RENDERED: SEPTEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001659-MR

MARY M.F. BOWMAN — APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 13-CI-00250

MEADOWVIEW REGIONAL MEDICAL CENTER, LLC, D/B/A MEADOWVIEW REGIONAL MEDICAL CENTER; SEDGWICK CLAIM MANAGEMENT SERVICES, INC.; AND SECURITAS SECURITY SERVICES USA, INC. — APPELLEES

AND

NO. 2014-CA-001773-MR

SECURITAS SECURITY SERVICES, USA, INC. — APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 13-CI-00250

MEADOWVIEW REGIONAL MEDICAL

CENTER, LLC, D/B/A MEADOWVIEW
REGIONAL MEDICAL CENTER
("MEADOWVIEW") APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: Mary Bowman and Securitas Security Services, Inc. (Securitas) both appeal from the Mason Circuit Court's order granting summary judgment in favor of Meadowview Regional Medical Center (Meadowview) regarding third-party liability in a workers' compensation case. This case turns on whether a hospital who hires a security firm qualifies for up-the-ladder immunity when one of the security guards is injured at the hospital. For the following reasons, we affirm.

I. Factual and Procedural Background

Meadowview retained the security services of Securitas in March 2012. Under this contract, Securitas employees were to make regular rounds around the hospital, observing and reporting any safety or maintenance issues, as well as addressing security issues when they arise. The Securitas contract with Meadowview was previously to provide full-time security services, but that has now been reduced to nights and weekends, with Meadowview maintenance staff providing security observation and reporting during day shifts.

In addition to her position as a security guard, Bowman also served as a supervisory security guard, beginning work full time at Meadowview in March 2012. On September 18, 2012, while making her rounds at Meadowview, Bowman stepped on a loose step in a stairwell, causing her to lose her balance. She sustained a knee injury in the fall, and has since been unable to return to work.

As a result of her injury, Bowman received workers' compensation benefits from her employer, Securitas. Bowman's workers' compensation benefits covered her medical bills, and she did not incur any out-of-pocket expenses for treatment related to her knee injury. Additionally, at the time of her deposition in this case, Bowman was receiving $214.25 weekly in temporary disability payments, and her workers' compensation case against Securitas was ongoing.

Bowman filed a negligence action against Meadowview, and Securitas intervened to assert its subrogation rights. Meadowview moved for summary judgment on the basis that it cannot be sued based on "up-the-ladder" immunity, and the trial court agreed, granting summary judgment in Meadowview's favor. Bowman and Securitas now appeal that decision. The facts underlying the case are not at issue; rather, the only issue is whether Bowman may recover from Meadowview as a matter of law.

II. Standard of Review

CR[1] 56.03 provides that summary judgment is appropriate when no genuine issue of material fact exists, and the moving party is therefore entitled to

[1] Kentucky Rules of Civil Procedure.

judgment as a matter of law. Summary judgment may be granted when "as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.,* 807 S.W.2d 476, 483 (Ky. 1991) (internal quotations omitted). "While the Court in *Steelvest* used the word 'impossible' in describing the strict standard for summary judgment, the Supreme Court later stated that that word was 'used in a practical sense, not in an absolute sense.'" *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Whether summary judgment is appropriate is a legal question involving no factual findings, so a trial court's grant of summary judgment is reviewed *de novo*. *Coomer v. CSX Transp., Inc.,* 319 S.W.3d 366, 370-71 (Ky. 2010).

III. Arguments

First, Bowman and Securitas both argue the trial court erred in finding that the work provided by Securitas for Meadowview was "regular or recurrent" under the statute, and thus Meadowview is not entitled to "up-the-ladder" immunity. Second, Securitas claims entitlement to recoup the benefits paid and payable to Bowman from Meadowview, which Securitas alleges is a third-party tortfeasor.

A. Regular or Recurrent Part of Work

First, both Bowman and Securitas contend that Meadowview does not fit the statutory definition required to receive up-the-ladder immunity in this case. The parties do not contest that Bowman suffered an injury while performing duties

within the scope of her employment, nor do they contest that she received workers' compensation benefits from Securitas for her injury; rather, they dispute whether Meadowview is considered an "employer" under the statute, and thus entitled to immunity from tort liability.

Kentucky has long recognized the doctrine of up-the-ladder immunity in workers' compensation cases to prevent a plaintiff from taking more than one bite of the apple, seeking to receive both workers' compensation benefits and tort damages. The Kentucky doctrine of up-the-ladder immunity holds 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, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death.

KRS[2] 342.690(1). "The injured worker is not entitled to tort damages from the employer or its employees for work-related injuries. And, in this context, the term *employer* is construed broadly to cover not only the worker's direct employer but also a contractor utilizing the worker's direct employer as a subcontractor." *Beaver v. Oakley*, 279 S.W.3d 527, 530 (Ky. 2009). In other words, "up-the-ladder immunity" refers to an employer's immunity from tort lawsuits when the plaintiff was injured at work and workers' compensation benefits are the plaintiff's exclusive remedy under KRS 342.690. *Id.* at 528 n. 1. The statute further states

[2] Kentucky Revised Statutes.

that the term "employer" includes a "contractor" covered by KRS 342.610(2), which provides the definition:

> A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor **unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter**. . . . 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.

(emphasis added). "'Recurrent' simply means occurring again or repeatedly. 'Regular' generally means customary or normal, or happening at fixed intervals." *Daniels v. Louisville Gas & Elec. Co.*, 933 S.W.2d 821, 824 (Ky. App. 1996).

In the instant case, in granting summary judgment for Meadowview, the trial court found that "[a]t the very least, security services are a 'recurrent' part of Meadowview's business" since Securitas employees provided security services repeatedly, and continue to do so at night and on weekends. The trial court continued that although the work performed by a contractor need only be regular *or* recurrent, the services performed by Securitas were also a regular part of Meadowview's business. The trial court found that although Meadowview is not in the business of providing security, "maintaining a safe premises and

environment for patients and visitors is an important part of running a hospital," and Meadowview "regularly conducted security sweeps with its own employees before contracting with Securitas and continues to do so during the day."

In *Young v. SCA Personal Care*, No. 1:12-CV-00041-JHM, 2013 WL 253149 (W.D. Ky. Jan. 23, 2013), a federal court ruled on this issue of "regular or recurrent" duties under KRS 342.610(2) on nearly identical facts. The plaintiff in *Young* was a security guard employed by Securitas, who was injured on the job while working at a manufacturing and distribution facility of SCA Personal Care, which is in the business of developing, producing, and marketing adult care products. In *Young*, as in the instant case, the trial court granted summary judgment in favor of the defendant/employer, finding that security of the defendant's facility is a regular or recurrent part of its operations, even though security is not its primary business. The *Young* court found that, under Kentucky law, even if an employer never performs a particular job with its own employees, if that work is a regular or recurrent part of the employer's business, it remains a contractor. 2013 WL 253149 at *4.

Furthermore, the Supreme Court of Kentucky has held that

> [w]e construe ["contractor" under KRS 342.610] to mean that a person who engages another to perform a part of the work which is a recurrent part of his business, trade, or occupation is a contractor. Even though he 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). "Kentucky case law is clear that activities beyond one's primary business objective may qualify under [the statute]." *Thompson v. The Budd Co.*, 199 F.3d 799, 805 (6th Cir. 1999).

> Work of a kind that is a "regular or recurrent part of the work of the trade, business, occupation, or profession" . . . is work that is customary, usual, or normal to the particular business (including work assumed by contract or required 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.

Gen. Elec. Co. v. Cain, 236 S.W.3d 579, 588 (Ky. 2007). "The test is relative, not absolute. Factors relevant to the 'work of the . . . business,' include its 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.*

We agree with the trial court that although security is not the primary business of Meadowview, security is a regular part of maintaining a safe and efficient healthcare facility. Furthermore, since Meadowview maintenance employees previously carried out similar duties as the Securitas employees, and now carry out the same duties during the day shift, this is also a recurrent part of Meadowview's business. Since Meadowview fits the statutory definition for an "employer," and Securitas has both secured and paid workers' compensation coverage and benefits to Bowman, we agree that no genuine issues of material fact remains. Thus the trial court did not err in granting summary judgment.

B. Subrogation

Securitas argues that it should be able to recoup benefits paid and payable to Bowman because, although Securitas already paid Bowman workers' compensation benefits, Securitas is entitled to the right of subrogation from a third-party tortfeasor. Securitas contends that Meadowview is a third-party tortfeasor in this case, who breached its duty to maintain safe facilities, and is thus liable to Securitas.

The trial court held that Meadowview is not a third-party tortfeasor against whom Securitas may exercise its right to subrogation for benefits paid to Bowman since Meadowview fits the statutory definition for an "employer." Since Bowman has already received workers' compensation benefits from Securitas for her injury, she cannot recover again from Meadowview; nor can Securitas recover that amount paid from Meadowview. KRS 342.690(1). As discussed at length, Meadowview fits the statutory definition of employer, and thus the workers' compensation benefits paid by Securitas are the sole remedy available to Bowman, and Securitas is not entitled to recoup those benefits.

IV. Conclusion

For the foregoing reasons, we affirm the Mason Circuit Court's grant of summary judgment in favor of Meadowview.

ALL CONCUR.

BRIEFS FOR APPELLANT
MARY M.F. BOWMAN:

Thomas A. Sweeney
Crescent Springs, Kentucky

BRIEFS FOR APPELLANT
SECURITAS SECURITY
SERVICES, USA, INC.:

Ronald J. Pohl
Arthur F. Cook
Louisville, Kentucky

BRIEFS FOR APPELLEE
MEADOWVIEW REGIONAL
MEDICAL CENTER, LLC,
D/B/A MEADOWVIEW
REGIONAL MEDICAL CENTER:

Stephen J. Mattingly
Bradley A. Case
Louisville, Kentucky