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**COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO. 2024-SC-0169-DG**

**FILED**

**MINOVA USA, INC.**

**APPELLANT** FEB 05 2025  
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SUPREME COURT

vs.

On Discretionary Review  
Court of Appeals Case No. 2022-CA-1534-MR  
Appeal from Scott Circuit Court  
Civil Action No. 18-CI-00772

**TOM JOLLY**

**APPELLEE**

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**BRIEF FOR APPELLEE, TOM JOLLY**

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**CERTIFICATE OF SERVICE**

This is to certify that on January 24, 2025, this brief was filed via the Court's electronic filing service and copies sent via e-mail or U.S. Mail to: Hon. Kate Morgan, Clerk of the Kentucky Court of Appeals, 669 Chamberlin Ave, Suite B, Frankfort, Kentucky 40601; Hon. Kathryn H. Gabhart, Scott Circuit Court, Division 2, Scott County Justice Center, 119 N. Hamilton St., Georgetown, KY 40324; Robert E. Stopher, Robert D. Bobrow, Boehl Stopher & Graves, LLP, 400 West Market Street, Suite 2300, Louisville, KY 40202. The record on appeal has not been withdrawn since this Court accepted review.

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## INTRODUCTION AND STATEMENT CONCERNING ORAL ARGUMENT

Tom Jolly suffered severe injuries at Minova USA, Inc.'s plant when he was struck by a 700-pound metal cart that had been improperly left on wheels to roll down a slope and hit him. At the time of the incident, Jolly worked for a delivery company, Trimac Transportation, Inc. Jolly had completed a Trimac delivery of raw limestone to Minova's manufacturing plant in Georgetown, Kentucky when he was hit.

Despite Minova's clear liability, the trial court dismissed Jolly's claims based on Minova's eleventh-hour motion for summary judgment asserting an up-the-ladder defense that Minova failed to sufficiently plead or prove based on substantial evidence.

Remarkably, Minova did not claim—let alone prove—that Minova or like manufacturers usually perform such deliveries themselves. Instead, Minova relied on an affidavit stating that it manufactures certain products (e.g. resin capsules) which “required” limestone filler. According to Minova's logic, it needed limestone filler so anyone delivering it (like Jolly for Trimac) must be Minova's statutory employee. That analysis is directly at odds with *General Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007).

The Court of Appeals unanimously reversed and remanded for a trial on the merits of the case because, among other things, Minova failed to prove by substantial evidence “that the hauling and transportation of raw materials is the type of work that [Minova] (or a similarly-situated business) would normally be expected to perform with its own employees” pursuant to *Cain*. (Opinion at 13, attached as Tab 1). This Court should affirm the Court of Appeals.

Pursuant to RAP 38, this case has been designated for oral argument which will be scheduled by separate order.

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### COUNTERSTATEMENT OF THE CASE<sup>1</sup>

Pursuant to RAP 32(B)(3), Appellee Tom Jolly does not accept Appellant Minova USA, Inc.’s Statement of the Case.

#### A. Minova’s negligent conduct severely injures Jolly.

On February 26, 2018, 36-year-old Tom Jolly made a delivery of raw limestone for his employer, Trimac Transportation, Inc., to Minova USA, Inc.’s (“Minova’s”) plant in Georgetown, Kentucky.

When Jolly got out of his Trimac tanker truck, a 700-pound metal cart, which Minova improperly left on wheels to roll down a slope, struck Jolly with enormous force, knocked him under his delivery tractor trailer, and caused serious injuries.<sup>2</sup> Pierre M. Vinzu Nseke (“Nseke”),<sup>3</sup> an employee of Management Registry, Inc., d/b/a Malone Staffing Solutions (“Malone Staffing”), and others at the Minova plant allowed the cart to strike Jolly.<sup>4</sup> Minova’s own investigation *faulted itself* for numerous system failures which led to the incident.<sup>5</sup> Minova’s investigation PowerPoint as a result of the incident and system failures in this case was shown to personnel spanning the globe in what its

<sup>1</sup> Record references are designated as “TR” followed by the page number.

<sup>2</sup> Minova conducted an investigation that faulted itself but did not determine the significance of the injuries. See “ICAM” Investigation Report (MUSA 5-38) (TR 1162-1194), attached as Tab 2, and PowerPoint regarding ICAM Investigation Report (MUSA 39-49) (TR 1195-1205), attached as Tab 3; Pl.’s CR 26 Expert Witness Disclosures filed June 9, 2022 (TR 2023-2122). The scanned quality of the ICAM Report and PowerPoint attached hereto is almost identical to the quality of the version produced by Minova.

<sup>3</sup> In several filings below, Appellee previously referred to Pierre M. Vinzu Nseke as Pierre Vinzu. Because the Court of Appeals Opinion, Tab 1, referred to him as Pierre Nseke, he will be referred to as Nseke in this brief.

<sup>4</sup> Malone Staffing had provided Nseke as a temporary employee to work at Minova’s plant. See (TR 1162-1205); *id.* MUSA 007 (TR 1164).

<sup>5</sup> (TR 1162-1205); *id.* MUSA 009-014 (TR 1166-1171).

President testified was a review on an “international scale.”<sup>6</sup>

As a result of his injuries, Jolly required multiple spinal surgeries, incurred substantial medical expenses, and is now disabled.<sup>7</sup> Jolly’s loss of earning capacity alone is calculated at \$1,895,547.<sup>8</sup>

**B. Trimac Transportation employs Jolly—not Minova.**

It is undisputed that, at the time of the incident, Jolly was employed by an interstate trucking company, Trimac Transportation, Inc., which transports goods and materials around the country. On behalf of Trimac, Jolly had just delivered raw limestone filler from Lhoist North America in Tennessee to Minova’s manufacturing plant in Georgetown when the incident occurred.<sup>9</sup> Minova claims that it uses the limestone filler to manufacture certain products at the Georgetown plant including resin capsules.<sup>10</sup> But Minova itself is *not* in the transportation or delivery business, and Minova is *not* Jolly’s employer.

**C. In late 2018, Jolly files suit against Minova.**

Jolly filed suit, and by First Amended Complaint (“Complaint”) filed shortly thereafter he sued Minova as well as Nseke and Malone Staffing. The Complaint alleged direct and vicarious negligence and gross negligence by Minova (acting by and through its employee and/or agent, Nseke and/or other persons), and Malone Staffing (acting by and through its employee and/or agent Nseke and/or other persons) due to their failure to maintain control over the cart which struck Jolly, including failures in hiring, training,

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<sup>6</sup> Pl.’s Not. Filing, Dep. of Minova President Michael Portwood, Ex. G, at 25 (TR 2947).

<sup>7</sup> Pl.’s Expert Discl., (TR 2023-2122), at 9, 30-48 (TR 2031, 2053-70).

<sup>8</sup> Pl.’s Expert Discl., (TR 2023-2122), at 10, 53-100 (TR 2032, 2076-2122).

<sup>9</sup> (TR 1162-1205); *id.* at MUSA 007 (TR 1164). Court of Appeals Op. at 2.

<sup>10</sup> Minova’s Mot. for Summ. Judg. (TR 1018-1027) and exhibits (TR 980-1014).

supervising, controlling and/or retaining Nseke and other persons responsible for maintaining control over the cart, and alleged that such negligence and gross negligence was a substantial factor in causing the injuries sustained by Jolly.<sup>11</sup> Jolly sought compensation for his permanent injuries and disability, as well as punitive damages.<sup>12</sup>

**D. Minova does not affirmatively plead an up-the-ladder defense or produce discovery related to the defense.**

Minova's answer generally denied the allegations in the Complaint and did not affirmatively plead an up-the-ladder contractor defense.

Instead, Minova included a vague, boilerplate reference that Jolly'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," but does not mention "up-the-ladder" at all.<sup>13</sup> There are numerous bases for exclusive-remedy under the Kentucky Workers' Compensation Act, and the latter two statutes cited by Minova feature *eleven* different sections and numerous subsections between them, and KRS 342.610(2) itself features two different contractor provisions.

As between just those two provisions, Minova did not plead whether Jolly's work at the time of his injury was a "regular or recurrent" part of Minova's business under KRS 342.610(2)(b) or whether Jolly's work "consist[ed] of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land" under KRS 342.610(2)(a). Minova also did not specifically plead that it secured workers' compensation coverage as required by KRS 342.340(1) and KRS 342.690(1).

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<sup>11</sup> Pl.'s First Amended Complaint (TR 45-50).

<sup>12</sup> *Id.*

<sup>13</sup> Minova's Ans. to Pl.'s First Am. Compl. filed February 2, 2019 (TR 100-103).

While the circuit court action was pending, Jolly filed a separate workers' compensation claim against his employer, Trimac Transportation, which, in 2021, resulted in a workers' compensation settlement for a reduced amount because of Jolly's then-existing liability claims against Minova.<sup>14</sup> No party to the workers' compensation action ever raised at any time in that action any claim that Minova was a statutory contractor/employer responsible for Mr. Jolly's workers' compensation benefits, and only Trimac Transportation was listed as the employer in those proceedings.<sup>15</sup>

Furthermore, despite several years of discovery in the circuit court, Minova neither asserted that it was Jolly's employer, nor did it mention an up-the-ladder defense in responses to interrogatories, requests for production, or deposition testimony. For example, Minova was asked to describe any reasons why Minova might contest liability, and Minova was asked to produce all documents pertaining to the subject matter of this action. In response to those interrogatories and requests, Minova did not provide any information regarding an up-the-ladder affirmative defense, let alone provide substantial evidence for any such an affirmative defense.<sup>16</sup> Minova was also asked to provide all insurance information but failed to then produce proof of a workers' compensation policy; instead, Minova only mentioned and produced a *liability* policy.<sup>17</sup>

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<sup>14</sup> Ky. Dep't of Workers' Claims Form 110, at 1 (TR 1160); Agreed Order of Dismissal of Great West, (TR 903), the workers' compensation carrier which intervened in the circuit court case to assert its subrogation rights. The workers' compensation carrier's subrogation claim against the Defendants in the state court tort action was assigned to Jolly as part of the settlement of the workers' compensation claim. As a result, Great West was dismissed by agreed order.

<sup>15</sup> Form 110 states *Trimac Transportation* was the employer (TR 1160).

<sup>16</sup> Pl.'s Resp. to Minova's Mot. for Summ. Judg., Ex. C (Interr. 11, Requests 1-2, Interr. 22, Request 12) (TR 1215-1233) & Ex. D (insurance coverage produced in discovery prior to motion for summary judgment) (TR 1251-57).

<sup>17</sup> *Id.* Ex. C (Interr. 22, Request 12) (TR 1222-1233) & Ex. D (insurance coverage produced

Furthermore, a document produced in discovery stated in part that Minova's liability carrier, Zurich Insurance, had accepted liability for Jolly's injuries: "Adjuster Brian Lindemann with Zurich Insurance contacted us [Great West, the workers' compensation carrier for Trimac] March 7, 2018 once his company was placed on notice of this claim" and further stated "that Zurich would accept liability and address any subrogation demand from Great West."<sup>18</sup>

On March 8, 2022, Jolly took the deposition of Minova's president, Michael Portwood, pursuant to a notice *duces tecum* for all "records pertaining to the subject matter of this action,"<sup>19</sup> yet Portwood produced no documents and testified he had no responsive documents.<sup>20</sup> When asked whether Minova was responsible, Portwood testified "Not in the instance, since we didn't recognize there was a risk in the process."<sup>21</sup> However, Portwood neither mentioned an up-the-ladder defense in his deposition nor did he produce any documents related to the defense in response to the notice *duces tecum* which commanded him to produce any such records.

**E. In 2022, Minova raises the up-the-ladder defense for the first time in its motion for summary judgment.**

Only ten days after the Portwood deposition, Minova filed a motion for summary

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in discovery prior to motion for summary judgment) (TR 1251-57). Minova produced workers' compensation coverage information *after* it filed its motion for summary judgment in 2022.

<sup>18</sup> Pl.'s Mot. to Alter, Amend, or Vacate, Ex. H (Final Report of Crawford attached to Dep. of Lisa Quisenberry), at 2 (TR 3026).

<sup>19</sup> Pl.'s Resp. to Minova's Mot. for Summ. Judg. (TR 1132-1298), Ex. F (TR 1273-76).

<sup>20</sup> *Id.* Ex. G at 27-28 (TR 1278-80).

<sup>21</sup> (TR 2947). This testimony is contrary to the testimony of other Minova employees and Minova's own incident report which faulted itself for numerous preventable reasons, including Minova's disregard of its own policies. *See, e.g.*, ICAM Report (MUSA 5-38) (TR 1162-1194) and PowerPoint on the report (MUSA 39-49) (TR 1195-1205).

judgment alleging an up-the-ladder contractor defense for the first time.

Despite numerous discovery requests and discovery depositions, including the Portwood deposition, Minova attached to the motion for summary judgment a never-before-seen affidavit from Portwood as well as documents Minova never produced in discovery.<sup>22</sup> Still, Portwood's affidavit only confirmed that Minova manufactures certain products (e.g. resin capsules) which "required" limestone filler.<sup>23</sup> Minova itself did not engage in the delivery or transport of that limestone filler, and Minova had no employees who performed the same or similar work.<sup>24</sup> According to Minova's motion, however, Minova regularly needed limestone filler deliveries; therefore, anyone delivering it—like Jolly for Trimac Transportation—must be its statutory employee.

As explained in Jolly's response, Minova failed to produce through the Portwood Affidavit or otherwise "substantial evidence" that Mr. Jolly "*performed regular or recurrent work of a type that [Minova] or similar businesses would perform or be expected to perform with employees*" under *General Elec. Co. v. Cain*, 236 S.W.3d 579, 590 (Ky. 2007) (emphasis added). Jolly also sought discovery on the up-the-ladder issue once it was raised and pursued in Minova's motion,<sup>25</sup> but Minova filed motions for protective order to prevent further discovery regarding the information and documents not previously produced.<sup>26</sup> Those motions were never ruled upon before entry of

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<sup>22</sup> Minova's Mot. for Summ. Judg. (TR 1018-1027) and exhibits (TR 980-1014). Minova did not produce in discovery the *first three documents* that it attached to its motion for summary judgment filed in 2022, years into the case.

<sup>23</sup> Portwood Affidavit (TR 980-981), attached as **Tab 4**.

<sup>24</sup> Jolly Affidavit (TR 1323-1326), attached as **Tab 5**.

<sup>25</sup> See Pl.'s third set of written discovery to Minova (TR 1309-22); Pl.'s CR 30.02(6) Deposition Notice *Duces Tecum* of Minova (TR 1302-08).

<sup>26</sup> See Minova's Mots. for Prot. Order (TR 1748-1750; TR 1751-1753).

summary judgment.

**F. Summary judgment is granted only days before trial.**

Only days before a trial scheduled to take place from July 18-29, 2022, Senior Judge Robert McGinnis, who was presiding for only a brief period in between circuit judges Brian Privett and Kathryn Gabhart, summarily dismissed Minova with no supportive reasoning.<sup>27</sup> Nseke and Malone Staffing were also dismissed the same week.<sup>28</sup> Jolly timely filed a motion to alter, amend, or vacate.<sup>29</sup> By then, Judge Kathryn Gabhart was presiding over the case. The trial court denied the motion as to Minova, concluding it qualified as an up-the-ladder contractor.<sup>30</sup> However, the trial court granted Jolly's motion as to Nseke and Malone Staffing, noting that they failed to plead workers' compensation immunity as a defense.<sup>31</sup> Accordingly, the trial court reinstated Jolly's claims against Nseke and Malone Staffing, and Jolly appealed Minova's dismissal.

**G. The Court of Appeals reverses and remands, properly applying this Court's unanimous decision in *General Elec. Co. v. Cain*.**

The Court of Appeals applied settled law in *General Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007), and unanimously reversed.

The Court of Appeals first observed, consistent with *Cain*, that a party asserting an up-the-ladder defense "must both plead and prove the affirmative defense."<sup>32</sup>

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<sup>27</sup> Order entered July 12, 2022 granting Summary Judgment for Minova (TR 2282-2283).

<sup>28</sup> Order entered July 15, 2022 granting Summary Judgment for Nseke and Malone Staffing (TR 2287-88); Court of Appeals Op. at 3. Of note, circuit judge Privett had also already denied a motion for summary judgment by Malone Staffing, ruling a year prior as follows: "genuine questions of material fact. I think that there are those at this point." VR 5/13/21 1:44:57-1:45:45.

<sup>29</sup> Pl.'s Mot. to Reconsider, Clarify, Alter, Amend, or Vacate (TR 2289-2690).

<sup>30</sup> Opinion and Order granting and denying in part Jolly's motion (TR 3685-3693).

<sup>31</sup> *Id.*

<sup>32</sup> Court of Appeals Op. at 5.

Although the Court of Appeals gave Minova the benefit of the doubt as to whether Minova sufficiently pleaded and prosecuted the defense, the Court then explained:

The Supreme Court in *Cain* concluded 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. Rather, 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*.<sup>33</sup>

The Court of Appeals further noted:

KRS 342.610(2) places the focus of an immunity analysis on whether the nature of the work performed *by the employee* is of a kind that is a regular or recurrent part of the work of the trade, business, occupation, or profession....Similarly, the Supreme Court in *Cain* further emphasized that “regular and recurrent” work 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. *Cain*, 236 S.W.3d at 588.<sup>34</sup>

Thus, the Opinion held:

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 .... [A]s 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. Likewise, Minova does not allege that Jolly had any other duties on Minova’s worksite that it would normally perform with its own employees .... Consequently, Minova failed to prove all of the elements necessary to succeed at the dispositive motion stage in the Trial Court. Therefore, we

<sup>33</sup> Court of Appeals Op. at 8 (emphasis added).

<sup>34</sup> Court of Appeals Op. at 12 (emphasis in original).

conclude that Minova was not entitled to workers' compensation immunity as an up-the-ladder contractor within the meaning of KRS 342.610(2)(b). As a result, Minova was not entitled to summary judgment on Jolly's claims.<sup>35</sup>

The Court of Appeals reversed and remanded for a jury trial against Minova.

**H. Minova concedes that *Cain* applies and is dispositive.**

Minova filed a motion for discretionary review because, according to Minova, the Court of Appeals Opinion "conflicts" with *Cain* and the cases *Cain* cites.<sup>36</sup> Jolly disagrees. However—and key to this Court's review—Minova's motion does not ask this Court to overrule or abrogate *Cain* in any way. And *Cain* fully supports the result and reasoning in the Court of Appeals Opinion.

For these reasons and the arguments that follow, this Court should affirm the Court of Appeals and remand for a trial on the merits.

**ARGUMENT**

**I. MINOVA MUST AFFIRMATIVELY PLEAD AND PROVE ENTITLEMENT TO THE UP-THE-LADDER DEFENSE**

For Minova to evade tort liability under the Kentucky Workers' Compensation Act, it must both plead and prove that it is an "up-the-ladder" contractor.

***A. Statutory basis for the up-the-ladder defense.***

KRS 342.690(1) provides, in pertinent part, as follows:

*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, 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.*

<sup>35</sup> Court of Appeals Op. at 13-14.

<sup>36</sup> Minova's Motion for Discretionary Review, p.11.

(Emphasis added.)

KRS 342.610(2) then identifies “employer” contractors who are liable for payment of workers’ compensation benefits to employees who suffer work-related injuries or occupational diseases:

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:

- (a) To have work performed consisting of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land; or
- (b) *To 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. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

(Emphasis added.)

The legislature narrowly defined activities that entitle a contractor to up-the-ladder exclusivity. Under KRS 342.610(2)(b)—the provision at issue in this case—the “regular or recurrent work” must be of a type that the alleged up-the-ladder contractor *“would perform or be expected to perform with employees.”* *General Elec. Co. v. Cain*, 236 S.W.3d 579, 590 (Ky. 2007) (emphasis added). Furthermore, “work” as used in KRS 342.610(2)(b) is further limited to *“providing services* to another in return for

remuneration on a regular and sustained basis in a competitive economy.” KRS 342.0011(34) (emphasis added).

KRS 342.610(2)(b) is not intended to shield contractors from tort liability, but merely to ensure that contractors and subcontractors provide workers’ compensation coverage to their employees. *Cain*, 236 S.W.3d at 587; *Davis v. Hensley*, 256 S.W.3d 16, 18 (Ky. 2008); *Uninsured Employers’ Fund v. City of Salyersville*, 260 S.W.3d 773, 776 (Ky. 2008). If “some other person than the employer” may be legally responsible for the worker’s on-the-job injuries, the worker may assert a tort claim against that other person and attempt to recover damages. *Beaver v. Oakley*, 279 S.W.3d 527, 530 (Ky. 2009) (citing KRS 342.700). Therefore, “[t]he humane spirit of the [Kentucky Workers’ Compensation Act] 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)).

***B. The up-the-ladder defense is an affirmative defense which a defendant must affirmatively plead and then prove based on substantial evidence.***

The up-the-ladder defense in KRS 342.610(2)(b) is “a matter constituting an avoidance within the ambit of CR 8.03 which should be pled as an affirmative defense.” *Gordon v. NKC Hosps., Inc.*, 887 S.W.2d 360, 362–63 (Ky. 1994). More than that, KRS 342.610(2)(b) must be “*pleaded and proven*, the failure of which amounts to a waiver.” *Gordon*, 887 S.W.2d at 363 (emphasis added).

“[A] conclusion that a defendant is entitled to judgment as a matter of law must be supported *with substantial evidence* that a defendant was the injured worker’s statutory employer under a correct interpretation of KRS 342.610(2)(b).” *Cain*, 236 S.W.3d at 585 (emphasis added). “Statements that amount to legal conclusions are not

properly included in an affidavit and, in any event, are not substantial evidence.” *Id.* A defendant must produce “substantial evidence” establishing that the work performed by the plaintiff was the “regular or recurrent” work of the defendant, meaning work “the business or similar businesses would normally perform or be expected to perform with employees.” *See Cain*, 236 S.W.3d at 584 (rejecting up-the-ladder defense where there was “no substantial evidence ... that all of the work [plaintiff] performed was of a kind that American Standard or similar businesses would normally perform or be expected to perform with employees”).

Furthermore, because a “contractor” under KRS 342.610(2) is deemed an “employer” under KRS 342.690(1), the contractor-employer must also prove that it “secure[d] payment of compensation as required this chapter,” KRS 342.690(1), specifically the proof required by KRS 342.340(1). In *Cain*, this Court held that “[a] certification of coverage from the Department of Workers’ Claims or an uncontroverted affidavit from the employer’s insurer is prima facie proof that a company has secured payment of compensation.” 236 S.W.3d at 605. This Court in *Cain* held that the alleged up-the-ladder contractor, General Electric; had to provide such proof to assert an up-the-ladder defense. *Id.* Likewise, in *Gordon v. NKC Hosps., Inc.*, 887 S.W.2d 360, 362 (Ky. 1994), with respect to an alleged up-the-ladder contractor-hospital, this Court held that “[t]he statutory provisions upon which [the hospital] relies are not self-executing.” *Id.* at 362. “To have protection of the Act, KRS 342.690 requires [the hospital] to secure payment of compensation as a condition of benefiting from the exclusive liability provision .... [N]ecessarily [the hospital] must inform the court of its status as such and prove its compliance with the statute.” *Id.*; see also *McDonald’s Corp. v. Ogborn*, 309

S.W.3d 274, 283-284 (Ky. App. 2009) (McDonald's waived workers' compensation exclusivity defense because it failed to "prove that it complied with KRS 342.340(1)").

**II. MINOVA FAILED TO SUFFICIENTLY PLEAD ITS UP-THE-LADDER DEFENSE AND OTHERWISE IS BARRED FROM ASSERTING IT.**

Minova's answer generally denied the allegations in the complaint and did not affirmatively plead an up-the-ladder contractor defense. Instead, Minova included a vague, boilerplate reference: "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."<sup>37</sup> Although the Court of Appeals agreed that Minova did not identify its status as an up-the-ladder contractor, the Court felt that Minova's citation to the statutes alone was "fair notice."<sup>38</sup>

However, the two statutes feature eleven different sections and numerous subsections between them. For example, KRS 342.610 includes provisions regarding the sequence of payments, intentional acts, illegal substances, building permits, and posting notices about workers' compensation carriers. KRS 342.690 addresses common law defenses, the purchase of workers' compensation insurance for employers, the Department of Labor, and franchisors. And KRS 342.610(2) alone features *two different* statutory contractor provisions. As between only those provisions, Minova did not plead whether Jolly's work at the time of his injury was a "regular or recurrent" part of Minova's business under KRS 342.610(2)(b) or whether Jolly's work "consist[ed] of the removal, excavation, or drilling of soil, rock, or mineral, or the cutting or removal of timber from land" under KRS 342.610(2)(a).

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<sup>37</sup> Minova's Ans. to Pl.'s First Am. Compl. filed February 2, 2019 (TR 100-103).

<sup>38</sup> Court of Appeals Op. at 6.

***A. Minova waived its affirmative up-the-ladder defense.***

“[T]he central purpose of pleadings remains notice of claims *and defenses*.” *Hoke v. Cullinan*, 914 S.W.2d 335, 339 (Ky. 1995) (emphasis added). In *Hoke*, this Court held that an allegation of negligence is not broad enough to provide fair notice of an allegation of recklessness. More recently, this Court held that “lack of informed consent must be specifically pled since a generalized claim of medical malpractice fails to give fair notice to the defendant that informed consent will be at issue.” *Watson v. Landmark Urology, P.S.C.*, 642 S.W.3d 660, 672 (Ky. 2022). In *Watson*, like this case, litigation and discovery spanned many years without fair notice. *Id.* at 671. Furthermore, “the general rule of pleading [is] that facts and not conclusions should be pleaded, and that, if only the latter is contained in the pleading, it will not authorize the granting of relief.” *Seiller Waterman, LLC v. RLB Props.*, 610 S.W.3d 188, 195 (Ky. 2020) (internal quotation omitted).

Similarly, in an up-the-ladder case, this Court held that the alleged up-the-ladder contractor-defendant “*must inform the court of its status as such and prove its compliance with the statute.*” *Gordon v. NKC Hosps., Inc.*, 887 S.W.2d 360, 362 (Ky. 1994) (emphasis added). This Court said that “we have no doubt that the *matters claimed to protect appellee are affirmative defenses which were required to have been pleaded and proven.*” *Id.* at 363 (emphasis added). Here, Minova did none of those things.

Minova did not plead its status as a statutory contractor or up-the-ladder employer, let alone specifically plead the “regular or recurrent” provisions in KRS 342.610(2)(b), and Minova did not plead that it secured the required workers’

compensation as required by KRS 342.690(1), KRS 342.340(1), *Cain, supra, Gordon, supra,* and *Ogborn, supra.*

Furthermore, Minova did not plead any facts that would provide fair notice of its status as an up-the-ladder employer. *Seiller Waterman, LLC*, 610 S.W.3d at 195; *see also Eaker v. Kansas City Power & Light Co.*, 473 S.W.3d 153, 159 (Mo. App. 2015) (“[T]he bare recitation that [defendant] intended to rely on the exclusive-remedy provisions of the Workers’ Compensation Law would not be sufficient to assert the affirmative defense” as defendant “was required to allege the *ultimate facts* entitling it to workers’ compensation exclusivity”) (emphasis in original).

In response, relying on inapposite case law addressing waiver of contractual provisions, Minova claims that any waiver must be voluntary, intentional, and knowing.<sup>39</sup> However, case law regarding waiver of affirmative defenses is clear: “If an affirmative defense is not raised in a responsive pleading or a motion to dismiss, it is waived.” *Headen v. Com.*, 87 S.W.3d 250, 254 (Ky. App. 2002); *Gordon*, 887 S.W.2d at 363 (failure to plead up-the-ladder defense “amounts to a waiver”).

Minova also claims that, because it is Jolly’s statutory employer and not his direct employer, it need not plead or prove that it secured workers’ compensation coverage, contrary to KRS 342.690(1), KRS 342.340(1), *Cain, supra, Gordon, supra,* and *Ogborn, supra.*<sup>40</sup> Here, Minova neither pleaded proof of coverage nor produced proof of coverage in response to Jolly’s discovery requests, resulting in a waiver. *Ogborn, supra.* According to Minova, however, it is sufficient that Trimac secured workers compensation coverage.

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<sup>39</sup> Minova Appellant’s Bf. at 8.

<sup>40</sup> Minova Appellant’s Bf. at 12-14.

Against plain statutory language and this Court's precedent, Minova cites a Court of Appeals opinion vacated for lack of jurisdiction, an unpublished and non-binding Court of Appeals opinion, and a Court of Appeals opinion that pre-dates this Court's precedent in *Cain*.<sup>41</sup> Still, in its answer, Minova did not *plead* that workers' compensation coverage had been secured (whether by Minova or Trimac) to "inform the court of its status" and "prove its compliance with the statute." *Gordon*, 887 S.W.2d at 362.

For any of these reasons, Minova failed to give fair notice of its up-the-ladder affirmative defense resulting in a waiver.

***B. Minova's up-the-ladder defense fails for other reasons.***

Minova is also barred from asserting an up-the-ladder defense based on the doctrines of estoppel and laches. For estoppel, there must be "concealment of a material fact" and "[t]he party relying on the estoppel must have acted or relied upon its to his detriment." *Ferguson v. Utilities Elkhorn Coal Co.*, 313 S.W.2d 395, 400-01 (Ky. 1958). The doctrine of laches applies "where a party engages in unreasonable delay to the prejudice of others, rendering it inequitable to allow that party to reverse a previous course of action." *Colston Investment Co. v. Home Supply Co.*, 74 S.W.3d 759, 768 (Ky. App. 2001). Both apply here.

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<sup>41</sup> Minova Appellant's Bf. at 11-13, citing *Louisville Gas & Elec. Co. v. Galvan*, No. 2019-CA-0961-MR, 2020 Ky. App. LEXIS 115 (Ky. App. 2020), vacated for lack of jurisdiction by *Louisville Gas & Elec. Co. v. Galvan*, No. 2019-CA-0961-MR, 2021 Ky. App. Unpub. LEXIS 541 (Ky. App. 2021) and *Sheets v. Ford Motor Co.*, 626 S.W.3d 594 (Ky. 2021); *Estate of Young v. ISP Chems., LLC*, No. 2017-CA-000838-MR, 2018 Ky. App. Unpub. LEXIS 324 (Ky. App. 2018); *Pennington v. Jenkins-Essex Constr., Inc.*, 238 S.W.3d 660 (Ky. App. 2006).

Minova concealed its up-the-ladder defense from 2018 until 2022 when it first gave notice of the defense in its motion for summary judgment. For years, Minova neither asserted that it was Jolly's statutory employer, nor did it mention an up-the-ladder defense in responses to interrogatories, requests for production, or deposition testimony. For example, Minova was asked to describe any reasons why Minova might contest liability, and Minova was asked to produce all documents pertaining to the subject matter of this action. In response to those interrogatories and requests, Minova did not provide any information regarding an up-the-ladder affirmative defense, let alone provide substantial evidence for any such an affirmative defense.<sup>42</sup> Minova was also asked to provide all insurance information but failed to then produce proof of a workers' compensation policy; instead, Minova only mentioned and produced a *liability* policy.<sup>43</sup>

On March 8, 2022, Jolly took the deposition of Minova's president, Michael Portwood, pursuant to a notice *duces tecum* for all "records pertaining to the subject matter of this action,"<sup>44</sup> yet Portwood produced no documents and testified he had no responsive documents.<sup>45</sup> When asked whether Minova was responsible, Portwood testified "Not in the instance, since we didn't recognize there was a risk in the process."<sup>46</sup> Portwood neither mentioned an up-the-ladder defense in his deposition nor did he

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<sup>42</sup> Pl.'s Resp. to Minova's Mot. for Summ. Judg., Ex. C (Interr. 11, Requests 1-2, Interr. 22, Request 12) (TR 1215-1233) & Ex. D (insurance coverage produced in discovery prior to motion for summary judgment) (TR 1251-57).

<sup>43</sup> *Id.* Ex. C (Interr. 22, Request 12) (TR 1222-1233) & Ex. D (insurance coverage produced in discovery prior to motion for summary judgment) (TR 1251-57). Minova produced workers' compensation coverage information *after* it filed its motion for summary judgment.

<sup>44</sup> Pl.'s Resp. to Minova's Mot. for Summ. Judg. (TR 1132-1298), Ex. F (TR 1273-76).

<sup>45</sup> *Id.* Ex. G at 27-28 (TR 1278-80).

<sup>46</sup> (TR 2947).

produce any documents related to the defense as requested. Then, ten days later, Minova filed its motion for summary judgment relying on Portwood's post-deposition affidavit as well documents Minova never produced in discovery.<sup>47</sup>

In the interim, while Minova concealed the defense, Jolly filed a separate workers' compensation claim against his employer, Trimac Transportation, which, in 2021, resulted in a reduced settlement based in part on the then-viable negligence claims against Minova.<sup>48</sup> Minova engaged in unreasonable delay in asserting its up-the ladder defense, and Jolly was unquestionably prejudiced by that delay both in his workers' compensation claim and in pursuing litigation and discovery for years until the defense was first raised and pursued by Minova after the Plaintiff took numerous depositions, disclosed experts, and was close to a two-week trial.

In summary, Minova failed to sufficiently plead its up-the-ladder affirmative defense and therefore waived it. The doctrines of estoppel and laches independently bar Minova's up-the-ladder defense. Although Jolly made these arguments in trial court and the Court of Appeals,<sup>49</sup> the Court of Appeals reversed only because Minova failed to prove its up-the-ladder defense. While Minova also failed to prove its up-the-ladder defense for the reasons detailed in the next section, this Court can and should affirm the Court of Appeals based on any of these alternate grounds and remand to the trial court for

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<sup>47</sup> Minova's Mot. for Summ. Judg. (TR 1018-1027) and exhibits (TR 980-1014). Minova did not produce in discovery the *first three documents* that it attached to its motion for summary judgment.

<sup>48</sup> Ky. Dep't of Workers' Claims Form 110, at 1 (TR 1160); Agreed Order of Dismissal of Great West (TR 903).

<sup>49</sup> Pls.' Resp. to Def. Minova's Mot. for Summ. Judg. (TR 1132-1322); Pl.'s Mot. to Reconsider, Clarify, Alter, Amend, or Vacate (TR 2289-2690); Court of Appeals Appellant's Bf. at 6-12.

a jury trial. See *Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co.*, 434 S.W.3d 489, 496 (Ky. 2014); see also *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006).

**III. MINOVA FAILED TO SUFFICIENTLY PROVE ITS UP-THE-LADDER DEFENSE BASED ON SUBSTANTIAL EVIDENCE.**

***A. General Elec. Co. v. Cain is controlling precedent and eviscerates Minova's up-the-ladder defense.***

Minova and its *amicus curiae* struggle with how to address this Court's unanimous decision in *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007). On the one hand, Minova says in its motion for discretionary review that the Court of Appeals Opinion "conflicts" with *Cain*, suggesting *Cain* is controlling.<sup>50</sup> On the other hand, Minova labels *Cain*'s analysis "dicta" when *Cain* is inconvenient.<sup>51</sup> Minova then pivots to Court of Appeals opinions, which are not binding on this Court, see SCR 1.030(8)(a), as well as federal opinions, which are likewise not binding on this Court, *Embs v. Pepsi-Cola Bottling Co. of Lexington, Kentucky*, 528 S.W.2d 703, 705 (Ky. 1975) ("Suffice it to say, this is a question of state law and we are not bound by [a federal] opinion"). Minova's *amicus* does the same, relying on *Cain* when it is convenient, and arguing that *Cain*'s analysis is against "public policy" when it is inconvenient, all while citing factually inapposite and non-binding opinions.<sup>52</sup>

In *Cain*, this Court considered two separate cases concerning the Kentucky Workers' Compensation Act and its provision regarding up-the-ladder immunity. The Court addressed each claim and respective facts separately, designating one claim as the "GE claim" and the other as the "Rehm claim." James Rehm was a millwright who

<sup>50</sup> Minova's Motion for Discretionary Review, p. 11.

<sup>51</sup> Minova's Bf. at 27-28.

<sup>52</sup> KDC Amicus Curiae Bf. at 5, 7, 12-15.

developed mesothelioma due to asbestos exposure at locations owned by sixteen (16) different companies. *Cain*, 236 S.W.3d at 590.

This Court in *Cain* held that a premises owner has the burden to “plead and prove” the work was regular or recurrent. *Id.* at 585. The burden is only met if “*substantial evidence*” is submitted. *Id.* Conclusory statements that amount to legal conclusions will not be considered substantial evidence. *Id.* This Court further held that work that is “regular or recurrent” in KRS 342.610(2)(b) “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.” *Id.* at 588. The *Cain* Court clarified the test making clear that a business is not immunized from tort liability “*unless the owner or the owners of similar businesses would normally expect or be expected to handle such projects with employees.*” *Id.* at 588 emphasis added).

This Court relied on Arthur Larson and Lex K. Larson, *Larson’s Workers’ Compensation Law*, § 70.06[3] (2006), to determine which activities are regular or recurrent and which are not. *Id.* at 587. In reaching its holding, the Court stated,

The treatise [Larson] 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.*”

*Id.* at 588 (citing Larson, supra, at § 70.06[1] (emphasis added)). This Court engaged in a detailed analysis and concluded that most courts interpreting statutes like KRS 342.610 interpreted “regular or recurrent” work as work ordinarily performed *through the alleged up-the-ladder contractor’s employees*. Consistently, this Court later held that “[c]ases

must be analyzed individually under KRS 342.610(2)(B) based on the particulars of the relationship at issue.” *Doctors’ Associates, Inc. v. Uninsured Employers’ Fund*, 364 S.W.3d 88, 92 (Ky. 2011); *see also Estate of Dohoney ex rel. Dohoney v. International Paper Co.*, 560 Fed. Appx. 564, 569 (6th Cir. 2014) (“[O]ur inquiry must focus on the actual work being performed at the time of the injury”). Thus, whether work is regular or recurrent, and whether it is performed or expected to be performed by the defendant’s own employees, is specific for each case.

Here, Minova did not claim—let alone prove—that Minova transports goods with its own employees. Instead, Minova relied on the Portwood Affidavit which says that Minova manufactures products (e.g. resin capsules) which “require” limestone filler. According to Minova’s logic, it needed limestone filler. Therefore, anyone delivering it, like Jolly for Trimac, must be Minova’s statutory employee. Such an analysis is contrary to *Cain* and contrary to KRS 342.610(2)(b).

Minova is a product *manufacturer*. Its employees are not engaged in interstate transportation. Indeed, Minova is *not licensed* to transport any cargo in interstate commerce. A DOT search revealed that neither Minova nor “Orica Ground Support” (the parent company for Minova which contracted with Trimac) are licensed to carry any cargo in interstate commerce,<sup>53</sup> and certainly not the interstate transport of heavily regulated raw materials known as “Commodities Dry Bulk,”<sup>54</sup> which is what Trimac was

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<sup>53</sup> Pl.’s Resp. to Minova’s Mot. for Summ. Judg., Ex. J (US DOT licensing search for “Orica Ground Support”) (TR 1288).

<sup>54</sup> Dry Bulk Commodity, available at <https://www.investopedia.com/terms/d/dry-bulk-commodity.asp#:~:text=A%20dry%20bulk%20commodity%20is,global%20manufacturing%20and%20production%20process>, last checked 1/23/25 (“The transport of dry bulk commodities is highly regulated due to the effects that an in-transport accident can have on the environment.”).

licensed to and did in fact transport in this case.<sup>55</sup> Minova does not dispute this.

***B. Minova's non-binding opinions are all distinguishable.***

Minova primarily relies on three Court of Appeals opinions, *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky. App. 1980), *Wright v. Dolgen Corp., Inc.*, 161 S.W.3d 341 (Ky. App. 2004), and *Thornton v. Carmuse Lime Sales Corp.*, 346 S.W.3d 297 (Ky. App. 2010). However, in each of those cases, there was either evidence or it was undisputed that the delivery of coal (*Blevins*), retail merchandise (*Wright*), and lime (*Thornton*) was a customary or usual part of each up-the-ladder's employer's business. Moreover, in all three cases the up-the-ladder employer was delivering *finished products* to customers where the customers paid for both the product and delivery. Minova even conceded that these cases involved persons who were "delivering finished products, while [Jolly] was delivering raw materials."<sup>56</sup>

In *Blevins*, a pre-*Cain* Court of Appeals opinion, the injured party was a truck driver for a coal mining company. *Blevins*, 614 S.W.2d at 248. The driver filed a workers' compensation claim. *Id.* at 249. Seeking to avoid workers' compensation payments, the mining company argued it was not the up-the-ladder worker's employer for the purpose of workers' compensation benefits. *Id.* However, the Board placed workers' compensation liability on the mining company pursuant to KRS 342.610(2)(b). *Id.* The Court of Appeals held that the Board's "classification [of the injured party] as an employee is not clearly erroneous and *in fact is scarcely questioned on appeal.*" *Id.* (emphasis added). That is not the case here, and nothing in *Blevins* suggests that the up-

<sup>55</sup> (TR 1162-1205); *id.* at MUSA 008 (TR 1165).

<sup>56</sup> Minova's Reply to Mot. for Summ. Judg., at 12 (TR 1519).

the-ladder defense applies in all cases involving transportation or delivery.

In *Wright*, a pre-*Cain* Court of Appeals opinion, the injured party's direct employer was contracted to transport merchandise from Dollar General's distribution centers to its other stores. *Wright*, 161 S.W.3d at 342. But the Court of Appeals in *Wright* noted that "[i]t is not disputed that the loading of the trailers and the transportation of the merchandise from the distribution center to the stores was a regular or recurrent part of Dollar General's business." *Id.* at 344. No such evidence or stipulation exists here.

In *Thornton*, a Court of Appeals opinion, a truck driver was injured while delivering from Carmeuse to its customers. Based on the evidence, the Court of Appeals held that "the delivery of lime to Carmeuse's customers was a regular and recurrent part" of Carmeuse's business as delivery of the product was included in the cost to the customer. *Thornton*, 346 S.W.3d at 299. No such evidence exists here.

The other cases cited by Minova are all similarly distinguishable:

In *Black v. Dixie Consumer Products, LLC*, 835 F.3d 589 (6th Cir. 2016), a non-binding federal opinion, the defendant produced evidence that other paper product manufacturers utilized their own fleets for their transportation needs. *Id.* at 586. No such evidence exists here.

In *Beals v. Countrymark Energy Resources, LLC*, 2021 WL 5181026 (W.D. Ky. 2021), a non-binding federal opinion, the district court found that "CountryMark, or any oil production company, would normally be expected to do [the same type of work performed by the plaintiff] with its employees." *Id.* at \*3. No such evidence exists here.

In *Cabrera v. JBS USA, LLC*, 568 S.W.3d 865 (Ky. App. 2019), a Court of Appeals opinion, the sanitation services at issue in that case were *required by law* to be

performed by the up-the-ladder employer. Likewise, in *Miller v. Kentucky Power Co.*, 683 S.W.3d 669 (Ky. App. 2023), the tree trimming services Kentucky Power enlisted were “required by law.” *Id.* at 675. No state or federal law required Minova to transport its own raw limestone. Likewise, in *Fireman’s Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986), a pre-*Cain* opinion, the Court found that construction and rough carpentry substantially overlap. Here, Minova is not in the business of manufacturing and delivery. There is no similar overlap.

Minova also relies on *Forbes v. Dixon Electric, Inc.*, 332 S.W.3d 733 (Ky App. 2010). In *Forbes*, the plaintiff-police officer was injured while directing traffic pursuant to contract for an electrical contractor working on traffic lights. *Id.* at 733. The Court of Appeals stated, “[i]t is equally undisputed that from time-to-time Dixon employees would direct traffic at intersections not requiring direct law enforcement.” *Id.* at 735. Here, there is no evidence that Minova ever engaged in the transportation at issue.

Finally, Minova cites *Waterbury v. Anheuser-Busch*, 2003 WL 1145470 (W.D. Ky. February 24, 2003) and *Smothers v. Tractor Supply Company*, 104 F.Supp.2d 715 (W.D. Ky 2000), both of which involved retail sales of finished products. Both are non-binding federal district court opinions which pre-date *Cain*. As a result, the opinions do not address the *Cain* standard. However, *Smothers* has been distinguished in an instructive opinion from Judge Heyburn, *Davis v. Ford Motor Company*, 244 F.Supp.2d 784 (W.D. Ky. 2003).

In *Davis*, the court held that the provision of crew cab roof panels by a third-party to Ford did not constitute a regular and recurrent part of Ford’s trade or business, absent the provision of some additional service Ford would have otherwise done itself. *Id.* at



render any additional services in connection with the installation of the lintels.” *Id.* at 790.

Thus, “one who supplies goods, even component parts, does not cross the line from a supplier to a subcontractor ... unless that person renders some type of additional services or assistance in relation to the goods supplied.” *Id.* Here, there is no evidence Jolly provided any “service” to Minova at the time of his injury beyond supplying the raw limestone delivery; therefore, Jolly’s claim against Minova should proceed for this independent reason.

***C. Minova ignores an opinion directly on point from this Court.***

Although Minova cites many unpublished opinions, it fails to cite *Com., Uninsured Employers’ Fund v. Ritchie*, No. 2012-SC-000746-WC, 2014 WL 1118201 (Ky. Mar. 20, 2014) (unpub., non-binding), an opinion from this Court which applies *Cain* and is directly on point.<sup>57</sup>

There, Ritchie was employed as a truck driver for United, Inc. While Ritchie was hauling a load of goods cross country, Ritchie was injured in an accident. United did not have workers’ compensation coverage. However, the goods Ritchie was transporting at the time of the accident included signs manufactured by a company called Image Point. Ritchie and the Uninsured Employers’ Fund sought workers’ compensation benefits from Image Point, the sign manufacturer, and Interchez, a shipping broker, as up-the-ladder employers.

Ultimately, this Court held that the companies were not Ritchie’s up-the-ladder employers because “while shipping was regular and recurring, there is no evidence that

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<sup>57</sup> *Ritchie* opinion attached as Tab 6.

Image Point, or a similar business, would use or be expected to use its own employees to perform that task.” *Id.* at \*4. This Court also noted that “[t]here is nothing in the record to indicate that Image Point ever owned a fleet of delivery trucks or employed individuals to transport its signs.” *Id.* There was no evidence “to show that Image Point employees physically transported its goods to purchasers.” *Id.* As for Interchez, there was “no evidence that Interchez was ever equipped with the skilled manpower or tools to actually ship products.” *Id.* *Ritchie* confirms that simply because a company *can* do something—here the interstate transport of dry commodities—that is irrelevant, and merely because a company might have the capacity to undertake the task is not the same as the company *actually* or normally performing it.

***D. Whether work is “necessary” from the standpoint of the up-the-ladder defendant is irrelevant.***

Like the statements in the Portwood Affidavit, Minova’s brief focuses on whether the plaintiff’s work is “necessary” from the standpoint of the defendant and, if so, then (according to Minova) it is a “regular or recurrent” part of the defendant’s business. This Court rejected that argument in *Cain*. Simply because work is “beneficial or incidental to the owner’s business, or that is necessary” to it, does not mean it is a regular or recurrent part of its business performed or ordinarily performed by its employees. *Cain*, 236 S.W.2d at 588. This Court in *Cain* reversed summary judgment for property owners who argued the tasks performed by the plaintiff were “necessary” but failed to prove what KRS 342.610(2)(b) requires—that the work performed is a regular or recurrent part of the defendant’s business performed or ordinarily performed by its own employees. *Id.* at 592-606.

As this Court has likely gathered already, Minova’s unprincipled and strained effort to undermine *Cain* is designed solely to absolve Minova of tort liability in this case rather than replace *Cain* with any sound analytical framework.

Indeed, if Minova and its *amicus* successfully eviscerate *Cain*, then virtually anyone who receives regular and “necessary” deliveries from an independent contractor—through Amazon, DoorDash, Uber Eats, Office Depot, Lowe’s or otherwise—becomes a “statutory employer” responsible for paying workers’ compensation benefits to that person if he or she suffers injury regardless of fault. Since the users of digital platforms like Amazon and DoorDash do not secure workers’ compensation coverage for or otherwise consider delivery persons their “statutory employees,” that cost would then be passed on to the state’s Uninsured Employers’ Fund under KRS 342.760. The UEF would then file collection actions against the individuals, homeowners, businesses, and government agencies that use those popular platforms.

Even if Minova could offer a sensible alternative to *Cain*, there is no reason to deviate from this Court’s precedent, especially since “the force of stare decisis is strongest in cases of statutory interpretation.” *Hall v. BPM Lumber, LLC*, \_\_\_ S.W.3d \_\_\_, 2024 WL 5174554, at \*8 (Ky. Dec. 19, 2024) (to be published and final). “The requirement that we adhere to our past decisions is perhaps even more compelling in workers’ compensation cases.” *Id.*

***E. Other states with similar up-the-ladder statutes allow tort recovery.***

Also instructive is *Kelly v. TRC Fabrication, LLC*, 487 P.3d 723, 729 (Idaho 2021), which looked to Kentucky’s up-the-ladder statutory provisions because they closely resembled Idaho’s statute. There, the Idaho Supreme Court, relying on *Davis v.*

*Ford Motor Company*, 244 F.Supp.2d 784 (W.D. Ky. 2003), adopted the general rule, noting “[i]n the last century, multiple states have examined the interaction between their worker’s compensation schemes and the provision of delivery services ancillary to the purchase of goods, and have adopted . . . the ‘general rule’: ‘The compensation act does not apply where the transaction between the immediate employer and the person sought to be held liable as his employer is that of purchase and sale.’” 487 P.3d at 729. Kelly, the plaintiff, was an owner-operator truck driver who was injured while unloading the truck on the premises of TRC which performs steel fabrication work. Kelly sued TRC and TRC claimed up-the-ladder immunity. After analyzing *Davis* and Kentucky statutes, the Idaho Supreme Court held that TRC was not entitled to up-the-ladder immunity under Idaho’s similar statutes because the delivery services were ancillary to TRC’s purchase of goods.<sup>58</sup> See also *Dobransky v. EQT Prod. Co.*, 273 A.3d 1133 (Pa. Super. Ct. 2022) (plaintiff who suffered injuries while unloading truck could recover from property owners under Pennsylvania up-the-ladder statutes which mirror Kentucky’s statutes). These opinions are likewise consistent with *Cain*’s observation in the context of the up-the-ladder defense: “The humane spirit of the [Kentucky Workers’ Compensation Act] 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)).

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<sup>58</sup> The Idaho Supreme Court also noted that a contrary holding would “inevitably constitute a ‘sea change,’” under which “a driver, working as an independent contractor for a meal delivery service, such as Uber Eats, DoorDash, or any other delivery provider, such as Amazon, would be able to obtain workers compensation benefits from the person ordering that delivery because the person ordering the delivery would become the category one employer of the deliverer if the delivery person did not have worker’s compensation insurance.” *Id.* at 730.

## CONCLUSION

Jolly simply delivered raw materials that Minova had purchased. Jolly was not engaged in the service of manufacturing or in delivering Minova's finished products, and there is no evidence that Minova or similar businesses would perform or be expected to perform Jolly's delivery of raw materials with their own employees. Minova is therefore not Jolly's statutory employer and Minova is not entitled to up-the-ladder tort immunity. The Court of Appeals properly reversed, and this Court should affirm. Alternatively, this Court can affirm for different reasons: Minova failed to plead—and therefore waived—any up-the-ladder affirmative defense and is otherwise barred from asserting it.

In any event, Minova's request that the case be "remanded to the Scott Circuit Court to permit Minova to develop further evidence" for its up-the-ladder defense should be denied. Minova took more than three years to even raise the defense in a dispositive motion and then relied on a conclusory affidavit from its president that did not address KRS 342.610(2)(b). Minova failed to offer substantial evidence of its entitlement to an up-the-ladder defense, thereby delaying a trial on the merits and prompting this appeal. Minova is not entitled to yet another bite at the apple.

Mr. Jolly respectfully requests that this Court affirm the Court of Appeals and remand this case to the Scott Circuit Court for a trial by jury.

Respectfully Submitted,

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### **WORD COUNT CERTIFICATE**

This behalf of appellee, Tom Jolly, complies with the word limit of RAP 31(G)(3)(a) because, excluding the parts of the document exempted by RAP 15(E) and RAP 31(G)(5), this document contains 8857 words as calculated by Microsoft® Word word-processing software.

s/ Kevin C. Burke  
Kevin C. Burke