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

REPLY BRIEF FOR APPELLANT, MINOVA USA, INC.

Submitted by:

/s/ Robert E. Stopher
Robert E. Stopher (KBA No. 68390)
Robert D. Bobrow (KBA No. 85871)
400 West Market Street, Suite 2300
Louisville, KY 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
COUNSEL FOR APPELLANT,
MINOVA USA, INC.

CERTIFICATE OF SERVICE

It is hereby certified that on the 19th day of February 2025, this Reply 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; D. Todd Varellas, Varellas & Varellas PLLC, 360 East Vine Street, Suite 320, Lexington, KY 40507; Kevin C. Burke, Jamie K. Neal, Burke Neal PLLC, 2200 Dundee Road, Suite C, Louisville, KY 40205; Joseph A. Wright, Thompson Miller & Simpson PLC, 734 West Main Street, Suite 400, Louisville, KY 40202. It is further certified, pursuant to CR 76.12(6), that the record on appeal was not withdrawn from the Clerk of the Scott Circuit Court by this appellant.

/s/ Robert E. Stopher
COUNSEL FOR APPELLANT,
MINOVA USA, INC.

I. INTRODUCTION

This is Minova USA, Inc.'s reply to appellee Tom Jolly's Appellee's Brief.

II. STATEMENT OF POINTS AND AUTHORITIES

III. ARGUMENT

A. MINOVA GAVE JOLLY FAIR NOTICE OF ITS EXCLUSIVE-REMEDY DEFENSE.

Jolly's first two response arguments are (1) Minova failed to plead its exclusive-remedy defense and (2) Minova concealed its exclusive-remedy defense.[1] Minova preemptively addressed these arguments in its Appellant's Brief.[2] The bottom line is that, as the Scott Circuit Court and the Court of Appeals both held, Minova gave Jolly fair notice of its exclusive-remedy defense by pleading the following in its answer.[3]

> 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.

This sentence gave Jolly clear notice of Minova's exclusive-remedy defense. It undermines Jolly's argument that Minova failed to plead such a defense. The sentence also undermines Jolly's argument that Minova concealed its exclusive-remedy defense. Minova didn't conceal its defense. It placed it in plain sight.

B. MINOVA ADDUCED UNDISPUTED EVIDENCE THAT IT AND JOLLY'S DIRECT EMPLOYER BOTH SECURED WORKERS'-COMPENSATION COVERAGE.

Jolly's argument that Minova failed to plead an exclusive-remedy defense includes a subargument that Minova was required to plead that it secured workers'-compensation coverage.[4] Jolly cites no authority for this argument. More importantly, as

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1 Brief for Appellee, pp. 9-19.

2 Brief for Appellant, pp. 8-14.

3 Opinion, pp. 5-6 (Appendix Item 1).

4 Brief for Appellee, pp. 15-16.

we explained in our Appellant's Brief, it's undisputed that Minova and Jolly's direct employer (Trimac Transportation) both secured workers'-compensation coverage and that Jolly received work-comp benefits as a result of his accident.[5]

C. MINOVA PROVED ITS EXCLUSIVE-REMEDY DEFENSE.

Jolly's third response argument is that Minova failed to prove its exclusive-remedy defense.[6] The argument has two parts. First, Jolly argues that Minova had to prove (and failed to prove) that it hired Trimac Transportation to haul finished goods from Minova to its customers. Second, Jolly argues that Minova had to prove (and failed to prove) that it or a similar business previously had hauled, or normally would haul, limestone filler with its own employees. Jolly is mistaken on both points.

The exclusive-remedy defense is statutory. In an up-the-ladder case like this one, two statutes—KRS 342.690(1) and KRS 342.610(2)(b)—combine to establish the defense. Here's KRS 342.690(1)'s portion of the defense.

> If an employer secures . . . compensation . . . , 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.

The second part of the exclusive-remedy defense in an up-the-ladder case is KRS 342.610(2)(b)'s definition of "contractor." 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.

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5 Brief for Appellant, pp. 11-14.

6 Brief for Appellee, pp. 19-29.

This second part of the exclusive-remedy defense is where the key issue lies in this case. The dispositive question on appeal is whether Minova was a "contractor" under KRS 342.610(2)(b). The answer turns on whether Minova contracted Trimac Transportation to perform work that was a "regular or recurrent" part of Minova's business. Specifically, the issue under KRS 342.610(2)(b) is whether Trimac's daily hauling of limestone filler for Minova was a regular or recurrent part of Minova's resin-capsule-manufacturing business. If so, Minova was a "contractor" under KRS 342.610(2)(b) and an "employer" entitled to immunity under KRS 342.690(1).

Kentucky and federal courts have discussed "regular or recurrent" numerous times, and it can be difficult to fully reconcile their decisions. Jolly doesn't think so. He argues that "regular or recurrent" is plain and that Minova failed to prove that Trimac's daily hauling for Minova was a regular or recurrent part of Minova's manufacturing business. Jolly's argument is twofold as is the following reply.

(1) Minova wasn't required to prove that it contracted Trimac to haul finished products to Minova's customers.

We analyzed several up-the-ladder cases that involved hauling goods in our Appellant's Brief.[7] Jolly tried to distinguish two of the cases in his response by pointing out that the defendants in them hired subcontractors to haul finished products to the defendant's customers rather than raw materials to their own manufacturing facilities as Minova did here. The two cases are *Tom Ballard Co. v. Blevins* and *Thornton v. Carmeuse*

[7] Brief for Appellant, pp. 19-24.

Lime Sales.[8] As we explained in our Appellant's Brief, neither *Blevins* nor *Thornton* turned on the fact that the goods being hauled were finished products being hauled to an immunity-seeking defendant's customers.[9] What mattered in *Blevins* and *Thornton* was that hauling the at-issue goods was customary and necessary to the defendants' businesses and the hauling was repeated at regular intervals.[10]

Jolly also tried to distinguish *Waterbury v. Anheuser-Busch* and *Smothers v. Tractor Supply* in his response brief.[11] He argued that both cases "involved retail sales of finished products."[12] That's partially true but insignificant. The pertinent aspect of *Waterbury* and *Smothers* is that neither case involved hauling finished products from an immunity-seeking defendant to its customers.

In *Waterbury*, defendant Anheuser-Busch hired a subcontractor to haul CO2 canisters from an Anheuser-Busch supplier to Anheuser-Busch.[13] Anheuser-Busch didn't hire the subcontractor to haul finished products to its customers. After receiving the canisters, Anheuser-Busch used them to dispense beer. Under these facts, facts analogous to those here, the *Waterbury* court held that hauling CO2 canisters was a regular or recurrent part of Anheuser-Busch's beer business.[14]

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8 614 S.W.2d 247, 249 (Ky. App. 1980); 346 S.W.3d 297 (Ky. App. 2010).

9 Brief for Appellant, pp. 19-24.

10 *Id.*

11 2003 U.S. Dist. LEXIS 2639 (W.D. Ky.); 104 F. Supp. 2d 715 (W.D. Ky. 2000).

12 Brief for Appellee, p. 24.

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

14 *Id.* at *6.

In *Smothers*, the immunity-seeking defendant was Tractor Supply.[15] It hired a subcontractor to haul merchandise to its stores for resale.[16] Tractor Supply didn't hire the subcontractor to haul finished products to its customers. Under these facts, which are analogous to the facts here, the *Smothers* court held that hauling the merchandise was a regular or recurrent part of Tractor Supply's retail business.[17]

Now we'll look at *Black v. Dixie Consumer Prods.*[18] Our first point about *Black* is that Jolly didn't try to distinguish the case with regard to his Minova-had-to-prove-Trimac-hauled-finished-products argument.[19] He didn't because the immunity-seeking defendant in *Black* (Dixie Products) hired a subcontractor to haul raw materials (bulk paper) to its manufacturing facility just like Minova did in this case. Dixie used the bulk paper to manufacture paper cups and plates. When Dixie argued that hauling the bulk paper to its facility was a regular or recurrent part of its manufacturing business, the Sixth Circuit agreed.[20] It made no difference to the court that Dixie hired the subcontractor to deliver raw materials to Dixie rather than finished products to Dixie's customers. As it didn't, *Black* fully undermines Jolly's argument that Minova had to prove that it hired Trimac to haul finished products to Minova's customers in order to prove that Trimac's hauling was a regular or recurrent part of Minova's manufacturing business.

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

16 *Id.* at 716.

17 *Id.* at 718.

18 835 F.3d 579 (6th Cir. 2016).

19 Brief for Appellee, p. 23.

20 *Black,* 835 F.3d at 586.

In the end, Jolly can't meaningfully distinguish *Black*, *Blevins*, *Thornton*, *Waterbury*, or *Smothers*. What matters about those cases is that, although none of the defendants were in the transportation business, the repeated hauling of goods was essential to their businesses and so was regular or recurrent work under KRS 342.610(2)(b). The same is true here. Minova isn't in the transportation business. But the repeated hauling of limestone filler is an essential part of its manufacturing business, which makes the hauling regular or recurrent work.[21]

Now we'll briefly address *Davis v. Ford Motor*.[22] Jolly ended his Minova-had-to-prove-Trimac-hauled-finished-products argument with *Davis*.[23] The rule from *Davis* that Jolly touts is that a goods purchaser isn't an up-the-ladder employer under KRS 342.610(2)(b).[24] The trouble Jolly has with this rule is that Minova didn't purchase goods from Trimac. Minova purchased limestone filler from Lhoist and contracted Trimac to haul that limestone filler to its manufacturing facility.

The plaintiff in *Davis* was Ricky Davis.[25] Davis's direct employer was The Budd Company. Ford bought roof panels from Budd.[26] When Davis sued Ford over an

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[21] "Kentucky case law is clear that activities beyond one's primary business objective may qualify under section 342.610." *Thompson v. The Budd Co.*, 199 F.3d 799, 805 (6th Cir. 1999)

[22] 244 F. Supp. 2d 784 (W.D. Ky. 2003).

[23] Brief for Appellee, pp. 24-26.

[24] *Id.* at 25.

[25] *Davis*, 244 F. Supp 2d at 785.

[26] *Id.*

injury, it argued that it was his up-the-ladder employer.[27] The *Davis* court disagreed. It held that Ford's exclusive-remedy defense failed because Ford bought goods from Budd rather than hire Budd to perform a service.[28] The facts here are materially different. Minova didn't buy goods from Trimac. It contracted Trimac to provide a service—haul limestone filler. Consequently, Jolly's reliance on *Davis* is misplaced.

(2) Minova wasn't required to prove that it or a similar business previously had hauled, or normally would haul, limestone filler with its own employees.

Jolly argues Minova failed to prove hauling limestone filler was regular or recurrent work by not adducing evidence that it or a similar business previously had hauled, or normally would haul, limestone filler with its own employees.[29] The Court of Appeals agreed with this. It held that, while theoretically, Minova could have hauled filler with its own employees, *Cain* requires evidence that it or a "similarly situated business did or would have done so."[30]

Minova disagrees with this interpretation of *Cain*.[31] This interpretation is inconsistent with *Cain*'s definition of "regular work," which is "work [that] is a customary, usual or normal part of the premises owner's . . . business."[32] It's also inconsistent with *Cain*'s definition of "recurrent work," which is "work [that] is repeated, though not with

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27 *Id.*

28 *Id.* at 787-89.

29 Brief for Appellee, pp. 19-21 (citing *GE v. Cain*, 236 S.W.3d 579 (Ky. 2007)).

30 Opinion, p. 13.

31 Brief for Appellant, pp. 26-30.

32 *Cain*, 236 S.W.3d at 586-587.

the preciseness of a clock."[33] Contrary to the Court of Appeals' interpretation of *Cain*, neither of these definitions suggest that Minova had to prove that it or a similar business previously had hauled, or normally would haul, limestone filler with employees.

Although *Cain* defined "regular" and "recurrent" as we just described, it also wrote that "regular or recurrent work" is "work that is customary, usual, normal, or performed repeatedly **and that the business or a similar business would perform or be expected to perform with employees**."[34] In reversing the Scott Circuit Court, the Court of Appeals held that the bold language in this quote required Minova to adduce evidence that it or a similar business previously had hauled, or normally would haul, limestone filler with employees.[35] The Court of Appeals rejected the argument that Minova satisfied this burden by adducing undisputed evidence that it needed a constant supply of limestone filler to manufacture resin capsules and contracted Trimac to deliver a load of filler daily.[36]

In our Appellant's Brief, we relied on *Miller v. Ky. Power* and *Forbes v. Dixon Elec.* to argue that the Court of Appeals erred when it held that Minova had to prove that it or a similar business previously had hauled, or normally would haul, limestone filler with its own employees.[37] We relied on *Miller* and *Forbes* because both held that *Cain* does **not** require a defendant to adduce evidence that it or a similar business

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33 *Id.*

34 *Cain*, 236 S.W.3d at 589 (bold added).

35 Opinion, pp. 12-13.

36 *Id.*

37 Appellant's Brief, pp. 28-29 (citing *Miller v. Ky. Power*, 683 S.W.3d 669, 677 (Ky. App. 2023); *Forbes v. Dixon Elec.*, 332 S.W.3d 733, 738 (Ky. App. 2010)).

previously had performed, or normally would perform, work with its own employees to prove the work was regular or recurrent.[38] In the *Miller* court's words,

> this Court has construed *Cain* as not setting forth a new test for up-the-ladder immunity but merely summarizing the same test set forth in prior precedent. In fact, in a decision rendered after *Cain*, we expressly rejected the argument that a contractor must show both that (1) the work was customary to the business or repeated with a degree of regularity and (2) of a kind normally performed or expected to be performed by employees to qualify for up-the-ladder immunity.[39]

Jolly attempted to distinguish *Miller* and *Forbes* on their facts.[40] But neither court relied on factual details in rejecting the argument that *Cain* requires a defendant to adduce evidence that it or a similar business previously had performed, or normally would perform, work with employees to prove that the work was regular or recurrent. *Miller* and *Forbes* rejected this argument because the *Cain* Court held that its regular or recurrent test "is relative, not absolute."[41] The factors relevant to *Cain*'s test include (but are not limited to) a business's "nature, size, and scope as well as whether it is equipped with the skilled manpower and tools to handle the task the independent contractor is hired to perform."[42] Furthermore, "activities beyond one's primary business objective may qualify [as regular or recurrent work]."[43]

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38 *Miller*, 683 S.W.3d at 677.

39 *Id.*

40 Brief for Appellee, p. 24.

41 *Forbes*, 332 S.W.3d at 737.

42 *Cain*, 236 S.W.3d at 588.

43 *Thompson*, 199 F.3d at 805.

As *Cain*'s test is relative, *Miller* and *Forbes* held that the key to the test is its "overarching gist," which is to separate large, sporadic projects from routine projects that a defendant could be expected to perform with employees.[44] Under the gist of *Cain*, if a defendant can prove that work is customary, repeated regularly, and feasibly performed with employees, it need not prove that it or a similar business previously had performed, or normally would perform, the work with employees.[45]

Unfortunately, neither the *Miller* nor the *Forbes* court rationalized the gist-of-*Cain* holding beyond "*Cain*'s test is relative, not absolute" and "this Court has construed *Cain* as not setting forth a new test for up-the-ladder immunity but merely summarizing the same test set forth in prior precedent."[46] A more thorough explanation of the holding is that courts readily can distinguish a large, sporadic project from a routine project without proof that a defendant previously had performed, or normally would perform, a similar project with employees. Such proof (or the lack thereof) is relevant to a court's decision under the gist of *Cain* but not dispositive.

A significant advantage of this relative approach under *Cain* is that it allows a court to consider whether a defendant's inability to offer proof that it or a similar business previously had performed, or normally would perform, work arises from the nature of the work or is the result of the ever-increasing trend to outsource work. This advantage is critical in cases like this one where the work is customary, repeated frequently, and could have been performed with employees, but there's little or no

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44 *Miller*, 683 S.W.3d 676-77.

45 *Id.*

46 *Id.*; *Forbes*, 332 S.W.3d at 737.

evidence available that the defendant or a similar business previously had performed the work with employees.

At this point, Jolly almost certainly would direct the Court back to *Cain*'s declaration that regular or recurrent "refers to work that is customary, usual, normal, or performed repeatedly and that the business or a similar business would perform **or** be expected to perform with employees." Jolly would argue that the *Miller* and *Forbes* courts failed to consider the second part of this declaration when distilling the "gist of *Cain*." We disagree. The second part of *Cain*'s declaration is disjunctive. Under it, a defendant can prove that work is regular or recurrent with evidence that it "would perform" the work with employees **or** evidence that it "would be expected to" perform the work with employees. To prove that it "would perform" work with employees, a business may need evidence that it or a similar business previously had performed the work with employees. But "would be expected" to perform work with employees imposes a lesser burden. "Would be expected" to perform work implies that neither the business nor a similar business previously had performed the work with employees but, in light of the routine nature of the work, the business "would be expected" to perform it with employees. In this light, "would be expected" to perform is the gist of *Cain*.

In the end, we believe the *Cain* Court recognized that there will be cases in which neither the defendant nor a similar business previously had performed the at-issue work with employees but, because the work is customary, usual, normal, and performed repeatedly, the defendant "would be expected" to perform it with employees. We believe that's the gist of *Cain* and why the *Miller* and *Forbes* courts held that *Cain* didn't establish a new test for up-the-ladder immunity but merely summarized the test set forth in prior

precedent.[47] It's why courts have held that *Cain*'s test contains numerous factors such as the nature, size, and scope of the immunity-seeking business and that the failure to meet all of the factors doesn't necessarily preclude immunity.[48]

Applying the gist of *Cain* here is straightforward. Minova adduced undisputed evidence that it needed limestone filler delivered daily in order to manufacture resin capsules and that it contracted Trimac to deliver the filler on that basis.[49] Furthermore, Minova showed that it would be feasible for it to haul limestone filler with employees by purchasing or leasing two trucks and hiring two or three drivers.[50] With this evidence, hauling limestone filler isn't a large, sporadic, capital project for Minova. It's "work that is customary, usual, normal, or performed repeatedly," which means it's work Minova or a similar business "would be expected" to perform with employees. That makes the work regular or recurrent work under *Cain*.

D. JOLLY'S PUBLIC-POLICY ARGUMENT IS MISPLACED.

Jolly argues that adopting Minova's interpretation of *Cain* would "eviscerate" *Cain* and strain the Uninsured Employer's Fund (UEF) because "virtually anyone who receives regular and necessary deliveries from an independent contractor—through Amazon, DoorDash, Uber Eats, Office Depot, Lowe's, or otherwise—[would]

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47 *Miller*, 683 S.W.3d at 677.

48 *Kubas v. Klondike Manor, LLC*, 2008 U.S. Dist. LEXIS 6040, **6, 8.

49 Opinion, pp. 12-13.

50 *Id.* (theoretically, Minova could have hauled filler with employees).

become a statutory employer responsible for paying workers' compensation benefits."[51] This argument ignores that, to become a statutory employer under KRS 342.610(2)(b), a person must contract "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." In other words, KRS 342.610(2)(b) doesn't apply to persons who purchase goods for personal use, which undermines Jolly's argument.

Another hole in Jolly's policy argument is that the purpose of KRS 342.610(2)(b) is to ensure injured workers can recover work-comp benefits.[52] The statute does this by making a contractor liable for a subcontractor's employees' work-comp benefits if the subcontractor fails to secure coverage.[53] The statute's purpose favors Minova's view of *Cain* because affirming the Court of Appeals would make it more difficult for injured workers to recover work-comp benefits from up-the-ladder contractors. *Commonwealth v. Ritchie*, a case Jolly relies on, proves this point.[54]

Howard Ritchie was injured while driving a truck for United.[55] Ritchie sought work-comp benefits from United, but it didn't carry the coverage. As a result, Ritchie sought benefits from Image Point, which had contracted United to haul the goods in Ritchie's truck. Ritchie's theory was that Image Point was an up-the-ladder contractor

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51 Brief for Appellee, p. 28.

52 *Fireman's Fund v. Sherman & Fletcher*, 705 S.W.2d 459, 461 (Ky. 1986).

53 *Id.*; *Cain*, 236 S.W.3d at 585, 587.

54 2014 Ky. Unpub. LEXIS 14 (non-binding).

55 *Id.* at *2.

under KRS 342.610(2)(b) and his statutory employer under KRS 342.690(1) because hauling goods was regular or recurrent work for Image Point.[56]

The *Ritchie* Court disagreed. It held that Image Point wasn't Ritchie's up-the-ladder employer because there was no evidence that it or a similar business previously had hauled goods with its own employees.[57] The result of this "absolute" interpretation of *Cain* was that the UEF became liable for Ritchie's benefits, which is contrary to the policy underlying KRS 342.610(2)(b).

In short, the narrower the definition of "regular or recurrent," the harder it is for injured workers to recover work-comp benefits from up-the-ladder contractors. That means Minova's argument in favor of *Miller* and *Forbes*'s interpretation of *Cain* is consistent with KRS 342.610(2)(b)'s purpose, and Jolly's opposing argument is not.

IV. CONCLUSION

We respectfully ask the Court to reverse the Court of Appeals and remand with instructions to enter judgment for Minova. If the Court decides Minova needs further evidence to prove its exclusive-remedy defense, we ask it to instruct the Scott Circuit Court to give Minova an opportunity to develop such evidence.

[56] *Id.* at **3-5.

[57] *Id.* at **9-11.

BOEHL STOPHER & GRAVES, LLP

/s/ Robert E. Stopher
Robert E. Stopher (KBA No. 68390)
Robert D. Bobrow (KBA No. 85871)
400 West Market Street, Suite 2300
Louisville, KY 40202
Phone: (502) 589-5980
Fax: (502) 561-9400
E-mail: rstopher@bsg-law.com
COUNSEL FOR APPELLANT,
MINOVA USA INC.

WORD-COUNT CERTIFICATE

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