SUPREME COURT OF KENTUCKY
2024-SC-0169-D
(2022-CA-1534)

MINOVA USA, INC. APPELLANT

SCOTT CIRCUIT COURT
v. 18-CI-00772

TOM JOLLY APPELLEE

BRIEF FOR APPELLANT, MINOVA USA, INC.

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CERTIFICATE OF SERVICE

It is hereby certified that on the 10th day of October 2024, this Brief for Appellant, Minova USA, Inc., was electronically filed via the Kentucky Court of Justice eFiling System, and was served via regular U.S. Mail, postage prepaid, upon the following: Kate Morgan, Clerk, Kentucky Court of Appeals, 669 Chamberlin Ave. Suite B, Frankfort, KY 40601; The Honorable Kathryn H. Gabhart, Scott Circuit Court, Division 2, 119 N. Hamilton Street, Georgetown, KY 40324; Tina M. Foster, Scott Circuit Court Clerk, 119 N. Hamilton Street, Georgetown, KY 40324; and D. Todd Varellas, Varellas & Varellas PLLC, 360 East Vine Street, Suite 320, Lexington, KY 40507. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Scott Circuit Court by this appellant.

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I. INTRODUCTION

The Scott Circuit Court dismissed this case because it held that appellant Minova USA, Inc. was appellee Tom Jolly's statutory/up-the-ladder employer under the Kentucky Workers' Compensation Act when he was injured on Minova's premises. The Court of Appeals reversed. It held that Minova failed to prove that the contract work Jolly was doing for Minova when injured was "regular or recurrent" work for Minova under KRS 342.610(2)(b). The primary issue on this appeal is whether the work Jolly was doing for Minova was "regular or recurrent" work for Minova under KRS 342.610(2)(b). Minova contends that it was and that the Court of Appeals erred.

II. STATEMENT CONCERNING ORAL ARGUMENT

Under RAP 38, this appeal has been designated for oral argument. Upon submission, as defined by RAP 37, oral argument will be scheduled by the Court.

III. STATEMENT OF POINTS AND AUTHORITIES

IV. STATEMENT OF THE CASE

A. INTRODUCTION

This is a personal-injury case that the Scott Circuit Court dismissed on summary judgment.[1] The circuit court dismissed because it held that appellant Minova USA, Inc. was appellee Tom Jolly's statutory/up-the-ladder employer when he was injured on Minova's premises in February 2018.[2] As Jolly's statutory/up-the-ladder employer, Minova was entitled to exclusive-remedy immunity and dismissal under the Kentucky Workers' Compensation Act (KRS 342.690(1)).

B. THE UNDISPUTED MATERIAL FACTS

Minova manufactures products for the mining, construction, and energy industries.[3] One of the products Minova manufactures is a resin capsule.[4] To manufacture resin capsules, Minova needs a regular supply of ground calcium carbonate/limestone filler.[5] Minova uses limestone filler to make resin mastic and catalyst paste which are the main ingredients in its resin capsules.[6]

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1 Summary Judgment (TR 2282-83) (Appendix Item 2); Opinion and Order (TR 3522-30) (Appendix Item 3).

2 Summary Judgment (TR 2282-83); Opinion and Order (TR 3522-30).

3 Affidavit of Michael Portwood (TR 980-81).

4 *Id.*

5 *Id.*

6 *Id.*

At the time of Tom Jolly's accident (February 2018), Minova was buying limestone filler from Lhoist North America.[7] Lhoist manufactured the filler in Crab Orchard, Tennessee.[8] To get Lhoist's filler from Crab Orchard to Minova's plant in Georgetown, Kentucky (a 217-mile trip), Minova contracted with Jolly's direct employer, Trimac Transportation.[9] The Minova-Trimac contract was a service (transportation) contract.[10] Under it, Trimac would pick up limestone filler from Lhoist in Tennessee and haul it 217 miles to Minova in Georgetown.[11] In 2017, the last full calendar year before Jolly's accident, Trimac picked up, hauled, and delivered 389 loads of limestone filler to Minova.[12] Trimac was still regularly picking up, hauling, and delivering filler to Minova at the time of Jolly's accident.[13] Jolly was making such a delivery at the time of his accident.[14]

7 *Id.;* Purchase Orders (TR 982-83); Uniform Straight Bills of Lading (TR 984-88); Transportation Services Agreement (TR 989-1010).

8 Portwood (TR 980-81); Purchase Orders (TR 982-83); Uniform Straight Bills of Lading (TR 984-88); Transportation Services Agreement (TR 989-1010).

9 Transportation Services Agreement (TR 989-1010); Portwood (TR 980-81).

10 Transportation Services Agreement (TR 989-1010).

11 Transportation Services Agreement (TR 989-1010); Portwood (TR 980-81).

12 Portwood (TR 980-81).

13 *Id.*

14 When Minova entered into its service contract with Trimac, it was known as Orica Ground Support, Inc. Orica changed its name to Minova USA in 2016. Amended Certificate of Authority (TR 1011); Transportation Services Agreement (TR 989-1010).

C. MINOVA PLEADED AN EXCLUSIVE-REMEDY DEFENSE

Minova answered Jolly's first-amended complaint in February 2019.[15] In its answer, Minova affirmatively pleaded that it was entitled to exclusive-remedy immunity under KRS 342.690 and KRS 342.610. Here's the defense as Minova pleaded it:

> 19. The plaintiff's action is barred, in whole or in part, by the exclusive-remedy provisions of the Kentucky Workers' Compensation Act, including provisions in KRS 342.690 and KRS 342.610.[16]

D. BOTH TRIMAC AND MINOVA CARRIED WORK-COMP COVERAGE AND JOLLY RECEIVED WORK-COMP BENEFITS

Jolly's direct employer (Trimac) carried work-comp coverage on the day of his accident.[17] Trimac's coverage was with Great West Casualty Company.[18] Great West paid Jolly work-comp benefits under Trimac's policy.[19] Minova also carried work-comp coverage on the day of Jolly's accident.[20] That coverage was with Granite State Insurance Company.[21] Minova's policy number with Granite State was WC 014—22-0470.[22]

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15 Answer (TR 90-95).

16 *Id.* at ¶ 19.

17 Intervening Complaint, ¶¶ 4, 6-7 (TR 100-03).

18 *Id.* at ¶ 4.

19 *Id.* at ¶¶ 6-7; Agreed Order (TR 1012-14).

20 Declarations for Policy No. WC 014-22-0470 (TR 1583).

21 *Id.*

22 *Id.*

E. SUMMARY JUDGMENT

After a three-year discovery period, Minova moved for summary judgment in March 2022.[23] In July 2022, Judge Robert W. McGinnis granted Minova's motion. Judge McGinnis held that Minova was Jolly's statutory employer and was, therefore, entitled to exclusive-remedy immunity against Jolly's tort claims.[24]

Jolly moved the circuit court to reconsider.[25] In November 2022, the new Scott Circuit Court Judge (Judge Kathryn H. Gabhart) affirmed Judge McGinnis's summary judgment and denied Jolly's motion to reconsider.[26] Judge Gabhart held that Minova was Jolly's statutory employer and so was entitled to exclusive-remedy immunity under our workers'-compensation act.[27]

F. THE COURT OF APPEALS' OPINION

The Court of Appeals reversed the Scott Circuit Court's summary judgment.[28] The Court of Appeals held that Minova wasn't Jolly's statutory employer under KRS 342.690(1).[29] In reaching this holding, the Court of Appeals answered five

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23 Motion for Summary Judgment (TR 1017-27).

24 Summary Judgment (TR 2282-83).

25 Plaintiff's Motion to Reconsider (TR 2289-90); Minova's Response in Opposition (TR 3055-75); Plaintiff's Combined Reply (TR 3282-3513).

26 Opinion and Order (TR 3522-30).

27 *Id.*

28 Opinion (Appendix Item 1).

29 *Id.* at 14.

questions. It answered four of the five in Minova's favor. Here are those four questions and the Court of Appeals' answers:

> (1) Did Minova plead an immunity defense? The Court of Appeals held it did.[30]
>
> (2) Did Minova enter a hauling contract with Trimac? The Court of Appeals held it did.[31]
>
> (3) Did Trimac regularly haul limestone filler from Lhoist to Minova? The Court of Appeals held it did.[32]
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> (4) Did Minova need Lhoist's limestone filler to make resin capsules? The Court of Appeals held it did.[33]

Question five was whether Minova or a similarly situated business would normally be expected to pick up and haul limestone filler from Lhoist with its own employees. Before the Court of Appeals answered this question, it acknowledged the well-established rule that "a company that engages another to perform a part of the work that is a regular and recurrent part of its business is considered a 'contractor' . . . even if it *never* performed that type of work with its own employees."[34]

Even though it acknowledged this well-established rule, the Court of Appeals went on to observe that, "while theoretically, Minova could have obtained its own license and hired a fleet of drivers with commercial drivers' licenses, no evidence was

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30 *Id.* at 5-6.

31 *Id.* at 12-13.

32 *Id.*

33 *Id.* at 11.

34 *Id.* at 13.

presented that it or any similarly-situated business did or would have done so."[35] It is unclear why the Court of Appeals commented about "federally required" licensing and speculated that Minova would need a "fleet of drivers" to haul limestone filler from Lhoist as there was no record evidence to that effect. The relevant record evidence was that, in 2017 Trimac hauled 389 loads of limestone filler from Lhoist's facility in Crab Orchard, Tennessee to Minova's facility in Georgetown, Kentucky.[36] Crab Orchard and Georgetown are 217 miles apart so that's roughly one 434-mile round-trip per day in 2017. Minova would not need a "fleet of drivers" to perform that work. It would need no more than two trucks and two drivers.

In addition, the Court of Appeals remarked that, while Trimac's delivery of raw materials to Minova was "clearly a necessary function, [it] [wa]s not the same type of work addressed in any of the previous [delivery] cases, and there is no binding authority on this particular issue."[37] This remark was likely prompted by two cases Minova relied on below, *Thornton v. Carmeuse Lime Sales Corp.* and *Tom Ballard Co. v. Blevins.* These two cases involved contracts for hauling goods from an immunity-seeking defendant to its customers while the Minova-Trimac contract was a contract for hauling goods from a supplier to an immunity-seeking defendant.[38]

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35 *Id.*

36 Portwood (TR 980-81).

37 Opinion, pp. 13-14 (Appendix Item 1).

38 *See Thornton v. Carmeuse Lime Sales Corp.*, 346 S.W.3d 297 (Ky. App 2010); *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky. App. 1980).

G. THE ISSUE FOR REVIEW

The central substantive issue before the Court is the issue we just discussed. Did the Court of Appeals err when it held that Minova was not entitled to statutory-employer/up-the-ladder immunity. In addition to this substantive issue, we expect Jolly to raise several procedural arguments that the lower courts rejected. We address those procedural issues in our first five arguments below. After that, we address the substantive issue and explain why the Court of Appeals erred when it held that Minova was not entitled to statutory-employer/up-the-ladder immunity here.

V. ARGUMENT

A. FAULT IS IRRELEVANT TO THE EXCLUSIVE-REMEDY ISSUE.[39]

Jolly's first argument in the Court of Appeals was that Minova was at fault for his accident.[40] The Court of Appeals didn't expressly address this argument. The trouble with the argument was that fault was and is irrelevant to the sole issue in the Court of Appeals, which was whether Minova was Jolly's statutory employer entitled to exclusive-remedy immunity. The Court should reject Jolly's Minova-was-at-fault argument as irrelevant, if he makes it here.

[39] Minova preserved this argument on page 5 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

[40] Jolly's Appellant's Brief, pp. 4-6.

B. MINOVA PLEADED AN EXCLUSIVE-REMEDY DEFENSE.[41]

Jolly's second argument in the Court of Appeals was that Minova waived its exclusive-remedy defense by not pleading it.[42] The Scott Circuit Court and the Court of Appeals disagreed. In Kentucky, a waiver is the voluntary and intentional relinquishment of a known, existing right or power.[43] "It's textbook law that a waiver must be intentional."[44] It's also textbook law that a waiver must be knowing.[45] As this Court has held, "both intent and knowledge are essential elements of waiver."[46]

Jolly argued below that Minova waived its exclusive-remedy defense by not pleading it. In Jolly's words, "Minova only made a vague claim of workers' compensation immunity."[47] Jolly was and is mistaken. Not only did Minova not knowingly and intentionally waive the exclusive-remedy defense, it plainly pleaded that Jolly's action was barred, in whole or in part, by exclusive-remedy immunity and cited the two relevant sections of Kentucky's Workers' Compensation Act in its answer.[48] Here's Minova's exclusive-remedy defense as pleaded:

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41 Minova preserved this argument on pages 5 and 6 of its Summary Judgment Reply (TR 1508-25) and on pages 6 and 7 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

42 Jolly's Appellant's Brief, pp. 6-7.

43 *Howard v. Motorists Mutual Ins. Co.*, 955 S.W.2d 525, 526 (Ky. 1997).

44 *Edmonson Penn. v. Nat'l Mut. Cas. Ins. Co.*, 781 S.W.2d 753, 756 (Ky. 1989).

45 *Id.* at 755.

46 *Id.*

47 Jolly's Appellant's Brief, p. 7.

48 Answer, ¶ 19 (TR 90-95).

> 19. The plaintiff's action is barred, in whole or in part, by the exclusive-remedy provisions of the Kentucky Workers' Compensation Act, including provisions in KRS 342.690 and KRS 342.610.[49]

This sentence from Minova's answer unambiguously sets forth an exclusive-remedy defense. Moreover, this sentence complies with our Civil Rules regarding pleading. As required by CR 8.05, the sentence is "simple, concise, and direct." As required by CR 8.02, the sentence pleaded Minova's exclusive-remedy defense "in short and plain terms." Minova clearly asserted an exclusive-remedy defense. Jolly's waiver argument to the contrary was and is empty.

C. MINOVA COMPLIED WITH ITS DISCOVERY OBLIGATIONS.[50]

Jolly's third argument in the Court of Appeals was that Minova waived its exclusive-remedy defense by not producing "information and documents in discovery that it attached to its motion for summary judgment."[51] Put affirmatively, Jolly argued that he needed more information to respond to Minova's exclusive-remedy argument and that Minova refused to produce it. That was not the case.

To support his needed-more-information argument, Jolly directed the Court of Appeals to Minova's answers to a single interrogatory and two document

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[49] *Id.*

[50] Minova preserved this argument on pages 6 through 8 of its Summary Judgment Reply (TR 1508-25) and on pages 7 through 9 of its Appellee's Brief in the Court of Appeals. As the argument concerns the circuit court's control over discovery, the Court's review is for abuse of discretion. *Primm v. Isaac,* 127 S.W.3d 630, 634 (Ky. 2004).

[51] Jolly's Appellant's Brief, pp. 7-9.

requests.[52] He argued that he asked Minova to produce exclusive-remedy-related information and that Minova failed to do so. Jolly further argued that Minova's alleged failure to produce the requested information served to waive Minova's exclusive-remedy defense. Jolly was and is mistaken. The circuit court had discretion to order Minova to produce additional information in response to these three requests and didn't do so.[53] Thus, as the Court of Appeals concluded, Minova waived nothing by not producing further information.

Turning to the interrogatory answer that Jolly complained about in the Court of Appeals, the answer was Minova's answer to his Interrogatory No. 11. The interrogatory asked Minova whether Jolly's injuries were Minova's fault. As we explained above, fault has no bearing on Minova's exclusive-remedy defense. Accordingly, Minova's answer to Interrogatory 11 was irrelevant to its exclusive-remedy defense and could not possibly have waived the defense as Jolly argues.

Jolly also told the Court of Appeals that Minova's responses to two document requests (Document Requests Nos. 1 and 2) waived its exclusive-remedy defense.[54] Again, he was and is mistaken. Neither request asked Minova to produce documents related to its exclusive-remedy defense. Jolly quoted the two requests on page 8 of his Appellant's Brief below. In them, he asked for "all documents related to the subject

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[52] *Id.* at 8-9.

[53] *Primm,* 127 S.W.3d at 634 ("Generally, control of discovery is a matter of judicial discretion.").

[54] Jolly's Appellant's Brief, pp. 8-9.

matter of this lawsuit." Minova objected to the request as overly broad. The circuit court never overruled that objection.

More importantly, when the Court looks past Jolly's smokescreen regarding his discovery requests, it will find that there's nothing Minova could have produced in discovery that would have changed the circuit court's exclusive-remedy analysis. The facts relevant to the analysis are undisputed and were set forth in an affidavit signed by Minova employee Michael Portwood.[55] And Jolly deposed Portwood.

In short, despite three years of discovery, Jolly didn't ask Minova for exclusive-remedy information. Furthermore, Jolly has never explained how additional information would have changed the lower courts' exclusive-remedy analyses. It wouldn't have. The best proof of that is that Jolly didn't contest Minova's exclusive-remedy defense on its facts in either court below. The facts material to the defense were set forth in Michael Portwood's affidavit and were undisputed. The Court should, therefore, reject Jolly's argument that Minova waived its exclusive-remedy defense during discovery as both courts did below.

D. MINOVA WAS NOT REQUIRED TO PRODUCE EVIDENCE OF ITS WORK-COMP COVERAGE TO BE ENTITLED TO EXCLUSIVE-REMEDY IMMUNITY.[56] BUT IT DID SO ANYWAY.

Jolly's fourth argument in the Court of Appeals was another waiver

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55 Portwood (TR 980-81).

56 Minova preserved this argument on pages 9 through 11 of its Summary Judgment Reply (TR 1508-25) and on pages 9 through 12 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

argument. He based the argument on *McDonald's Corp. v. Ogborn*.[57] What he argued was that Minova was required to produce proof of its work-comp coverage to support its exclusive-remedy defense. He added that, without such proof, the circuit court should reject Minova's exclusive-remedy defense. Jolly was mistaken. As the circuit court held, *Ogborn* doesn't apply here.

What distinguishes this case from *Ogborn* is that the immunity-seeking defendant in *Ogborn* was the plaintiff's direct employer. The *Ogborn* Court held that a direct employer asserting an exclusive-remedy defense must produce proof of its work-comp coverage. That rule doesn't apply here because Minova is Jolly's statutory employer, not his direct employer. *Louisville Gas & Elec. Co. v. Galvan* makes that clear.[58]

In *Galvan*, the Court of Appeals held that *Ogborn*'s rule regarding proof of work-comp coverage only applies in direct-employer cases, not in up-the-ladder cases. In up-the-ladder cases, all a statutory employer must show is that the plaintiff's direct employer provided work-comp coverage. In the *Galvan* court's words:

> In the case at bar, LG&E is not seeking immunity from a claim brought by a direct employee. Of course, if this were the case, LG&E would be required to provide sufficient evidence that it secured workers' compensation coverage. Instead, LG&E is seeking immunity from a claim brought by an employee of one of its subcontractors. The distinction is key, as this Court has held "an up-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." Therefore, it was enough

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[57] Jolly's Appellant's Brief, pp. 9-10.

[58] *Louisville Gas & Elec. v. Galvan*, 2020 Ky. App. LEXIS 115, *5-7 (reversed on other grounds in *Galvan v. LG&E*, 2021 Ky. LEXIS 260) (rendered after 1/1/03, final, no published opinion that adequately addresses, not binding authority) (Appendix Item 4).

> that LG&E provided evidence that Galvan received benefits from his direct employer, Petrochem.[59]

This quote from *Galvan* shows that *Ogborn* doesn't apply here. And *Galvan* isn't a stand-alone case. The Court of Appeals reached the same conclusion in *Pennington v. Jenkins-Essex Constr.* The *Pennington* court held that "an up-the-ladder contractor is immune from tort liability to an injured employee of a subcontractor if it proves that the immediate employer of the employee secured coverage for the employee."[60]

The Court of Appeals reached the same conclusion in *Estate of Young v. ISP Chems., LLC.*[61] In *Young*, the plaintiff argued that a statutory employer's exclusive-remedy defense failed because it didn't produce proof that it had secured work-comp coverage. The Court of Appeals held that it was enough that the statutory employer proved that the plaintiff's direct employer provided work-comp coverage. Quoting *Pennington*, the *Young* court held that an "up-the-ladder contractor is immune from tort liability . . . if it proves that the immediate employer . . . secured coverage for the employee."[62]

In the end, Jolly's reliance on *Ogborn* in the lower courts was misplaced. The cases that apply here are *Galvan*, *Pennington*, and *Young*. All three hold that a statutory employer like Minova is only required to prove that a plaintiff's direct employer

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59 *Galvan*, 2020 Ky. App. LEXIS 115 at *6.

60 *Pennington v. Jenkins-Essex Constr., Inc.*, 238 S.W.3d 660, 666 (Ky. App. 2006).

61 *Estate of Young v. ISP Chems., LLC*, 2018 Ky. App. LEXIS 324, *16-17 (rendered after 1/1/03, final, no published opinion that adequately addresses, not binding authority) (Appendix Item 5).

62 *Id.*

provided work-comp coverage. Minova proved that below.[63] Thus, Jolly's argument under *Ogborn* failed as the circuit court held. Moreover, although unnecessary, Minova attached proof of its own work-comp insurance to its Summary Judgment Reply.[64]

E. THE CIRCUIT COURT GAVE JOLLY MORE THAN ENOUGH TIME TO TAKE DISCOVERY REGARDING MINOVA'S EXCLUSIVE-REMEDY DEFENSE.[65]

Jolly's fifth argument in the Court of Appeals was that the circuit court didn't give him enough time for discovery and that Minova's summary-judgment motion was premature.[66] As with Jolly's other arguments below, he was and is mistaken about this one.

In Kentucky, "[a] party 'cannot complain of the lack of a complete factual record [on summary judgment] when it can be shown that [he] had an adequate opportunity to undertake discovery.'"[67] "'It is not necessary to show that [a plaintiff] has actually completed discovery, but only that [he] has had an opportunity to do so.'"[68] As

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63 Intervening Complaint, ¶¶ 6-7 (TR 100-03); Agreed Order (TR 1012-14).

64 Exhibit 9 to Summary Judgment Reply (TR 1583).

65 Minova preserved this argument on pages 4 and 5 of its Summary Judgment Reply (TR 1508-25) and on pages 12 through 14 of its Appellee's Brief in the Court of Appeals. As the argument concerns the circuit court's control over discovery, the Court's review is for abuse of discretion. *Primm,* 127 S.W.3d at 634.

66 Jolly's Appellant's Brief, pp. 13-15.

67 *Faller v. Endicott-Mayflower, LLC*, 2009 Ky. App. LEXIS 234 (quoting *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63, 69 (Ky. App. 2006)) (rendered after 1/1/03, final, no published opinion that adequately addresses, not binding authority) (Appendix Item 6).

68 *Faller*, 2009 Ky. App. LEXIS 234 (quoting *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979)).

the Court of Appeals recently explained, "[t]here is no requirement that discovery be completed, only that the non-moving party have had an opportunity to do so."[69]

Jolly sued Minova in January 2019.[70] Minova answered in February 2019.[71] In its answer, Minova pleaded that Jolly's action was "barred, in whole or in part, by the exclusive-remedy provisions of the Kentucky Workers' Compensation Act, including provisions in KRS 342.690 and KRS 342.610."[72] In light of this pleading, Jolly had actual notice of Minova's exclusive-remedy defense in February 2019—three years before Minova moved for summary judgment.[73] That was more than enough time for Jolly to take discovery regarding the defense. Furthermore, as we explained above, Jolly deposed Michael Portwood, the Minova employee who signed the affidavit in support of Minova's summary-judgment motion. We believe it's fair to say that Jolly could not have had a better chance to take discovery on the exclusive-remedy issue than when he deposed Portwood.

The bottom-line regarding Jolly's not-enough-time-for-discovery argument (as with his other procedural arguments below) was that it lacked merit. Jolly made the arguments to try to prevent the lower courts from deciding Minova's exclusive-remedy defense on the merits. The trouble with the arguments was that they were undermined by

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69 *Mining, LLC v. Elk Horn Coal Co.*, 2021 Ky. App. Unpub. LEXIS 310 (rendered after 1/1/03, final, no published opinion that adequately addresses, not binding authority) (Appendix Item 7).

70 First Amended Complaint (TR 45-50).

71 Answer, ¶ 19 (TR 90-95).

72 *Id.*

73 Motion for Summary Judgment (TR 1017-27).

two undisputed facts. First, Minova unambiguously pleaded an exclusive-remedy defense in February 2019.[74] Second, Minova waited until March 2022 to move for summary judgment.[75] As the circuit court held, the three years between Minova's answer and its summary-judgment motion were enough for Jolly to investigate Minova's exclusive-remedy defense. The Court should, therefore, reject Jolly's not-enough-time-for-discovery argument along with his other procedural arguments, if he makes them here.

F. THE CIRCUIT COURT CORRECTLY HELD THAT HAULING LIMESTONE FILLER WAS A REGULAR OR RECURRENT PART OF MINOVA'S BUSINESS, THAT MINOVA WAS JOLLY'S STATUTORY EMPLOYER, AND THAT MINOVA WAS ENTITLED TO EXCLUSIVE-REMEDY IMMUNITY. THE COURT SHOULD REVERSE THE COURT OF APPEALS' OPINION TO THE CONTRARY.[76]

We have now reached the substantive issue on appeal. The ultimate issue is whether the Court of Appeals erred when it reversed the circuit court's holding that Minova was Tom Jolly's immune statutory employer. The short answer is, "Yes."

In Kentucky, employers who provide their employees workers'-compensation benefits are immune from tort liability to those employees. In statutory terms, workers'-compensation benefits are the employees' "exclusive remedy" against their employers. The relevant statute is KRS 342.690(1). It provides:

> 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. For purposes of this section,

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74 Answer, ¶ 19 (TR 90-95).

75 Motion for Summary Judgment (TR 1017-27).

76 Minova preserved this argument in its summary-judgment briefs below (TR 1017-27; TR 1508-25) and on pages 15 through 24 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

> the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610.

In this case, on the day Tom Jolly was injured at Minova, his direct employer was Trimac Transportation. Thus, Trimac was immune from tort liability under KRS 342.690(1) because it provided Jolly work-comp benefits related to the accident. That's not in question. The question here is whether Minova is also entitled to exclusive-remedy immunity to Jolly's tort claims. The answer turns on whether Minova was Jolly's statutory employer under KRS 342.690(1).

KRS 342.690(1) broadly defines "employer" to include "'contractor[s]' covered by subsection (2) of KRS 342.610." "Contractors" under KRS 342.610(2) are statutory employers entitled to exclusive-remedy immunity under KRS 342.690(1). As KRS 342.690(1) uses KRS 342.610(2) to define "contractor," we need to look at KRS 342.610(2)'s definition of the word. Under KRS 342.610(2)(b), a "contractor" is "[a] person who contracts . . . [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."

Now the Court has the two statutory pieces necessary to decide whether Minova was entitled to exclusive-remedy immunity. The first piece is KRS 342.690(1). Under it, Minova was Jolly's statutory employer if it was a "contractor" as defined in KRS 342.610(2). The second piece is KRS 342.610(2). Minova was a "contractor" under KRS 342.610(2)(b) if it contracted with Jolly's direct employer (Trimac) to have Trimac perform work that was a regular or recurrent part of Minova's business. Focusing our inquiry, the narrow issue under KRS 342.690(1) and KRS 342.610(2)(b) is whether obtaining a continuous supply of limestone filler was a "regular or recurrent" part of Minova's business of manufacturing and selling resin capsules. And it was.

With the primary issue framed, we'll turn to our analysis. We'll start with the Minova-Trimac contract.[77] Under the contract, Trimac regularly picked up limestone filler at Lhoist North America and hauled it 217 miles to Minova.[78] The question for the Court is whether hauling Minova's filler was "a regular or recurrent part of the work of [Minova]" under KRS 342.610(2)(b). If it was, Minova was Jolly's statutory employer entitled to immunity under KRS 342.690(1) as the Scott Circuit Court held.

Procedurally, the regular-or-recurrent issue is a legal issue, which means the issue was for the circuit court to decide on the law.[79] Kentucky's appellate courts have explained "regular or recurrent" in numerous opinions. One such case is this Court's opinion in *General Electric Co. v. Cain*.[80]

The *Cain* Court decided a handful of statutory-employer cases in one opinion. Each case turned on what "regular or recurrent" means under KRS 342.610(2)(b). Before deciding each case, the *Cain* Court explained exclusive-remedy immunity as follows:

> If premises owners are "contractors" as defined in KRS 342.610(2)(b), they are deemed to be the "up-the-ladder," employers of individuals who are injured while working on their premises. If deemed to be "contractors," the owners, like any other employers, are immune from tort liability with respect to work-related injuries. Thus, whether an owner is entitled to "exclusive remedy" immunity depends upon whether the worker was injured while performing work that

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77 Transportation Services Agreement (TR 989-1010).

78 Transportation Services Agreement (TR 989-1010); Portwood (TR 980-81); Purchase Orders (TR 982-83); Uniform Straight Bills of Lading (TR 984-88).

79 *General Electric Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007); *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky. App. 1980).

80 *Cain*, 236 S.W.3d at 579.

> was "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession" of the owner. If so, the owner is immune.[81]

After explaining the basics of exclusive-remedy immunity, the *Cain* Court looked to Kentucky case law for the definition of "regular or recurrent." One of the cases the Court examined and relied on was *Tom Ballard Co. v. Blevins*.[82] In *Blevins*, the defendant was a coal company that included delivery with each sale of coal. Critically, the coal company did not deliver the coal itself. Instead, it contracted with a trucking firm to deliver the coal. During the pendency of the contract, an employee of the trucking firm was injured while delivering coal to a coal-company customer. The employee sued the coal company. The company argued that it was the driver's statutory employer and so immune. The *Blevins* court agreed. It held that the coal company was the driver's immune statutory employer because delivering coal was a regular or recurrent part of the company's business of selling coal.[83]

Comparing this case to *Blevins*, Minova is analogous to the coal company, which makes it Jolly's statutory employer. The following parallel material facts make this point. Like the coal company in *Blevins*: (1) Minova hired a trucking firm to haul goods (limestone filler); (2) having limestone filler hauled on a regular basis was essential to Minova's business; and (3) Jolly was injured while hauling Minova's limestone filler.[84]

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81 *Id*. at 585.

82 *Id*. at 586 (citing *Blevins*, 614 S.W.2d at 247).

83 *Blevins*, 614 S.W.2d at 249.

84 Transportation Services Agreement (TR 989-1010); Portwood (TR 980-81).

A second hauling case that supports Minova's statutory-employer argument is *Thornton v. Carmeuse Lime Sales Corp.*[85] The defendant in *Thornton* was Carmeuse Lime Sales. Carmeuse sold and delivered lime products to customers but did not deliver the products itself. It hired Bulk Transit Corporation to haul and deliver its products. The plaintiff in *Thornton* was James Thornton. Thornton was a Bulk Transit employee who regularly hauled lime for Carmeuse under the Carmeuse-Bulk Transit hauling contract.[86] Thornton was injured while hauling lime for Carmeuse.[87] He collected work-comp benefits from Bulk Transit and sued Carmeuse for negligence. After some discovery, Carmeuse moved for summary judgment arguing that it was Thornton's statutory employer. Relying on *Blevins*, the circuit court and the Court of Appeals both agreed.[88] The Court of Appeals held that hauling lime was a regular or recurrent part of Carmeuse's business of selling lime and, therefore, that Carmeuse was Thornton's statutory employer entitled to exclusive-remedy immunity.

Applying *Thornton* here, Minova is analogous to Carmeuse Lime Sales, which makes Minova Jolly's statutory employer. Like Carmeuse, Minova hired Jolly's direct employer (Trimac) to haul goods, having Trimac regularly haul the goods was essential to Minova's business, and Jolly was injured while hauling Minova's goods.

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85 *Thornton v. Carmeuse Lime Sales Corp.*, 346 S.W.3d 297 (Ky. App 2010).

86 *Id.* at 298.

87 *Id.*

88 *Id.*

As we did below, we'll briefly discuss two persuasive statutory-employer cases that were decided by federal courts under Kentucky law. Both support our arguments under *Blevins* and *Thornton*. The first is *Waterbury v. Anheuser-Busch, Inc.*[89]

In *Waterbury*, Anheuser-Busch was in the business of selling beer and needed CO2 canisters to do so.[90] Anheuser-Busch contracted Helget Gas to supply the canisters. Helget Gas then contracted with a delivery service to deliver the canisters to Anheuser-Busch. Harry Waterbury worked for the delivery service. Waterbury was injured making a delivery at Anheuser-Busch. Anheuser-Busch defended Waterbury's negligence action by raising an exclusive-remedy defense. The *Waterbury* court held that obtaining a regular supply of CO2 canisters was a necessary and regular or recurrent part of Anheuser-Busch's business of selling beer. As it was, the court further held that Anheuser-Busch was Waterbury's statutory employer entitled to exclusive-remedy immunity.

The second federal case (applying Kentucky law) is *Smothers v. Tractor Supply Co.*[91] In that case. Tractor Supply hired Rollins Dedicated Carriage Service to deliver merchandise to Tractor Supply stores.[92] Smothers was a Rollins employee. While making a delivery to a Tractor Supply store, Smothers fell and was injured. When Smothers sued Tractor Supply, it raised an exclusive-remedy defense. When it assessed

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89 *Waterbury v. Anheuser-Busch, Inc.*, 2003 U.S. Dist. LEXIS 2639 (W.D. Ky.); *Smothers v. Tractor Supply Co.*, 104 F. Supp. 2d 715 (W.D. Ky. 2000).

90 *Waterbury*, 2003 U.S. Dist. LEXIS 2639.

91 *Smothers v. Tractor Supply Co.*, 104 F. Supp. 2d 715 (W.D. Ky. 2000).

92 *Smothers*, 104 F. Supp. 2d at 715.

Tractor Supply's defense, the *Smothers* court concluded that delivering merchandise to Tractor Supply stores was a regular or recurrent part of Tractor Supply's business of selling that merchandise. As it was, the court held that Tractor Supply was Smother's statutory employer entitled to exclusive-remedy immunity.

Waterbury and *Smothers* are analogous to this case. As here, the plaintiffs were drivers who were hauling goods to businesses that needed the goods to operate. Notably, the goods being delivered in *Waterbury* and *Smothers* were not being hauled to the businesses' customers. They were being hauled to the defendant-businesses themselves. Thus, *Waterbury* and *Smothers* are even closer to this case on their material facts than *Blevins* or *Thornton*. The result under *Waterbury* and *Smothers* is, of course, the same as under *Blevins* and *Thornton*. Businesses that hired third parties to deliver goods were statutory employers and immune from tort liability.

Jolly disagrees with this analysis. He argued below that this case is "readily distinguishable" from cases like *Blevins* and *Thornton*.[93] What he said makes this case different is that Minova hired Trimac to haul goods to Minova while the defendants in *Blevins* and *Thornton* hired trucking firms to haul goods to their customers.[94]

There are several holes in Jolly's argument. First, the fact that Minova hired Trimac to haul goods to Minova rather than to a Minova customer doesn't change the analysis under KRS 342.610(2)(b). What matters under KRS 342.610(2)(b) is that the hauling Minova hired Trimac to perform was "a regular or recurrent part of [Minova's]

93 Jolly's Appellant's Brief, pp. 19-20.

94 *Id.*

business."[95] Second, Jolly did not cite a single case that holds that it matters that Minova hired Trimac to regularly haul goods to Minova rather than to a customer. Third, the Court of Appeals determined that there is no case that supports Jolly's argument. The Court of Appeals' Opinion states, "[T]here is no binding authority on this particular issue."[96] Fourth, although Jolly's argument may not have been raised in *Waterbury* or *Smothers*, the holdings in both cases are contrary to his position. That is, the defendants held to be immune statutory employers in *Waterbury* and *Smothers* had hired trucking firms to deliver goods to themselves, not customers. Finally, there is a persuasive case from the Sixth Circuit (applying Kentucky law) that flatly rejects Jolly's argument. The case is *Black v. Dixie Consumer Prods., LLC.*[97] We'll discuss it now.

The plaintiff in *Black* was Steve Black.[98] Black drove trucks for Western Express.[99] The defendant in *Black* was Dixie Consumer Products.[100] Dixie manufactured paper products, including paper cups and plates. Dixie hired Western Express to haul raw paper to Dixie.[101] Dixie used the raw paper to make its paper cups and plates.[102] Black was

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95 *See* KRS 342.610(2)(b).

96 Opinion, 13-14 (Appendix Item 1).

97 *Black v. Dixie Consumer Prods., LLC*, 835 F.3d 579 (6th Cir. 2016).

98 *Id*. at 581.

99 *Id*.

100 *Id*.

101 *Id*.

102 *Id*.

injured on Dixie's premises while unloading a load of raw paper that he'd hauled there while on the job for Western Express.[103] He sued Dixie for his damages.

Dixie moved for summary judgment.[104] It argued that it was Black's statutory employer and, therefore, entitled to exclusive-remedy immunity.[105] After two appeals, the Sixth Circuit, relying on *Thornton v. Carmeuse*, held that Dixie was right.[106] In *Black*, as in *Waterbury* and *Smothers*, goods were being delivered to the defendant-business, rather than to its customers. And in *Black* the goods being delivered to Dixie were raw materials needed to produce its products. Minova is like Dixie in the Black case and it is entitled to statutory-employer immunity.

G. MINOVA DIDN'T HIRE TRIMAC TO SUPPLY MATERIALS. IT HIRED TRIMAC TO PROVIDE HAULING SERVICES.[107]

Jolly argued below and will likely argue here that Minova wasn't his statutory employer because Trimac supplied Minova materials (limestone filler) rather than a service. Generally speaking, a contractor like Minova is not deemed to be the statutory employer of direct employees of suppliers of materials.

Jolly tried to use this observation below to distinguish *Blevins* and *Thornton* from this case. He argued that, unlike the defendants in *Blevins* and *Thornton*,

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103 *Id.*

104 *Id.* at 581-82.

105 *Id.* at 582.

106 *Id.* at 586.

107 Minova preserved this argument in its summary-judgment briefs below. (TR 1017-27; TR 1508-25) and on pages 24 and 25 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

Minova contracted Trimac to supply it materials (limestone filler) and not services.[108] That's not so. Minova didn't hire Trimac to supply limestone filler. Minova hired Trimac to haul limestone filler. Minova bought the filler from Lhoist North America, which makes LHoist the materials supplier in this case. Trimac's role was to haul the limestone filler the 217 miles from Lhoist to Minova. In that role, Trimac provided Minova a service just like the trucking companies in *Blevins* and *Thornton*.

In sum, Jolly's Trimac-was-a-materials-supplier argument was and is misplaced. Minova hired Trimac to provide hauling services. That makes this case analogous to *Blevins* and *Thornton* (and *Waterbury, Smothers,* and *Black*), which means the circuit court was right to hold that Minova is entitled to exclusive-remedy immunity as Jolly's statutory employer. The Court of Appeals erred when it reversed the circuit court.

H. MINOVA WAS NOT REQUIRED TO PROVE IT HAD PREVIOUSLY HAULED LIMESTONE FILLER WITH ITS OWN EMPLOYEES TO BE ENTITLED TO EXCLUSIVE-REMEDY IMMUNITY.[109]

Jolly argued below that Minova was not his statutory employer under cases like *Blevins* and *Thornton* because there was no record evidence that Minova previously hauled limestone filler from LHoist to Georgetown with its own employees. The argument was misplaced. It is well-established that a contractor need not have previously done the

[108] *Id*. at 19, 23-24.

[109] Minova preserved this argument in its summary-judgment briefs below. (TR 1017-27; TR 1508-25) and on pages 26 and 27 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

relevant work with its own employees for the work to be regular-or-recurrent work.[110] As the Court of Appeals explained in *Cabrera v. JBS USA, LLC,* "whether [a contractor's] employees ever performed this type of work with its own employees or had employees skilled enough or trained to do it is not dispositive of this issue. Persons or entities who engage another to perform a part of the work which is a recurrent part of their business, trade, or occupation are considered 'contractors' under the Act even if they never perform that type of work with their own employees."[111] And as Judge McKinley explained in *Beals v. Countrymark Energy Res., LLC,* "[t]he standard for whether a type of work is 'regular and recurrent' for a contractor is not whether the employees of the contractor have ever performed the work in question themselves."[112] In sum, Jolly's argument below that Minova was required to show that it had previously hauled limestone filler with its own employees (to be entitled to exclusive-remedy immunity) was and is misplaced.

I. JOLLY WAS DOING REGULAR OR RECURRENT WORK FOR MINOVA. THE COURT OF APPEALS ERRED IN HOLDING THAT HE WAS NOT.[113]

As noted above, the Court of Appeals reversed the Judges of the Scott Circuit Court and held that Minova was not entitled to statutory-employer/up-the-ladder

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110 *Beals v. Countrymark Energy Res., LLC*, 2021 U.S. Dist. LEXIS 215465 *9 (W.D. Ky.) (citing multiple Kentucky cases); *Cabrera v. JBS USA, LLC*, 568 S.W.3d 865, 869-870 (Ky. App. 2019).

111 *Cabrera*, 568 S.W.3d at 869-870.

112 *Beals*, 2021 U.S. Dist. LEXIS 215465 *9.

113 Minova preserved this argument in its summary-judgment briefs below. (TR 1017-27; TR 1508-25) and on page 28 of its Appellee's Brief in the Court of Appeals. The Court's review is *de novo*.

immunity. Quoted below is the key portion of the Court of Appeals' Opinion in that regard:

> Minova bore the burden of proving its entitlement to up-the-ladder immunity, including making a showing that the work performed by Jolly was a regular and recurrent part of its business. *Id.* at 585. Minova clearly established the existence of a contract between it and Trimac to pick up and deliver raw materials. Furthermore, Minova has shown that Trimac's hauling and delivery of raw materials occurred at regular and recurrent intervals.
>
> However, Minova was also required to prove that the hauling and transportation of raw materials is the type of work that it (or a similarly-situated business) would normally be expected to perform with its own employees. We recognize that a company that engages another to perform a part of the work that is a regular and recurrent part of its business is considered a "contractor" under the Workers' Compensation Act even if it never performed that type of work with its own employees. *Cabrera v. JBS USA, LLC*, 568 S.W.3d 865, 869-70 (Ky. App. 2019) (citing *Fireman's Fund*, 705 S.W.2d at 462). But as Jolly notes, Minova was not licensed to transport bulk commodities such as raw limestone, and Minova would have been federally required to maintain such a license if this activity were part of its regular or recurrent work performed with its own or another's employees. While theoretically, Minova could have obtained its own license and hired its own fleet of drivers with commercial drivers' licenses, no evidence was presented that it or any similarly-situated business did or would have done so.[114]

Although the Court of Appeals did not cite any binding precedent for its conclusion that Minova had to prove what other similarly-situated businesses do or would normally be expected to do, it appears that the Court of Appeals may have been looking at *dicta* in the *Cain* case. In its discussion of "regular or recurrent," the *Cain* Court commented that the work at issue should be customary, usual, or normal and of a kind

114 Opinion, 12-13 (Appendix Item 1).

that the defendant-business or similar businesses would normally perform or be expected to perform with employees. However, this *dicta* is inconsistent with or contrary to the *Cain* Court's effective endorsement of Court of Appeals' decisions like *Blevins* and *Wright*. *Blevins* and *Wright* did not require the immunity-seeking defendant-business to prove what other businesses do or would normally be expected to do.

In addition to *Blevins* and *Wright*, throughout this case we have also relied upon *Thornton,* which was decided after *Cain*. Neither *Blevins* nor *Wright* nor *Thornton* required the defendant-business to prove what other businesses do or would normally be expected to do with their own direct employees. We acknowledge that the *Thornton* court didn't expressly confront the normally-be-expected-to-do issue, but there are cases that have. One such case is *Forbes v. Dixon Elec., Inc.*[115]

The plaintiff in *Forbes* specifically argued that *Cain* established a two-part test, requiring that the work under consideration 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 [the business's own] employees."[116] The *Forbes* Court then stated (correctly in our view) that this Court did not create a new test in *Cain*, "but rather it summarized the existing test." The statutory-employer summary judgment in favor of the defendant-business was affirmed.[117]

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115 *Forbes v. Dixon Elec., Inc.*, 332 S.W.3d 733, 738 (Ky. App. 2010).

116 *Forbes v. Dixon Elec., Inc.*, 332 S.W.3d at 738 (Ky. App. 2010).

117 This Court declined to review the *Forbes* opinion.

Another Court of Appeals case worthy of mention is *Miller v. Ky. Power Co.*[118] In *Miller*, another panel of the Court of Appeals also rejected the idea that *Cain* established a new two-element test. The *Miller* Court affirmed a summary judgment in favor of the defendant-business, observing that, rather than establishing a two-element test, the *Cain* Court merely summarized the "same test set forth in prior precedent."[119]

The Court of Appeals faulted Minova for not submitting evidence that the delivery of raw materials was "the type of work that it (or a similarly-situated business) would normally be expected to perform with its own employees."[120] With all due respect, KRS 342.610(2) does not require any such proof. And two separate panels of the Court of Appeals held (in published opinions cited immediately above) that *Cain* did not require such proof. Further, as a matter of practicality and common sense, requiring evidence about "similarly-situated" businesses would be unworkable and could well lead to the demise of the exemption from liability expressly provided for contractors by KRS 342.610(2).

How would a resin-capsule manufacturer like Minova prove what other resin-capsule manufacturers do or would normally be expected to do? Would Minova be required to depose every other resin-capsule manufacturer (wherever located around the world)? And compel them to disclose the raw materials used in their manufacturing processes? And force them to disclose the identities and locations of their suppliers and their methods of obtaining delivery of the raw materials? And what if some resin-capsule

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118 *Miller v. Ky. Power Co.*, 683 S.W.3d 669 (Ky. App. 2023)

119 683 S.W.3d at 677. This Court declined to review the *Miller* decision.

120 Opinion, p. 13 (Appendix Item 1).

manufacturers do one thing and some another? Moreover, as a matter of logic, how could any defendant-business prove "normal expectations"? The ruling of the Court of Appeals is impractical and, if permitted to stand, could well result in the virtual abolition of the exemption from liability provided by the Act.

VI. CONCLUSION

This Court is the court of last resort in Kentucky and it is the final interpreter of Kentucky law. We respectfully submit that it is up to this Court — not the Court of Appeals — to interpret the relevant statutes and establish (or re-establish) clear and workable rules regarding the nature and extent of the up-the-ladder doctrine in Kentucky.

We respectfully request this Court to reverse the Opinion of the Court of Appeals and remand this case to the Scott Circuit Court with instructions to once again enter judgment in favor of Minova. We further ask this Court to rule that a contractor-defendant is not required to prove what other businesses do or would normally be expected to do to avail itself of the statutory-employer/up-the-ladder defense. If, however, this Court is inclined to require such proof, at a minimum this case should be remanded to the Scott Circuit Court to permit Minova to develop further evidence.

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