RENDERED: MAY 18, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000838-MR

ESTATE OF ERIC YOUNG,
BY AND THROUGH KRISTY YOUNG,
AS ADMINISTRATRIX, KRISTY YOUNG,
INDIVIDUALLY, KRISTY YOUNG AS
MOTHER AND NEXT FRIEND OF JOSEPH
YOUNG AND KALOB YOUNG, MINORS,
JAMES BOWLING AND RICHARD L. WHEELER — APPELLANTS

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE JAMES T. JAMESON, JUDGE
ACTION NO. 15-CI-00042

ISP CHEMICALS, LLC AND
ASHLAND, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: Appellants seek review of an Order of the Marshall Circuit Court granting summary judgment in favor of Appellees, Ashland, Inc., and ISP

Chemicals LLC. The court held that the Appellees are up-the-ladder contractors who are entitled to the exclusive remedy protection afforded by the Kentucky Workers' Compensation Act -- KRS[1] Chapter 342 (the Act). Finding no error, we affirm.

We first review the applicable provisions of KRS 342.610(2), which governs liability and provides as follows:

> 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. Any contractor or his or her carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another:
>
> …
>
> (b) To have work performed of a kind which is a regular or recurrent[2] 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. . . .

KRS 342.690(1), commonly referred to as the exclusive remedy provision of the Act, provides in relevant part:

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[1] Kentucky Revised Statutes.

[2] "'Recurrent' simply means occurring again or repeatedly. 'Regular' generally means customary or normal, or happening at fixed intervals. However, neither term requires regularity or recurrence with the preciseness of a clock or calendar." *Daniels v. Louisville Gas and Elec. Co.*, 933 S.W.2d 821, 824 (Ky. App. 1996).

> If 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. For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. . . .

In the case before us, the underlying facts are outlined in the trial court's April 14, 2017, Order Granting Defendants' Motions for Summary Judgment:

1) Ashland is a chemical company that, among other things, manufactures a food grade oral care product known as Gantrez S-97.

2) Ashland does not transport Gantrez S-97. Rather, Ashland contracts with motor carriers to deliver Gantrez S-97.

3) Quality is a national trucking company with many local affiliates throughout the country, which include QCKY located in Calvert City, Kentucky.

4) On or about May 17, 2005, Ashland entered into an agreement (the "Motor Contract Agreement") with Quality. Under this agreement, Quality agreed to provide transportation services to Ashland. These "transportation services" include tank washing.

5) In August 2011, Ashland completed its acquisition of ISP, which is also a chemical manufacturing company located in Calvert City, KY.

6) Prior to Ashland's acquisition of ISP, ISP and Quality entered into an agreement ("ISP Agreement") whereby Quality would transport goods and wash tank wagons for ISP.

7) According to the Motor Contract Agreement, Quality may subcontract its obligations under the Motor Contract Agreement to its affiliates. However, under the Motor Contract Agreement, the subcontractor affiliates must operate under Quality's authority and Quality must ensure that workers compensation insurance is in place for all employees carrying out the terms of the Motor Contract Agreement.

8) In a written agreement (the "Contractor Agreement"), Quality subcontracted its obligations to transport products and wash tank wagons from ISP's facility in Calvert City to its affiliate QCKY.

9) In the Contractor Agreement, QCKY warranted that it would provide workers' compensation insurance for all employees carrying out the obligations owed by Quality to Quality's customers.

10) At all times relevant to this action, Plaintiffs Eric Young ("Young") and Richard Wheeler ("Wheeler") were employed by QCKY to wash tanks.

11) Wheeler testified at his deposition that he cleaned trailers for Ashland at least four to five times a day and sometimes more.

12) Frank Cummins, supervisor at QCKY, testified that employees of QCKY would clean tank wagons that hauled Gantrez S-97 for Ashland on a daily basis.

13) Cheryl Hartig, an employee for ISP, testified that Gantrez S-97 would be loaded into a tank wagon at the ISP facility two to four times per day. Ms. Hartig

further testified that the particular tank wagon at issue in this case was washed and sanitized by QCKY on a weekly to biweekly basis.

14) Because Gantrez S-97 is a food grade product, the tank wagons used to transport Gantrez S-97 must be washed and sanitized pursuant to strict quality controls.

15) The tank wagons in this case were leased by QCKY from an entity that is not a party to this action.

16) On or about February 7, 2014, Young and Wheeler entered a tank wagon that was being washed at QCKY's Calvert City facility. This tank wagon was used by QCKY to transport Gantrez S-97 from ISP's Calvert City facility to QCKY's facility in Calvert City. Wheeler and Young were overcome by an oxygen deficient atmosphere, which caused injuries to Wheeler and Young's death. Young and Wheeler's actions were in the course and scope of their employment.

17) After the events involving Young and Wheeler, Young's estate and Wheeler filed for and received workers' compensation benefits through the workers' compensation insurance (Brickstreet Insurance) secured by their employer, QCKY.

(Footnotes omitted).

On February 6, 2015, a lawsuit was filed in the Marshall Circuit Court by the following Plaintiffs: the estate of Eric Young, by and through Kristy Young as Administratrix; Kristy Young, individually; Kristy Young, as Mother and Next

Friend of Joseph Young and Kalob Young, minors; James Boling;[3] and Richard Wheeler. The Defendants were ISP and Ashland (collectively Ashland). On March 4, 2015, Ashland filed an Answer asserting, *inter alia*, the affirmative defense that Plaintiffs' claims were barred by the Kentucky Workers' Compensation Act, KRS 342.690, *et seq.*

Thereafter, Ashland was granted leave to file a third-party complaint against QCKY and its supervisor, Frank Cummins, and against Quality Carriers. The Defendants/Third-Party Defendants all filed motions for summary judgment which were heard on March 28, 2017.

By Order entered April 14, 2017, the trial court granted the motions. The court explained that tank washing was the type of work at issue in this case and that it would use the two-part test utilized in *General Electric Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007). The court concluded that:

> [W]ashing the tank wagons was customary, usual or normal to Ashland and ISP, who are in the business of chemical manufacturing. Tank wagons that carry food grade chemicals, such as Gantrez S-97[,] are required to be washed and sanitized. These chemicals were transported using tank wagons, and these tank wagons cannot be reused without them [*sic*] being washed and sanitized. Furthermore, washing of the tank wagons was work that is repeated with some degree of regularity. The Court is able to come to this conclusion based on the testimony during the depositions cited in the above facts that the tank wagons are washed at least on a biweekly

[3] According to the Complaint, Eric Young was James Boling's stepfather.

> basis, and at times, multiple times per day. Thus, the first part of the test is met by Ashland and ISP.
>
> The second part of the test laid out by the *Cain* Court, is whether the washing of tank wagons is a type of work that Ashland, ISP, or similar businesses would normally perform or be expected to perform with its employees. The Plaintiffs argue that because neither Ashland nor ISP's employees ever performed the washing or sanitizing of the tank wagons, then neither Ashland nor ISP are [*sic*] "contractors."

Addressing the Plaintiff's argument that the failure of Ashland or ISP to wash the tanks themselves negated their status as contractors, the court responded: "whether the contractor had employees perform work that was a regular or recurrent part of its trade or business or whether the contractor hired subcontractors to do such work was a distinction of 'no significance.'" *Pennington v. Jenkins-Essex Const., Inc.*, 238 S.W.3d 660, 664 (Ky. App. 2006), *quoting Fireman's Fund Ins. Co. v. Sherman & Fletcher,* 705 S.W.2d 459, 461 (Ky. 1986). The court concluded that washing tank wagons was the type of work that Ashland and ISP, as chemical manufacturers, would normally perform or be expected to perform with their own employees and that cleaning of the tank wagons is akin to routine maintenance that Ashland or ISP's employees might be expected to perform.

On May 4, 2017, Appellants filed a Notice of Appeal to this Court. Before us, they contend: (1) that summary judgment was premature because the

record was not developed as to key factual issues; (2) that the trial court usurped the jury's role and decided facts not supported by the record; and (3) that defendants are not an employer or contractor under the Kentucky Workers' Compensation Act; therefore, up-the-ladder immunity is unavailable.

The standard of our review "is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

Appellants preface their arguments by asserting that the Kentucky Workers' Compensation Act requires that immunity be narrowly construed. However, we are aware of no such provision under the Act or of any rule of statutory construction so interpreting to the act. In support of their contention the Appellants cite *Boggs v. Blue Diamond Coal*, 590 F.2d 655, 659 (6th Cir. 1979), which stated that "Kentucky courts have given the 'liberal' construction required by the express language of the Act by broadly construing the coverage provisions of the Act and narrowly construing the immunity provisions." The *Boggs* court was referring to KRS 342.004, which was repealed in 1980. "Notwithstanding the repeal of KRS 342.004, the law continues to favor a liberal construction of the Workers' Compensation Act, with a view to effectuating the beneficent intent of the legislature. *Standard Gravure Corp. v. Grabhorn*, Ky.App., 702 S.W.2d 49

(1985)…. [However] where the controlling facts 'collectively outweigh the liberal construction of the law, the determination must go against the claimant." *Uninsured Employers' Fund v. Wilson*, 2005-CA-000140-WC, 2005 WL 1593704, at *5 (Ky. App. July 8, 2005) (citations and internal quotation marks omitted). In *Beaver v. Oakley*, 279 S.W.3d 527, 530 (Ky. 2009), the Kentucky Supreme Court addressed the exclusivity provision of the act as follows:

> Under Kentucky law, unless a worker has expressly opted out of the workers' compensation system, the injured worker's recovery from the employer is limited to workers' compensation benefits. 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.

(Footnotes omitted, italics original).

Appellants' arguments on appeal overlap and rely heavily on *Cain*. *Cain* involved the issue and circumstances in which a premises owner may be considered an up-the-ladder contractor. Our Supreme Court extensively reviewed pertinent caselaw for guidance on the issue:

> In *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky.App.1980), a coal mining company was under contract to sell and deliver coal to its customers. The Court of Appeals held that the mining company was the statutory employer of truck drivers, employed by a contractor and hired by the mining company to haul the coal to the coal company's customers, because delivering

> the coal to its customers was a regular or recurrent part of the business of the mining company under its contracts to both mine and deliver. *Id*. at 249. Under similar reasoning, in *Wright v. Dolgencorp, Inc*., 161 S.W.3d 341, 344 (Ky.App.2004), the Court of Appeals held that an employee of a trucking company hired to haul merchandise from a business retailer's main distribution center to its retail stores was the statutory employee of the retailer.
>
> In *Daniels v. Louisville Gas & Electric Co.,* 933 S.W.2d 821 (Ky.App.1996), the Environmental Protection Agency (EPA) had ordered LG & E and other coal-fired utility companies to conduct emissions testing of its coal-fired furnaces on specified occasions. LG & E contracted with an emissions testing company to conduct the tests, and an employee of that company was severely burned while conducting such tests at the LG & E plant. Because the EPA required LG & E to conduct the emissions testing upon the occurrence of specified events, the Court of Appeals held that the emissions tests were a regular or recurrent part of LG & E's business. *Id.* at 823–24. The holding in *Daniels* is consistent with the previous holding in *Blevins.* In *Blevins*, the work performed by the injured worker became a part of the mining company's business by contract, whereas in *Daniels*, it became a part of the utility company's business by law.

236 S.W.3d at 586. The Court also looked to Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law,* § 70.06[3] (2006) for guidance:

> [T]he test must be relative, not absolute, since a job of construction or repair that would be a nonrecurring and extraordinary undertaking for a small business might well for a large plant be routine activity which it normally expects to cope with through its own employed staff. …

> The treatise notes that, "with a surprising degree of harmony," the courts agree on a general rule of thumb that a statute deeming a contractor to be an employer "covers all situations in which work is accomplished which this employer, or employers in a similar business, would ordinarily do through employees." *Larson's, supra,* at § 70.06[1].

Id. 587-88. In conclusion, the Court stated that:

> Work of a kind that is a "regular or recurrent part of the work of the trade, business, occupation, or profession" of an owner does not mean work that is beneficial or incidental to the owner's business or that is necessary to enable the owner to continue in business, improve or expand its business, or remain or become more competitive in the market. *Larson's, supra,* at § 70.06[10]. It 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.

Id. at 588.

This Court examined *Cain* in *Forbes v. Dixon Elec., Inc.*, 332 S.W.3d 733 (Ky. App. 2010). In *Forbes*, the issue was whether the trial court erred in concluding that Dixon Electric was immune as an up-the-ladder contractor. Dixon had a contract with Lexington-Fayette Urban County Government (LFUCG) to install and repair traffic systems. Pursuant to the contract, Dixon was to provide for any necessary traffic control. Dixon's foreman testified that he would request

traffic control assistance from the Lexington Police Department several times per month. On the date in question, Dixon had requested assistance at a busy intersection. While on assignment to manually direct traffic, Officer Forbes was struck by a motor vehicle and injured. He received workers' compensation benefits through the police department. Ultimately, the Forbeses sued Dixon, alleging that Dixon had been negligent in failing to provide notice and to warn oncoming traffic of non-working signals at the intersection.

The Forbses argued that traffic control at major intersections could not be considered a part of Dixon's regular or recurrent work because Dixon's employees could not legally direct traffic. The trial court disagreed and held that Dixon was entitled to up-the-ladder immunity. This Court affirmed:

> The Forbeses assert that in *Cain*, the Supreme Court created a two-part test; namely, the work must be: 1) customary to the business or repeated with a degree of regularity; and 2) of a kind normally performed or expected to be performed by employees. We do not believe that the Supreme Court created a new test, but rather it summarized the existing test. Furthermore, we agree with Dixon Electric that the facts of this case fall squarely within the application of *Cain* and KRS 342.610. By virtue of its contract with LFUCG to install and repair traffic signals throughout the city, Dixon Electric had to provide for traffic control, which was done either by its employees or by Lexington police officers. Traffic control is unquestionably a regular and recurrent part of Dixon Electric's business. Therefore, Dixon Electric took on the role of contractor while the Lexington Police Department took on the role of sub-contractor at the time and place of the accident, and

> Dixon Electric was entitled to up-the-ladder immunity. The circuit court did not commit any error in so holding.

Id. at 738.

In the case before us, Appellants contend that summary judgment was premature because there is no evidence that tank washing is the type of work that Ashland (or other chemical manufacturers) would perform or would expect to perform with its own employees. For the same reason, Appellants contend that the trial court usurped the jury's role and decided facts that were not in the record. We disagree on both counts. "A contractor that never performs a particular job with its own employees can still come within KRS 342.610(2)(b)." *Doctors' Associates, Inc. v. Uninsured Employers' Fund*, 364 S.W.3d 88, 92 (Ky. 2011).

There is no genuine dispute or lack of evidence that tank washing is a regular and recurrent part of Ashland's business. Ashland contracted with Quality to provide those services. Thus, Ashland took on the role of contractor while Quality Carriers took on the role of sub-contractor. Quality then subcontracted its obligations to its affiliate, QCKY, as permitted under the Motor Contract Agreement with Ashland.

Appellants assert that Ashland cannot satisfy the definition of contractor under Kentucky law because it had no contractual relationship with QCKY. However, as Ashland notes, immunity has been held to apply under similar situations -- such as that in *Waterbury v. Anheuser-Busch, Inc.*, CIV.A.

3:01-CV536-S, 2003 WL 1145470, at *1 (W.D. Ky. Feb. 24, 2003). In that case, Anheuser-Busch had a contract with Helget Gas for it to supply canisters used to dispense beer. Helget contracted with Apollo Express to transport the canisters. Apollo Express then contracted with Connection Company/TSF, Ltd., whose employee was injured while unloading the canisters at Anheuser-Busch's warehouse. The court explained that the delivery and unloading of the canisters is a regular and recurrent part of the business of selling beer; thus, Anheuser-Busch was a contractor for purposes of KRS 342.610(2).

> Because Anheuser-Busch is a contractor in the contractual chain between Anheuser-Busch, Helget Gas, Apollo Express and Connection Company/TSL, Ltd., and because Connection Company/TSL, Ltd. properly procured workers's [*sic*] compensation insurance for its -- employee … Anheuser-Busch is immune from civil liability to [the] plaintiff ….”

Id. at *2.

The same reasoning applies in this case. Appellants argue that summary judgment must be reversed because Appellees failed to show that they had secured workers’ compensation coverage. The exclusive remedy provision of the Workers’ Compensation Act is an affirmative defense which must be pleaded and proved. *Gordon v. NKC Hosps., Inc.*, 887 S.W.2d 360 (Ky. 1994). The record establishes that it was properly pled and proven. Ashland raised the affirmative defense in its Answer. Appellant Wheeler testified by deposition that he had filed

a workers' compensation claim and that he had received payments from Brickstreet Mutual Insurance, and his Answers to Interrogatories reflect the same information. The Answers to Interrogatories filed by Kristy Young, Individually and as Administratrix of Eric Young's Estate, reflect that Brickstreet Insurance Company paid workers' compensation benefits for Eric Young's death. *Pennington* 238 S.W.3d 660, 666 (Ky. App. 2006) ("[U]p-the-ladder contractor is immune from tort liability to an injured employee of a subcontractor if it proves that the immediate employer of the injured employee had secured coverage for the employee.").

We find no merit in Appellants' assertions that Ashland waived immunity as a defense or that ISP's statements in the Kentucky Occupational Safety and Health Agency (KOSH) proceeding constituted a judicial admission which would preclude Appellees from raising immunity as a defense in this case.

We affirm the Order of Marshall Circuit Court granting Defendants' (now Appellees') motions for summary judgment entered on April 14, 2017.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Jennifer Moore
Louisville, Kentucky

BRIEF FOR APPELLEES:

Barbara B. Edelman
Lexington, Kentucky