps, ECMOs.

Q: Okay.

Blasko: There's a whole lot. VADs.

Q: So, without a perfusionist, the surgeon—

Blasko: You can't do the surgery.

Q: -- would not be able to perform the surgery?

Blasko: Yes.

Q: Now, are there any other people that are qualified to run these machines, or do you actually have to have a certified perfusionist?

Blasko: You have to have a perfusionist.

Q: Do you know if there's a requirement of the state or the medical board of licensure or—I guess do you know why you have to have a perfusionist perform that activity?

Blasko: You have to know how to use the equipment and understand the physics and the physiology and everything, because it's pretty complicated because you're adding a lot of different drugs and calculating

different flows based on the patient. Every patient's different. Every surgery's different. And you have to know the different surgeons and their methods and be able to think about what to do if something falls apart and know how to change everything out, understand how to put everything together, take everything apart. And it's a lot involved, so you have to be trained in it.

Q: What if I guess one of your assistants decided they had learned all there was to know and even though they didn't have a certification they were in there performing your activity during the surgery, would the hospital get in trouble—

Blasko: Oh, yeah.

Q: --if an inspector walked in and—

Blasko: There's no way that the assistant could do it. No.

Q: So, they need someone of your qualifications—

Blasko: Correct.

Blasko testified that during an open-heart procedure, she followed the orders of the cardiac surgeon. However, Blasko was employed by Fresenius Medical Care, an international firm which provides perfusionists on an as-needed basis. Fresenius had a contract with Lourdes to provide it with perfusionists to assist cardiac surgeons performing open-heart procedures at Lourdes Hospital. When an open-heart surgery was scheduled at Lourdes Hospital, Lourdes would notify Fresenius, and Fresenius would then offer Blasko or its other perfusionists the opportunity to work during that operation.

Fresenius owned and maintained the equipment Blasko used during open-heart procedures, but stored that equipment on Lourdes' premises in a caged area a short distance away from the room Lourdes designated for its open-heart procedures. When an open-heart procedure was finished, Blasko would move the equipment back into that room. Blasko was on the premises of Lourdes Hospital on July 6, 2006, putting the Fresenius equipment back into that storage room following an open-heart procedure, when she slipped and fell allegedly due to a piece of plastic on the floor. Blasko claims to have suffered significant injuries as a result of the fall.

On July 2, 2007, Blasko filed a workers' compensation claim against Fresenius, which maintained a policy of Workers' Compensation insurance at all relevant times; her claim was accepted and she has been paid over $31,468.53 in medical expenses through its carrier. Blasko filed this tort action against Lourdes on July 3, 2007.

ANALYSIS

As a preliminary matter, Blasko takes umbrage with the fact that, in total, the trial court granted summary judgment in favor of Lourdes in an order that consists of three sentences and no apparent reason for its decision. Although it would have been better practice for the trial court to have added a further measure of clarity, we note that 1) the only issue that was before the trial court was whether

the exclusive remedy provision of Kentucky's Workers' Compensation Act applied in favor of Lourdes; 2) Blasko made no request for more specific findings; and that 3) the order was a summary judgment order, and pursuant to Civil Rule (CR) 52.01, specific findings and conclusions of law are not required with summary judgments. *See Wilson v. Southward Inv. Co. No. 1*, 675 S.W.2d 10 (Ky. App. 1984). Rather, summary judgment is proper if the record, when examined in its entirety, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Here, the question presented is one for the Court to decide as a matter of law. Of relevance, KRS 342.690(1) states in part that "[i]f an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . on account of such injury." It further provides that "employers" include "contractor[s] covered by subsection (2) of KRS 342.610." *Id*. KRS 342.610(1), in turn, makes "[e]very employer subject to this chapter . . . liable for compensation for injury . . . without regard to fault as a cause of the injury." In what is sometimes referred to as "up-the-ladder liability," the statute also makes "[a] contractor who subcontracts all or any part of a contract . . . liable for the payment of compensation to the employees of the subcontractor unless the

subcontractor primarily liable for the payment of compensation has secured the payment of compensation as provided for in this chapter." KRS 342.610(2). Furthermore, "[a] person who contracts with another . . . [t]o have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor." *Id*.

The purpose of up-the-ladder workers' compensation liability is "to discourage a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers' compensation benefits . . . not to shield owners or contractors from potential tort liability." *Gen. Elec. Co. v. Cain*, 236 S.W.3d 579, 585, 587 (Ky. 2007) (citing *Elkhorn-Hazard Coal Land Corp. v. Taylor*, 539 S.W.2d 101, 103-4 (Ky. 1976)). However, "'the humane spirit of the statute does not warrant its extension beyond its legitimate scope.'" *Cain*, 236 S.W.3d at 587 (citing *Gateway Const. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962)). Thus, "[i]f premises owners are 'contractors' as defined in [the statute], they are deemed to be the statutory, or 'up-the-ladder' employers of individuals who are injured while working on their premises and are liable for *workers' compensation* benefits . . . [but] are immune from tort liability . . . with respect to work-related injuries." *Cain*, 236 S.W.3d at 585 (emphasis added).

Blasko asserts that the court erred in dismissing her tort action against Lourdes because KRS 342.610(2)(b) cannot extend its immunity to Lourdes. Her

reasons for this contention are that 1) Lourdes did not set Blasko's work schedule; 2) Lourdes was not in charge of supervising Blasko; 3) Lourdes did not directly pay Blasko; 4) Blasko was a perfusionist licensed by the Commonwealth; 5) Blasko did not work exclusively for Lourdes; 6) Blasko followed the direction of a heart surgeon; 7) Blasko worked exclusively with equipment which was owned and maintained by Fresenius; and that 8) Lourdes simply provided the hospital where the operations took place. These reasons, however, are not relevant to an analysis under KRS 342.610.

To the contrary, the relevant analysis under KRS 342.610(2)(b) is limited to answering the question of whether Blasko, in her role as a perfusionist, was providing Lourdes with services that were "a regular or recurrent part of the work" performed by Lourdes. The Kentucky Supreme Court recently defined such work as that which is "customary, usual, or normal to the particular business (including work assumed by contract or by law) or work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees." *Cain*, 236 S.W.3d at 588. The Court cautioned that "[t]he test is relative, not absolute," and advised that factors relevant to making the determination include the contracting business's "nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform." *Id*. (citing Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 70.06[5]).

Here, it cannot be contested that the perfusion work performed by Blasko pursuant to Fresenius' contract with Lourdes was a "regular and recurrent part" of operating a hospital that performs open-heart surgeries. Blasko herself testified at length that an open-heart surgery cannot proceed without a perfusionist. Similarly, Kyle Washburn, a surgical technician employed by Lourdes, testified via deposition that it is necessary to have a perfusionist at every open-heart surgery; and Joe Roberts, a registered nurse employed by Lourdes, testified via deposition that perfusionists are needed exclusively for open-heart procedures.[1]

Regarding the factor of whether Lourdes was "equipped with the skilled manpower and tools to handle the task the independent contractor was hired to perform," Blasko makes the point that, at the time Lourdes contracted with Fresenius for perfusion services, it employed no perfusionists of its own and relied upon equipment supplied by Fresenius. However, this point misses the mark. In Blasko's own words, because of the integral role that a perfusionist plays in every open-heart surgery, Lourdes could not have performed open-heart surgery on any patients without one present. Furthermore, "[e]ven though [a contractor] may never perform that particular job with his own employees, he is still a contractor if the job is one that is usually a regular or recurrent part of his trade or occupation. *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 462 (Ky. 1986).

In sum, the record before this Court presents no factual issues of whether the services a perfusionist renders are a "regular and recurrent part" of

[1] Curiously, Blasko's treating physician, Dr. Emily J. Rayes-Prince, agreed in her own deposition that a hospital could not perform open-heart surgery in patients without a perfusionist.

operating a hospital that performs open-heart surgeries. As such, Lourdes qualifies as a "contractor" for purposes of KRS 342.610(2)(b). And, because its subcontractor, Fresenius, had in place at the time of Blasko's accident a workers' compensation policy, Lourdes is entitled to the "exclusiveness of liability" provided by KRS 342.690(1). Blasko's tort claim against it is barred. Thus, we affirm the trial court.

ALL CONCUR.

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