COMMONWEALTH OF KENTUCKY
SUPREME COURT

CASE NO. 2024-SC-0169-D

MINOVA USA, INC. **MOVANT**

vs. On Review from Court of Appeals No. 2022-CA-1534
Scott Circuit Court No. 18-CI-00772

TOM JOLLY **RESPONDENT**

BRIEF ON BEHALF OF *AMICUS CURIAE* KENTUCKY JUSTICE ASSOCIATION IN OPPOSITION TO APPELLANTS' BRIEFS

Respectfully submitted,

/s/ Paul J. Kelley
Paul J. Kelley
Satterley & Kelley, PLLC
8700 Westport Rd., Suite 202
Louisville, KY 40242
(502) 589-5600
Counsel for Amicus Curiae,
Kentucky Justice Association

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of this motion along with the $150 filing fee was this 28th day of October, 2024 e-filed with the Clerk of the Kentucky Supreme Court, Katie Bing, State Capitol Building, Room 235, 700 Capitol Ave., Frankfort, KY 40601; and a copy sent via email or first class mail on the same date to Hon. Kathyrn Gabhart, Bourbon County Judicial Center, 310 Main St., Paris, Ky 40361; Clerk of the Kentucky Court of Appeals, 360 Democrat Drive., Frankfort, KY 42501; Robert Stopher and Robert D. Bobrow, 400 West Main Street, Suite 2300, Louisville, KY 40202; and James J. Varellas, Sandra M. Varellas and D. Todd Varellas, 360 East Vine Street, Suite 320, Lexington, KY 40507.

/s/ Paul J. Kelley
Counsel for Amicus Curiae
Kentucky Justice Association

PURPOSE AND INTEREST OF *AMICUS CURIAE*

Founded in 1954, the Kentucky Justice Association ("KJA") is a non-profit organization dedicated to protecting the health and safety of Kentuckians, enhancing consumer protection, and preserving every citizen's right to trial by jury.

This case implicates a fundamental and extraordinarily critical issue to the KJA and its members: whether a defendant claiming up the ladder workers compensation exclusivity has an affirmative burden to prove that the work an injured party performed at the time of the injury was a regular or recurrent part of the defendant's business that it ordinarily performed or expected to be performed by its own employees, or whether they should be awarded tort immunity based on possibilities, speculation or conjecture. The KJA submits that a party seeking workers' compensation exclusivity must prove, with "substantial evidence", that the work performed by the injured party was performed or expected to be performed by its own employees. Theoretical possibilities concerning what the defendant could have done with its own employees do not satisfy its stringent burden. Further, what other courts have ruled concerning employees in similar industries, under different facts, is irrelevant to subsequent cases, which must be judged on the specific facts of their case.

This Court's holding in *General Electric Company v. Cain*, 236 S.W.3d 579 (Ky. 2007), applied well-settled Kentucky case law concerning the requirements for proving up the ladder exclusivity. This Court defined "regular or recurrent" work as those activities that are "customary, usual, or normal to the particular business (including work assumed by contract or by law) or work that the business repeats with some degree of

regularity and are of a kind that the business or similar businesses would **normally perform or be expected to perform with employees.**" *Id.* at 588. (emphasis added).

The *Cain* court held that a premises owner has the burden to "plead and prove" the work was regular or recurrent. *Id.* 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" "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.

Minova effectively requests the Court to abandon its holding in *Cain*, and numerous other cases, which have routinely affirmed what is necessary to prove an injured person's work was a regular or recurrent part of their business. Instead, they want the Court to create a new rule that parties claiming up the ladder exclusivity can satisfy the "substantial evidence" requirement by merely suggesting the possibility that they could have performed the work conducted by the injured party with their own employees.

Relying on *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247 (Ky. App. 1980), *Wright v. Dolgencorp., Inc.*, 161 S.W.3d 341 (Ky. App. 2004), and *Thornton v. Carmuse Lime Sales Corp.*, 346 S.W.3d 297 (Ky. App. 2010), Minova contends the Court must reverse the Court of Appeals' decision because in those cases, a truck driver was deemed a statutory employee of a company that paid his employer to haul goods. However, this Court has held, "[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).

Minova wants the Court to ignore its holding in *Doctors' Associates, Inc.* because of its proclamation that neither the *Blevins* nor *Wright* courts required the defendants to present evidence that they or similarly situated businesses would normally be expected to performing hauling services with their own employees.[1] Thus, Minova contends this Court should assume that its industry would ordinarily be expected to perform the duties performed by an injured party, with its own employees regardless of the lack of evidence supporting such an assumption.[2] Further, Minova wants the Court to reverse *Cain's* longstanding rule that an activity is not a regular or recurrent part of a company's business merely because it is necessary for the company to function. *Cain*, 236 S.W.2d at 588.

Minova advocates for unnecessary changes to Kentucky law concerning what is necessary to prove up the ladder exclusivity. Minova's requested changes would effectively eliminate the burden on parties claiming up the ladder immunity by allowing them to rely on theoretical possibilities rather than "substantial evidence." Further, the new rules sought by Minova would shift the burden to the injured party to prove that work was not a regular or recurrent part of their business requiring him or her to refute not just facts, but also possibilities.

[1] Minova's Opening Brief at p. 28.
[2] Minova's Opening Brief at p. 29.

For these extraordinary reasons, the KJA respectfully requests the Court to reaffirm that parties seeking "up the ladder" exclusivity must present "substantial evidence" demonstrating that work performed by the injured party was a regular or recurrent part of the defendant's business performed or expected to be performed by its own employees. Theoretical possibilities, speculation and conjecture are insufficient. Further, whether work performed by an injured party fits the definition of regular or recurrent as announced by this Court rests on the facts of the specific case and is not dependent on the outcome of prior cases with different facts.

ARGUMENT

1. There is No Justification for Altering a Defendant's Affirmative Burden to Present Substantial Evidence to Prove Up the Ladder Tort Immunity.

Kentucky's workers' compensation scheme limits an employee's right to recover damages against his or her employer for occupational injuries, which is often referred to as the exclusive remedy provision of the Act. KRS 342.690(1). The exclusive remedy applies, at times, to the employees of independent contractors. Specifically, if an entity is a "contractor" as defined by KRS 342.610(2)(b), it may be considered the statutory employer to an independent contractor's employees. To obtain this benefit, it must demonstrate the independent contractor's employees performed work of a kind which was a regular or recurrent part of the alleged statutory employer's operations. KRS 342.610(2)(b). Workers' Compensation exclusivity, including the up-the-ladder defense, is an affirmative defense which must be proven by the party asserting it. *Gordon v. NKC Hospitals, Inc.*, 887 S.W.2d 360, 362-363 (Ky. 1994).

In *GE v. Cain*, this Court considered two separate cases concerning the Kentucky Worker's 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 developed mesothelioma as a result of asbestos exposure at locations owned by sixteen (16) different companies. *Cain*, 236 S.W.3d at 590. The defendants moved for, and were granted, summary judgment pursuant to the up-the-ladder provisions of the Kentucky Worker's Compensation Act. *Id* at 584.

This Court held, that "a premises owner who asserts exclusive remedy immunity must both plead and prove the affirmative defense." *Id.* at 585. Further, a defendant will not be entitled to immunity unless it provides substantial evidence that the defendant was the injured worker's statutory employer. *Id.* The *Cain* Court clarified the test by making clear that a business is not shielded from tort immunity "**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).

In *Estate of Dohoney ex rel. Dohoney v. International Paper Co.*, 560 Fed. Appx. 564 (6th Cir. 2014), Stephen Dohoney, an outside contractor, was killed while performing electrical work on International Paper's ("IP") "house crane" during a regularly scheduled plant shutdown. *Id.* at 565. IP sought and was granted summary judgment on the basis that it was entitled to up-the-ladder immunity because it was Dohoney's statutory employer. *Id.* at 566. The defendant, IP, claimed that the killed worker was its statutory employee because of its contention that the work he performed

was routine maintenance and thus a regular or recurrent part of its business. *Id.* at 568-569. The 6th Circuit noted that disputes remained as to whether the work performed by the killed worker was regular or recurrent work ordinarily performed by IP's own employees. *Id.* at 569. After considering this Court's decision in *Cain*, the 6th Circuit reversed, holding that **"our inquiry must focus on the actual work being performed at the time of the injury**." *Id.* at 569. (emphasis added). The Court concluded there was no evidence that IP performed the work conducted by the worker with its own employees on a regular or recurrent basis. *Id.* at 569-570.

Minova claims there is a conflict between the Court of Appeals' decision in this case and prior cases, relied upon by the *Cain* court. Minova relies upon the incorrect assumption that all cases involving truck drivers' delivery of goods must yield the same result. Further, Minova incorrectly assumes that this Court approved of the results of *Blevins, supra*, and *Wright, supra*, by referencing those decisions in *Cain*.[3] The *Cain* court merely referenced those cases in a summary of reported decisions under Kentucky law concerning up the ladder exclusivity. *Cain*, 236 S.W.3d at 585-586.

In *Blevins*, the injured party was a truck driver who delivered coal mined by another company. *Blevins*, 614 S.W.2d at 248. The driver filed a workers' compensation claim against the mining company. *Id.* at 249. Seeking to avoid workers compensation liability, the mining company argued it was not the up the ladder worker's employer for the purposes of workers' compensation benefits. *Id.* However, the Workers' Compensation Board placed workers' compensation liability on the mining company

[3] Minova's Opening Brief at p. 28.

pursuant to KRS 342.610(2)(b). *Id.* The Court of Appeals held that the Workers' Compensation 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). The *Blevins* opinion was not fact intensive, but clearly the mining company did not present a challenge to the Board's findings.

Nothing about the *Blevins* holding mandates a finding of up the ladder workers compensation exclusivity in all cases involving truck drivers' delivery of products to the defendant's customers or from its suppliers. Likewise, in *Wright*, the injured party's direct employer was contracted to transport merchandise from Dollar General's distribution centers to its stores. *Wright*, 161 S.W.3d at 342. He was struck by a falling object on the trailer he hauled. *Id.* After being sued for negligence, the defendants asserted up the ladder exclusivity, which the circuit court granted. *Id.* at 343. On appeal, the injured party complained that the defendants did not contract or subcontract with his employer; therefore, the defendants could not be contractors under KRS 342.610(2). *Id.* Relying on this Court's decision in *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986) and *U.S. Fidelity & Gaur. Co. v. Technical Minerals, Inc.*, 934 S.W.2d 266 (Ky. 1996), the *Wright court* concluded the "definition of "contractor" in KRS 342.610(2) included someone other than one who "engages subcontractors to assist in the performance of the work or the completion of the project which [he] has undertaken to perform for another.'" *Wright*, 161 S.W.3d at 344-345.

The issue in *Wright* was never whether the work performed by the injured party was a regular or recurrent part of the defendant's business, or whether the defendant

performed similar work with its own employees. Indeed, the Court of Appeals noted, "[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. Thus, no conflict exists between the Court of Appeals decision in this case and *Wright*. In *Wright*, everyone agreed under the facts of that case that the work was regular or recurrent. In the case at bar, the ultimate issue was in dispute. The Court of Appeals analyzed the record and correctly concluded that Minova failed to present "substantial evidence" in support of its position.

Minova also argues that the Court of Appeals' decision here conflicts with its decision in *Thornton v. Carmeuse Lime Sales Corp.*, 346 S.W.3d 297 (Ky. App. 2010), which also involved a truck driver. The *Thornton* opinion is devoid of the specific facts upon which it relied in determining the defendant was the injured party's statutory employer. It certainly made no express finding that the injured victim's work was ordinarily performed or expected to be performed by the defendant's own employees. *Id.* It is impossible to determine from the opinion that the injured party contested whether the defendant's employees ordinarily performed or were expected to perform his work. Critically, the *Thornton* court never explicitly or impliedly held that assumptions about the defendant's employees' capabilities or expectations were satisfactory substitutes for "substantial evidence."

Minova also relies upon *Waterbury v. Anheuser-Busch*, 2003 WL 1145470 (W.D. Ky. February 24, 2003) (attached as **Appendix 1** pursuant to RAP 41), which pre-dated *Cain*, and also did not comment on whether Anheuser-Busch ever performed duties

performed by the injured party with its own employees. Likewise, Minova's reliance on *Smothers v. Tractor Supply Company*, 104 F.Supp.2d 715 (W.D. Ky 2000) is misplaced. *Smothers*, which also pre-dated *Cain*, did not address whether the defendant ever performed similar work with its own employees, or whether similar industries performed the type of work with their own employees.

Minova also directs the Court to *Black v. Dixie Consumer Products, LLC*, 835 F.3d 589 (6th Cir. 2016), which involved a truck driver delivering raw materials to a manufacturer of paper products. *Id.* at p. 581. In *Black*, the defendant produced evidence that other paper product manufacturers utilized private fleets for their transportation needs. *Id.* at 586. Based on this evidence, the 6th Circuit concluded the defendants were entitled to up the ladder exclusivity. *Id.* There is no similar evidence in this case.

Minova further relies on *Beals v. Countrymark Energy Resources*, LLC, 2021 WL 5181026 (W.D. Ky November 8, 2021) (attached as **Appendix 2** pursuant to RAP 41), to support its position that it never has to perform the type of work performed by the injured party with its own employees. The *Beals* decision was scant on facts supporting its conclusion. The district court did not identify any evidence that the work performed by the plaintiff was ordinarily performed or expected to be performed by the defendant's own employees. *Id.* at *4. Indeed, the court did not analyze whether the defendant's employees ordinarily performed similar work. Instead, it focused on the fact that the work was routinely performed by subcontractors, which rendered it regular or recurrent. *Id.* The district court misapplied *Cain* by improperly eliminating the requirement that the work must be performed or expected to be performed by the defendant's own employees.

Proving that a subcontractor always performed the work would not constitute "substantial evidence" that the work was performed or expected to be performed by the property owner's own employees.

Likewise, the Court of Appeals' decision in *Cabrera v. JBS USA, LLC*, 568 S.W.3d 865 (Ky. App. 2019), relied upon by Minova, also misapplied *Cain*. In *Cabrera*, the injured party pointed out that the defendant failed to prove that it ever performed the same type of work with its own employees, or had the capability to perform such work. *Id.* at p. 869. The Court of Appeals affirmed summary judgment simply because of the frequency of the activities and because sanitation services were required by regulations. *Id.* However, the court failed to analyze a critical factor under *Cain* – whether the defendant would ordinarily perform the work or expect to perform the work with its own employees. It effectively exempted the defendant from having to provide "substantial evidence" supporting its affirmative burden of proving workers compensation exclusivity.

Minova further relies on *Forbes v. Dixon Electric, Inc.*, 332 S.W.3d 733 (Ky App. 2010), to support its position that parties claiming up the ladder exclusivity do not have to prove that they or similar business perform work through their own employees.[4] Minova's characterization of *Forbes* is incorrect. In *Forbes*, the plaintiff was a police officer who was injured while directing traffic pursuant to contract for an electrical contractor working on traffic lights. *Id.* at 733. The Court of Appeals expressly stated, "[i]t is equally undisputed that from time to time Dixon employees would direct traffic at

[4] Minova Opening Brief at p. 28.

intersections not requiring direct law enforcement." *Id.* at 735. Thus, not only was it proven that the job performed by the police officer was also conducted by the contractor's employees, but the plaintiff did not dispute this fact, which entitled the defendant to up the ladder exclusivity.

Nearly all of the cases cited by Minova did not state whether the work performed by the injured party was expected to be conducted by the defendants' employees, much less determine that it was conducted by their employees. Those courts did not have to decide the issue because there was no dispute that the work performed was a regular or recurrent part of their business ordinarily performed by the defendant's own employees. Several of the cases misapplied *Cain* and eliminated the defendant's obligation to prove that it performed or would be expected to perform the same type of work with its own employees. Accordingly, none of them are dispositive of all up the ladder cases, and do not exempt defendants from presenting "substantial evidence" supporting their claims of up the ladder tort immunity, as this Court required in binding precedent in *Cain*.

Minova's position would dramatically change what parties claiming up the ladder workers compensation exclusivity must prove. They no longer would have to satisfy their affirmative burden to prove workers' compensation tort immunity by submitting "substantial evidence." *Cain*, 236 S.W.3d at 585; *Gordon*, 887 S.W.2d at 362-363. Instead, they could simply ask the trial courts to make unsupported assumptions that they could have performed such work with their own employees if they wanted. Not only would such a standard eliminate their affirmative burden to prove entitlement to workers' compensation exclusivity, but it would improperly invite speculation and conjecture. This

Court has held, "speculation and supposition are insufficient to justify a submission of a case to the jury, and that the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave,* 202 S.W.3d 585, 588 (Ky. 2006) (quoting *Chesapeake & Ohio Ry. Co. v. Yates,* 239 S.W.2d 953, 955 (Ky. 1951)). This Court has routinely disapproved of rank speculation to support any party's affirmative burden.

Indeed, if a party claiming workers' compensation exclusivity is allowed to rely on what it could have theoretically done to satisfy its obligation to produce "substantial evidence", it would improperly shift the burden to the injured party to refute possibilities. The party without the affirmative burden would be forced to demonstrate that it was impossible for the defendant to carry out the duties with its own employees. While the Court of Appeals was persuaded by Jolly's evidence that Minova could not perform the work he performed with its own employees, injured parties defending claims of workers' compensation exclusivity should not be forced to refute possibilities, speculation or conjecture. If the moving party presents affirmative evidence, certainly the injured party must present evidence to refute it, but that burden should not exist unless the defendant presents "substantial evidence", rather than rank speculation.

In *Cain*, this Court stated that "legal conclusions are not properly included in an affidavit and, in any event are not substantial evidence." *Cain*, 236 S.W.3d at 585 (citing 2A C.J.S. Affidavits § 39 (2006). If legal conclusions in an affidavit cannot be considered substantial evidence, certainly possibilities, speculation, and conjecture also cannot be

considered substantial evidence which satisfies a defendant's affirmative burden to prove entitlement to workers' compensation tort immunity.

Accordingly, the KJA respectfully requests the Court to reaffirm that parties claiming up the ladder exclusivity have a stringent burden to present "substantial evidence" in support of their position, and that mere possibilities, conjecture or speculation are insufficient.

2. *Cain's* Holding That Regular or Recurrent Work Is Work Performed or Expected to be Performed by Defendant's Own Employees is not *dicta*.

Minova's argument that *Cain's* holding that a regular or recurrent determination requires evidence that the work performed by the injured party was the type of work the defendant or a similar business would perform or expect to be performed with its own employees is mere *dicta* is unsupported by this Court's detailed analysis of up the ladder exclusivity. This Court unequivocally held, "[s]tated simply, KRS 342.610(2)(b) 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." *Cain*, 236 S.W.3d at 588-589. This Court relied heavily 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 statement was not *dicta*. The Court engaged in a detailed analysis and concluded that most courts have interpreted statutes similar to KRS §342.610 that to be a regular or recurrent part of a business' work, it would ordinarily be performed through its own employees.

Minova's argument that *Cain's* holding is *dicta* is further undermined by the Court's thorough analysis of the sixteen (16) defendants in the *Rehm* matter:

Allied Chemical – up the ladder exclusivity was appropriate because the there was evidence it performed similar work as Rehm with its own employees. *Id.* at 592-593.

American Standard – up the ladder exclusivity denied because there was no evidence its own employees performed the type of work conducted by Rehm. *Id.* at 593-594).

Brown and Williamson – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 594.

Brown-Foreman – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 595.

Colgate – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 596.

Dupont – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 597.

Ford – up the ladder exclusivity denied because there was no evidence its own employees performed the type of work conducted by Rehm. *Id.* at 598.

General Electric – up the ladder exclusivity denied because there was no evidence its own employees performed the type of work conducted by Rehm. *Id.* at 599.

Goodrich – up the ladder exclusivity denied because there was no evidence its own employees performed the type of work conducted by Rehm. *Id.* at 600.

International Truck and Engine Corporation – up the ladder exclusivity denied because there was no evidence its own employees performed all of the type of work conducted by Rehm. *Id.* at 601.

Kentucky Utilities Company – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 601.

Lorillard, Inc. – up the ladder exclusivity denied because there was no evidence its own employees performed the type of work conducted by Rehm. *Id.* at 602.

Louisville Gas & Electric – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 603.

Phillip Morris, Inc. – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 603.

Reynolds Metals Company – up the ladder exclusivity denied because there was no evidence its own employees performed the type of work conducted by Rehm. *Id.* at 604.

Rohm & Haas – granted up the ladder exclusivity because its employees performed the same type of work as Rehm. *Id.* at 604-605.

It is impossible to consider *Cain's* holding mere *dicta* when this Court analyzed and based its decision concerning up the ladder exclusivity for each defendant on whether the company performed similar tasks with its own employees.

3. Simply Because a Job Task is "Necessary" Does Not Entitle a Defendant to Workers' Compensation Exclusivity.

An overriding theme throughout Minova's brief is its argument that the job duties performed by Jolly were "necessary", and that therefore they were a regular or recurrent part of its business.[5] This Court rejected this argument in *Cain*. Simply because work is necessary or beneficial to a party's business 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. The *Cain* Court reversed the trial court's grant of summary judgment for several property owners who argued that the tasks performed by the injured party were "necessary", but failed to prove what KRS 342.610(2)(b) actually requires – that the

[5] Minova's Opening Brief at p. 19-21.

work performed was a regular or recurrent part of the property owner's business performed or ordinarily performed by its own employees. *Id.* at 592-606.

This Court could not have been clearer – the fact that a task is necessary to a company's business does not entitle it to up the ladder workers' compensation exclusivity. The KJA requests the Court to reject Minova's effort to change the law to allow workers' compensation exclusivity simply because a task is necessary to a company's business.

4. As a Matter of Public Policy, the Court of Appeals' Decision Should be Affirmed.

This Court has routinely stated that 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). "The humane spirit of the statute [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)). Minova advocates for a rule where virtually everything would be up the ladder if it was necessary to a company's business, required by law, or could possibly have been performed by the company's own employees. Indeed, it argues that up the ladder exclusivity should apply even if it never performed a task with its own employees, and there is no evidence it or other similarly situation companies would perform such a task with their own employees, which renders KRS 342.610(2)(b) meaningless in most instances. It also ignores *Cain*'s holding that a company claiming up

the ladder exclusivity must prove that that its own employees performed the same task or would ordinarily be expected to perform the same task with substantial evidence. *Cain*, 236 S.W.3d at 588. This interpretation contradicts the plain language of KRS 342.610(2)(b). If the legislature wanted up the ladder exclusivity to encompass everything a company contracts out to others, it would have said so in the statute.

The power to express public policy is granted to the legislature. *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992). It is beyond the power of the courts to vitiate an act of the legislature by stating it is against the public interest. *Id.* at 614. Judicially created public policy must always yield to the superior policy of the legislature. *Id.* This Court has held that it "only speaks to public policy when the constitution and the legislature have failed to properly recognize it." *City of Bromley v. Smith*, 149 S.W.3d 403, 406 (Ky. 2004). "The public policy of a state is determined by its Constitution and statutes, and, where these are silent, by the decisions of its courts." *Allin v. Am. Indem. Co.*, 246 Ky. 396, 55 S.W.2d 44, 45 (1932) (citing *Chreste v. Louisville Railway Company*, 167 Ky. 75, 180 S. W. 49 [L. R. A. 1917B, 1123, Ann. Cas. 1917C, 867]; *Union Central Life Insurance Co. v. Spinks*, 119 Ky. 261, 83 S. W. 615, 26 Ky. Law Rep. 1205, 84 S. W. 1160, 27 Ky. Law Rep. 325, 69 L. R. A. 264, 7 Ann. Cas. 913; *Davies v. Davies*, L. R. 36, Ch. Div. 359; *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 A. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793). "Hence, when the Legislature speaks within the limits of the Constitution, its declaration of public policy is conclusive." *Allin*, 55 S.W.2d at 45.

This Court has held, "when engaging in statutory interpretation, it is imperative that we give the words of the statute their literal meaning and effectuate the intent of the legislature." *Samons v. Kentucky Farm Bureau Mut. Ins. Co.*, 399 S.W.3d 425, 429 (Ky. 2013)(citing *Cosby v. Commonwealth*, 147 S.W.3d 56, 59 (Ky.2004)). "The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Jefferson Cnty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 718 (Ky. 2012) (citing *MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky.2009)); *Saxton v. Commonwealth*, 315 S.W.3d 293, 300 (Ky.2010)). "Thus, we first look at the language employed by the legislature itself, relying generally on the common meaning of the particular words chosen, which meaning is often determined by reference to dictionary definitions." *Jefferson, supra,* at 719 (citing KRS 446.080(4)). "Moreover, "[i]n construing statutory provisions, it is presumed that the legislature did not intend an absurd result." *Cosby v. Com.*, 147 S.W.3d 56, 59 (Ky. 2004) (citing *Commonwealth, Central State Hosp. v. Gray*, 880 S.W.2d 557, 559 (Ky. 1994)).

The legislature narrowly defined activities that entitle a contractor to up the ladder exclusivity. This Court narrowly interpreted KRS 342.610(2)(b) in *Cain*. Minova seeks a broader interpretation which expands the scope of KRS 342.610(2)(b) beyond its intended purpose to include all activities which are necessary to a company's business, or which could have been theoretically performed by its own employees even though there is no evidence that they ever did. As a matter of public policy, the KJA respectfully requests the Court to refrain from interpreting KRS 342.610(2)(b) in a manner which would render virtually all work performed by a subcontractor as affording a company up

the ladder immunity, and also eliminate the well-worn requirement of producing "substantial evidence."

CONCLUSION

This Court has established clear, cogent rules for determining whether a business is entitled to up the ladder tort immunity. The Court should not replace the "substantial evidence" standard with a rule allowing mere possibilities, speculation or conjecture to satisfy a defendant's stringent burden. If such a standard is adopted, virtually all situations would be deemed a regular or recurrent party of defendant's business performed or expected to be performed with its own employees, which is contrary to the narrow scope of KRS 342.610(2)(b). Further, the KJA requests the Court to refrain from adopting a rule directly opposite of *Cain*, which made clear that simply because work is necessary does not automatically render it regular or recurrent work performed or expected to be performed by the company's own employees. *Cain*, 236 S.W.3d at 588.

Accordingly, the KJA respectfully requests the Court to affirm the Court of Appeals decision, which properly applied well settled long standing Kentucky law.

Respectfully Submitted:

/s/Paul J. Kelley
Paul J. Kelley
Satterley & Kelley, PLLC
8700 Westport Road
Suite 202
Louisville, KY 40242
(502)-589-5600
Counsel for Amicus Curiae
Kentucky Justice Association

WORD COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B)(4)(C) because, excluding the parts of the document exempted by the rule, this document contains 5,239 words.

/s/ Paul J. Kelley
Counsel for Amicus Curiae
Kentucky Justice Association

APPENDIX

Appendix 1: *Waterbury v. Anheuser-Busch*, 2003 WL 1145470 (W.D. Ky. February 24, 2003).

Appendix 2: *Beals v. Countrymark Energy Resources*, LLC, 2021 WL 5181026 (W.D. Ky November 8, 2021).

APPENDIX

"1"

2003 WL 1145470
Only the Westlaw citation is currently available.
United States District Court,
W.D. Kentucky.

Harry WATERBURY, Plaintiff,
v.
ANHEUSER–BUSCH, INC., Defendant.

Civil Action No. 3:01cv–536–S.
|
Feb. 24, 2003.

Attorneys and Law Firms

Mat A. Slechter, Sampson, Smith & Slechter, Louisville, KY, for Plaintiff.

Thomas U. Stewart, Krauser & Brown, Louisville, KY, for Intervenor–Plaintiff.

D. Craig York, Patrick Shane O'Bryan, Woodward, Hobson & Fulton, Louisville, KY, for Defendant.

MEMORANDUM–OPINION

CHARLES R. SIMPSON III, Judge.

*1 The matter is before the court on motion of the defendant, Anheuser–Busch, Inc., for summary judgment pursuant to Fed.R.Civ.P. 56. DN 19. Defendant contends that Plaintiff, Harry Waterbury's claims are barred by the exclusive remedy provision of the Kentucky Workers' Compensation Act, KRS 342.690(1).

Background

The facts in this case are undisputed. Anheuser–Busch is in the business of brewing and selling beer, and owns a warehouse in Louisville, Kentucky. *Affidavit of William R. Dyer,* attached as Exhibit 1 to defendant's motion for summary judgment. The warehouse is used to store canned, bottled and keg beer for delivery to distributors and wholesalers, as well as to store CO_2 canisters used to dispense beer from beer wagons. *Id.* The CO_2 canisters are necessary to dispense Anheuser–Busch beer from beer wagons set up at various outdoor events. *Id.*

Anheuser–Busch had a contract with Helget Gas to supply Anheuser–Busch with the CO_2 canisters. Helget Gas contracted with Apollo Express to transport the canisters. Apollo Express then contracted with Connection Company/TSF, Ltd to transport the canisters to Anheuser–Busch's warehouse.

Waterbury was employed by Connection Company/TSF. He claims that he was injured while unloading CO_2 canisters at Anheuser–Busch's warehouse.

Anheuser–Busch maintains that Waterbury's claims are barred by the Kentucky Workers' Compensation Act, which provides immunity from civil liability to an employee's direct employer and to all other entities in the contractual chain (contractors, subcontractors, etc.) so long as (1) the employee's direct employer has procured workers' compensation coverage, and (2) the other entities can establish they have contracted to perform work "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person." KRS 342.610(2)(b).

Waterbury concedes that his employer contracted with Anheuser–Busch for the delivery of the CO_2 canisters. However, he maintains that the delivery of the CO_2 canisters was not part of Anheuser–Busch's regular or recurrent business or trade.

Analysis

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 151–60, 90 S.Ct. 1598, 16 L.Ed.2d 142 (1970); *Felix v. Young,* 536 F.2d 1126, 1134 (6th Cir.1976). Not every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which

makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288–89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir.1962).

*2 The plaintiff has raised no material issues of fact. The only issue before us is whether, as a matter of law, the delivery of CO_2 canisters was a part of the regular or recurrent business of Anheuser–Busch. Therefore, summary judgment is appropriate in this case.

Under the Kentucky Workers' Compensation Act, worker's compensation is the exclusive remedy available to an employee injured on the job, and the employer is immune from civil liability for such injury. KRS 342.690(1). Under the provisions of KRS 342.610(2), this immunity flows "up the ladder" from an employee's direct employer to all other entities in the contractual chain (contractors, subcontractors, subcontractors, etc.) so long as (1) the employee's direct employer has procured workers' compensation coverage, and (2) the "up the ladder" entity can establish they have contractually agreed "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." KRS 342.610(2).

It is undisputed that Connection Company/TSL, Waterberry's direct employer, secured worker's compensation coverage. Therefore, whether the delivery of the CO_2 canisters was part of Anheuser–Busch's regular or recurrent business or trade is determinative of whether they will be immune from civil liability to Waterbury.

Kentucky courts have broadly interpreted what constitutes a regular or recurrent part of a person's business or trade. *See Fireman's Fund Insurance Co. v. Fletcher*, 705 S.W.2d 459 (Ky.1986) (holding that performing rough carpentry work was part of developer's business even though they never performed it themselves); *Smothers v. Tractor Supply Co.*, 104 F.Supp.2d 715 (W.D.Ky.2000) (holding that delivery of merchandise to a tractor supply store was a regular element of the retail operation); *Daniels v. LG & E*, 933 S.W.2d 821 (Ky.App.1996) (finding that EPA emissions tests performed nine times per year were a regular part of LG & E's business); *Granus v. North American Phillips Lighting Corp.*, 821 F.2d 1253 (6th Cir.1987) (holding that the re-bricking of a glass melting furnace was part of routine maintenance necessary for the overall manufacturing operations at a glass making factory); *Thompson v. The Budd Co.*, 199 F.3d 799 (6th Cir.1999) (finding that changing the heating filter was a regular part of the maintenance of a business stamping auto parts).

Anheuser–Busch is in the business of selling beer. Since 1988, CO_2 canisters have been delivered, unloaded and stored at Anheuser–Busch's warehouse. These canisters are used in the summer months to dispense Anheuser–Busch beer from beer wagons at various outdoor events. The unloading of delivery carrying CO_2 canisters used to dispense beer is a regular and recurrent part of Anheuser–Busch's business of selling beer. Therefore, Anheuser–Busch is a contractor for purposes of KRS 342.610(2).

Because Anheuser–Busch is a contractor in the contractual chain between Anheuser–Busch, Helget Gas, Apollo Express and Connection Company/TSL, Ltd., and because Connection Company/TSL, Ltd. properly procured workers's compensation insurance for its employee Harry Waterbury, Anheuser–Busch is immune from civil liability to plaintiff, Harry Waterbury.

*3 Motion having been made and for the reasons set froth above and the court being sufficiently advised, the motion of defendant, Anheuser–Busch, for Summary Judgment will be **GRANTED** by separate order.

All Citations

Not Reported in F.Supp.2d, 2003 WL 1145470

End of Document

APPENDIX

"2"

2021 WL 5181026
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky, Owensboro Division.

Morris W. BEALS and Joni Beals, Plaintiffs
and
Clearpath Mutual Insurance Company, Intervening Plaintiff
and
Stinson Bros. Welding Service, Inc., Intervening Plaintiff/Third-Party Defendant
v.
COUNTRYMARK ENERGY RESOURCES, LLC, Defendant/Third-Party Plaintiff

CIVIL ACTION NO. 4:20-CV-00074-JHM

Signed November 8, 2021

Attorneys and Law Firms

Curtis J. Hamilton, III, Curt Hamilton Law Office, PLLC, Shannon N. King, Hamilton Injury Law Group, PLLC, Henderson, KY, for Plaintiffs.

Samuel J. Bach, Bach & Armstrong LLP, Henderson, KY, for Intervening Plaintiff.

Brian Scott Jones, Christine A. Gilliam, Reminger Co., LPA, Louisville, KY, for Defendant/Third-Party Plaintiff.

Samuel J. Bach, Bach & Armstrong LLP, Henderson, KY, for Intervening Plaintiff/Third-Party Defendant.

MEMORANDUM OPINION AND ORDER

Joseph H. McKinley Jr., Senior Judge

*1 This matter is before the Court on CountryMark's Motion for Summary Judgment [DN 46]. Fully briefed, this matter is ripe for decision. For the following reasons, the Motion is **GRANTED**.

I. BACKGROUND

Plaintiff Morris Beals ("Mr. Beals") is a professional welder employed by Stinson Brothers ("Stinson Bros."), a welding company which has been in operation for more than 55 years. Mr. Beals and Stinson Bros. frequently performed welding services for CountryMark Energy Resources ("CountryMark"), an oil production company with over 1,200 active oil wells in the region. Stinson Bros. has done welding work on CountryMark's oil structures dating back to 1967, evaluating and/or repairing hundreds of structures for CountryMark. [DN 46-4 at 15].

In 2019, CountryMark re-located a steel oil well pumping unit substructure ("the structure" or "structure") from an inactive site in Indiana to Henderson County, Kentucky. Because the structure was old, CountryMark needed to make some repairs to it—not the least of which was building a platform, flooring, and handrails on the structure. CountryMark hired Stinson Bros., as it had numerous times before, to evaluate the structure and make the necessary repairs.

Mr. Beals testified that he knew there was a danger of falling off the structure, because it was high off the ground with no platform or flooring to stand on (he was there in part to build the platform for the structure). [DN 46-8]. Mr. Beals observed the framing of the structure and determined that it was structurally safe for him to climb up on. [*Id.* at 14–15]. Using his own ladder, he climbed on to the structure and began to use his acetylene torch to cut some old steel pieces from the structure as part of the rehab process. [DN 50 at 3]. Mr. Beals stepped onto a small piece of rusted pipe, which gave way, causing him to fall ten feet to the ground. As a result of his fall, Mr. Beals broke his spine and became paralyzed. [*Id.* at 2–3]. He now has no feeling below his chest and is confined to a wheelchair. [*Id.* at 2].

Mr. Beals received workers' compensation from Stinson Brothers' insurer, Clearpath Mutual Insurance Company. Mr. Beals now brings claims against CountryMark for negligence in failing to provide him with safety equipment and otherwise ensure his safety, as well as negligence per se. Mrs. Joni Beals, Beals's wife, has also sued for loss of consortium. CountryMark filed for summary judgment, claiming it is protected by up-the-ladder immunity for contractors under Kentucky state law. In the alternative, CountryMark argues for summary judgment on Mr. Beals's negligence claims.

II. STANDARD OF REVIEW

Before the Court may grant a motion for summary judgment, it must find that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of specifying the basis for its motion and identifying that portion of the record that demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

*2 Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party must do more than merely show that there is some "metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the Federal Rules of Civil Procedure require the non-moving party to present specific facts showing that a genuine factual issue exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence ... of a genuine dispute[.]" Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

III. DISCUSSION

The question before the Court is whether CountryMark is a statutory contractor within the express provisions of the Kentucky Workers' Compensation statute. In Kentucky, workers' compensation is the exclusive remedy for workers injured on the job, meaning that workers who are entitled to workers' compensation are generally unable to recover in negligence suits brought against their employers for on-the-job injuries. *See Beaver v. Oakley*, 279 S.W.2d 527, 530 (Ky. 2009); KRS § 342.690(1). This immunity for employers extends to contractors under the Kentucky statute, with the purpose of "discourag[ing] a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor in an attempt to avoid the expense of workers compensation benefits." *Gen. Elec. Co. v. Cain*, 236 S.W.3d 579, 585 (Ky. 2007). As such, a contractor[1] is entitled to "up-the-ladder" immunity—immunity from tort liability resulting from injuries to the employees of its subcontractor—if (1) the subcontractor employing the injured worker ensures workers compensation for its employees and (2) the work being performed by the injured employee is "of a kind which is a *regular or recurrent* part of the work of the trade, business occupation, or profession" of the contractor. KRS § 342.610(2) (emphasis added).

Because up-the-ladder immunity is an affirmative defense, CountryMark must prove both statutory elements to avoid a suit by Mr. Beals. Because Stinson Bros. (the subcontractor), provided workers' compensation insurance to its employees, the only other issue is whether Mr. Beals was doing work that was a "regular or recurrent" part of CountryMark's business at the time of his injury. "Recurrent" simply means occurring again or repeatedly. "Regular" means customary or normal, or happening at fixed intervals. *Daniels v. Louisville Gas & Elec. Co.*, 933 S.W.2d 821, 824 (Ky. Ct. App. 1996). The Webster's Dictionary defines "regular" work as a "customary, usual, or normal part of the premised owner's trade, business, occupation, or profession." *See Cain*, 236 S.W.3d at 589. As the Kentucky Supreme Court wrote in *Cain*, "regular or recurrent" work is "work that the business repeats with some degree of regularity, and it is of a kind that the business or similar businesses would normally perform or be expected to perform with employees." *Id.* at 588.

The Sixth Circuit has developed a three-part test for determining what type of work by a contractor constitutes "regular or recurrent" under Kentucky's up-the-ladder statute. *See Black v. Dixie Consumer Prods. LLC*, 835 F.3d 579, 585 (6th Cir. 2016). The three factors used to consider whether the contractor is entitled to immunity are (1) whether the subcontractor was hired to perform the work during which the injury occurred; (2) whether the subcontractor's work was a customary or usual part of the contractor's business, or work that the contractor repeats with "some degree of regularity;" and (3) whether the work was that which the contractor "or a similar business would normally perform or be expected to perform with employees." *Id.* If all three questions are answered affirmatively, the Sixth Circuit finds the "regular and recurrent" requirement to be met. *Id.*

*3 For the first prong, it is plainly evident that the subcontractor, Stinson Bros., was hired by CountryMark to perform the welding work Mr. Beals was performing when he was injured. As for prong two, the factual record consistently shows that welding is a regular part of CountryMark's business as an oil company. CountryMark hired the professional welders at Stinson Bros. to evaluate

and repair "hundreds" of oil pumps and supporting structures over the course of the last fifty years. [DN 46-4 at 9, 15]. Welding is repeated with "some degree of regularity" to ensure CountryMark's continued operation. *Black*, 835 F.3d at 585. Welding is unquestionably a regular and recurrent part of CountryMark's business in the oil industry.

Beals argues that the welding work he was engaged in at the time of his injury was not regular "routine maintenance" of CountryMark's business because it involved a special project —fabrication work necessary to raise a pumping unit onto an elevated structure. [DN 50 at 15]. He cites a Sixth Circuit case, *Estate of Dohoney v. Int'l Paper Co.*, where the court reversed a finding of summary judgment for the contractor on up-the-ladder immunity in a case where a subcontractor's employee was electrocuted while performing specialized work that the contractor, International Paper, did not regularly perform. 560 F. App'x 564 (6th Cir. 2014). However, CountryMark, and other businesses like it, regularly elevate pumps in flood prone areas. Regular or recurrent work "is work that is customary, usual, or normal to the particular business ... or work that the business repeats with some degree of regularity." *Louisville Gas & Elec. Co. v. Galvan*, No. 2019-CA-0961-MR, 2020 WL 6106958, at *4 (Ky. Ct. App. Oct. 16, 2020). [2] The record shows that CountryMark repurposed structures and elevated pumps with some degree of regularity. In fact, Mr. Beals and Stinson Bros. had performed this very same welding work on ten to twelve similar structures for CountryMark in the few months leading up to the events in this case alone. [DN 46-3 at 3; DN 46-4 at 8–9].

The third inquiry of the *Black* test asks whether the work was that which the contractor "or a similar business would normally perform or be expected to perform with employees." In *Black v. Dixie*, the Sixth Circuit found that a subcontractor's delivery service was the type of work that a consumer products producer such as Dixie might be expected to handle itself, even though it contracted it out. 835 F.3d at 587. Likewise, CountryMark, or any oil production company, would normally be expected to do this work with its employees.

The 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. Both the Kentucky Supreme Court and Kentucky federal courts have found that "[a] contractor that never performs a particular job with its own employees can still come within KRS 342.610(2)(b)." *Doctors' Assocs., Inc. v. Uninsured Employers' Fund*, 364 S.W.3d 88, 92 (Ky. 2011); *see also Boyd v. Doe*, No. 12-136-ART, 2014 WL 5307951, at *2 (E.D. Ky. Oct. 15, 2014). As long as the company contracts away a job it is expected to perform themselves —even if it never actually performs the job—the company can be considered a "contractor" that reassigned "regular or recurrent" work. *Doctors' Assocs.*, 364 S.W.3d at 92. For example, the court in *Boyd v. Doe* found that the installation of plumbing and electricity was a regular and recurring part of a building contractor's business even though the contractor regularly outsourced those tasks to subcontractors. *Id.*

*4 Although CountryMark readily admits it lacks the capacity to perform this type of welding work in-house, the work is still a regular and recurrent part of its oil production business which it chooses to reassign to a subcontractor. Thus, CountryMark is a statutory contractor protected by up-the-ladder immunity under KRS § 342.610(2).

IV. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that CountryMark's Motion for Summary Judgment [DN 46] is **GRANTED**.

All Citations

Not Reported in Fed. Supp., 2021 WL 5181026

Footnotes

1 KRS § 342.610(2)(b) defines a "contractor" as "[a] person who contracts with another ... [t]o have work performed of a kind which is a regular or recurrent part of the work of that person's "trade, business, occupation, or profession."

2 *Galvan* was overturned by the Kentucky Supreme Court on jurisdictional grounds. Still, the up-the-ladder analysis remains instructive for this case and this body of law.

End of Document