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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001925-MR

SANDRA PETRONIS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CI-002963

CHURCHILL DOWNS, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR , JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Sandra Petronis appeals from an August 26, 2005, summary judgment of the Jefferson Circuit Court concluding that Churchill Downs, Inc. (Churchill Downs) was entitled to immunity from tort liability under the exclusive remedy provision of the Workers' Compensation Act (Act) and dismissing Petronis's action. We affirm.

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Petronis is a resident of New York and is employed by Schenectady Community College (SCC) in Schenectady, New York. Petronis has been employed with SCC for over twenty years. For most of that time, Petronis was employed in her current position in the Hotel Culinary Arts Department, where she schedules reservations for meals. In April 2003, Petronis also became employed with Levy Premium Food Service Limited Partnership (Levy), in New York.[2] Levy has a contract to provide food and beverage services for Churchill Downs at its racetrack in Louisville, Kentucky. Levy also has an internship program with SCC whereby Levy hires students from SCC's Hotel Culinary Arts Department to work as Levy employees during the weeks surrounding the Kentucky Derby. Through her employment with Levy, Petronis supervised SCC students employed by Levy during their trip to Louisville. Petronis chaperoned the female students and worked in Levy's Human Resources office located on Churchill Downs' property. Petronis arrived in Louisville on April 25, 2003. Prior to this time, Petronis had never been to Kentucky.

On April 26, 2003, Petronis and the SCC students arrived at Churchill Downs racetrack at approximately 7:00 a.m. Petronis escorted the students to the clubhouse area. Petronis left the students at approximately 8:15 a.m. and began searching for Levy's Human Resources office. Petronis proceeded out of the clubhouse building through a door marked "Exit." The door was just outside Levy's vending area and led to

[2] Sandra Petronis was interviewed by Levy Premium Food Service Limited Partnership before receiving the position. During her trip to Kentucky, Petronis was not supervised by Churchill Downs, Inc., nor did she receive any compensation from Churchill Downs. Rather, she received a salary from Schenectady Community College and was also paid $1,050.00 per week by Levy.

an open metal staircase. The stairs were divided by concrete landings. Petronis testified that it had rained the night before, that it was misting rain when she exited the building, and that the stairs were slippery. She proceeded down the stairs and slipped on the next to the last step from the first platform. Petronis fell on the platform landing, hitting her right shoulder and side.

After her fall, Petronis reported to Levy's Human Resources office but was instructed that she was not needed there. Petronis walked around the rest of the day checking on the students.[3] Petronis testified that later that day she was in too much pain to drive the students back to their hotel. Two days after the accident, Petronis went to the emergency room at Caritas Hospital. Petronis was x-rayed, but the attending physician could not find any injury. The attending physician told Petronis to see an orthopedic surgeon when she returned to New York. Petronis and the other Levy employees returned to New York on May 6, 2003, the Monday after the Kentucky Derby. Petronis later saw an orthopedic surgeon and was diagnosed with a torn rotator cuff, fractured ribs, and a fractured bone in the right shoulder. Petronis eventually underwent rotator cuff surgery and physical therapy.[4]

Petronis filed an application for workers' compensation benefits under Levy's policy in New York, which was granted. Petronis was awarded and received benefits from Levy's workers' compensation carrier for medical expenses and lost wages.

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[3] Petronis did this throughout the trip. On Friday, May 3, Oak's Day, and Saturday, May 4, Derby Day, Petronis assisted in handing out lunches and badges.

[4] Petronis testified that she still has pain down her right arm, the extent of which depends on what activities she is involved in, and that she has continual pain in her right shoulder.

On April 7, 2004, Petronis filed an action against Churchill Downs alleging that its negligence was the sole and proximate cause of her injury.[5] Churchill Downs filed an answer denying negligence and asserting certain affirmative defenses on June 18, 2004.

On March 18, 2005, Churchill Downs filed its motion for summary judgment, in which it argued as follows:

> Levy is a subcontractor of [Churchill Downs], and it performs work that is a regular and recurrent part of the track's business. Both Levy and [Churchill Downs] provided workers' compensation coverage to [Petronis]. Thus, pursuant to Kentucky's Workers' Compensation Act, [Churchill Downs] is an 'up-the-ladder' contractor, entitled to protection from tort liability. Therefore, [Petronis's] claims must be dismissed as a matter of law.

Petronis filed a response to the motion on May 2, 2005, and Churchill Downs filed a reply on May 31, 2005. On August 26, 2005, the circuit court entered an order granting summary judgment in favor of Churchill Downs on Petronis's negligence claims. The circuit court concluded that Churchill Downs was an "up-the-ladder" employer and, thus,

[5] Petronis alleged in her complaint as follows:

> As a direct and proximate result of the negligence of [Churchill Downs], [Petronis] received bodily injuries which have required her to seek medical treatment in the past which is likely to continue to the future; that [Petronis] has suffered physical pain and mental anguish in the past which is also likely to continue into the future; that [Petronis] has lost income and wages in the past which is likely to continue to the future; and that [Petronis'] ability to labor and earn wages in the future has been permanently impaired, all to her damage.

immune from tort liability under the Act. The circuit court stated, in relevant part, as follows:

> Because [Churchill Downs] has shown that it is a contractor that hired Levy to conduct a regular and recurring part of its business and because Levy properly provided workers' compensation coverage for its employee [ ] Petronis, [Churchill Downs] qualifies for 'up the ladder' immunity from liability for [ ] Petronis'[s] negligence action.

This appeal follows.

Initially, Petronis argues that New York law should be applied in this case because her workers' compensation claim was litigated under New York law. New York law apparently allows an employee to receive workers' compensation benefits from her employer and maintain a tort action against a contractor of her employer. *See Sweezey v. Arc Electric Const. Co.*, 67 N.E.2d 369 (N.Y. 1946). Petronis relies upon *Lewis v. American Family Ins. Group*, 555 S.W.2d 579, 581 (Ky. 1977) and argues that the modern choice of law test in Kentucky requires that we consider "which state has the most significant relationship to the transaction and the parties." We disagree and conclude that the circuit court applied the correct test when it ruled that "Kentucky law should be applied if there are significant, though not necessarily the most significant, contacts with Kentucky."

If this were a contract action, Petronis would be correct that the law of the state with the greatest interest in the outcome of the litigation should be applied. *See Breeding v. Massachusetts Indemnity & Life Ins. Co.*, 633 S.W.2d 717 (Ky. 1982). However, as a tort action, Kentucky case law clearly holds that any significant contact

with Kentucky is sufficient to allow an application of Kentucky law. *See Foster v. Leggett*, 484 S.W.2d 827 (Ky.1972)9 (holding that the fact a Kentucky resident was killed in an automobile accident which occurred in Ohio was enough contact to justify the application of Kentucky law, even though the accident was in Ohio and the tortfeasor was an Ohio resident.) As this is an action in tort, "[w]hen the Court has jurisdiction of the parties its primary responsibility is to follow its own substantive law." *See Foster*, 484 S.W.2d at 829. Further, our Supreme Court has stated that "[l]aws unique to other jurisdictions, e.g., regarding statutes of limitations, interspousal immunity, worker's compensation, and comparative or contributory negligence, should not bind and define the public policy of Kentucky." *United States Fidelity & Guaranty Co. v. Preston*, 26 S.W.3d 145, 147-48 (Ky. 2000).

Petronis was domiciled in New York, her employment with Levy began in New York, and her employment agreement with Levy was entered into in New York. Her trip to Kentucky began and ended in New York. Further, she was covered by workers' compensation in New York. Petronis's injury, however, occurred in Kentucky and she brought her action against Churchill Downs in a Kentucky court. We conclude that based upon Kentucky law there was sufficient contact with Kentucky for its courts to apply Kentucky law in this case. Thus, having concluded that Kentucky law is controlling, our analysis turns to whether summary judgment was proper in granting "up-the-ladder" immunity in this case.

Under Kentucky law, it is well-settled that "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were

no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Ky. R. Civ. P. (CR) 56.03 provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment is improper unless it would be "impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Steelevest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991)(citation omitted).

When evaluating a motion for summary judgment, the role of the circuit court is not to decide issues of fact, but rather to determine whether a real issue exists. *R.J. Corman Railroad Co.*, 116 S.W.3d at 488 (Ky. 2003). Because a summary judgment involves no fact-finding, the appellate court reviews the circuit court's decision *de novo.* *3D Enterprises Contracting Corp. v. Louisville & Jefferson Co. Metro. Sewer District*, 174 S.W.3d 440 (Ky. 2005). Our review shall proceed accordingly.

KRS 342.690(1)[6] states, in relevant 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,

[6] The Workers' Compensation Statutes in effect at the time of injury are controlling. As such, we cite to those versions in effect on April 26, 2003. *See Woodland Hills Min., Inc. v. McCoy*, 105 S.W.3d 446 (Ky. 2003).

> whether or not the subcontractor has in fact, secured the payment of compensation. . . .

KRS 342.610(2) defines a "contractor" for purposes of KRS 342.690(1) as follows:

> A person who contracts with another:
>
> . . . .
>
> (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 . . . be deemed a contractor, and such other person a subcontractor.

Furthermore, KRS 342.340(1) provides:

> Every employer under this chapter shall either insure and keep insured his liability for compensation hereunder in some corporation, association, or organization authorized to transact the business of workers' compensation insurance in this state or shall furnish to the commissioner satisfactory proof of his financial ability to pay directly the compensation in the amount and manner and when due as provided for in this chapter. . . .

Kentucky Revised Statutes (KRS) 342.690(1) grants immunity from liability to employers and contractors as defined by KRS 342.610(2) when workers' compensation payments have been secured. Stated differently, workers' compensation is the exclusive remedy of a covered employee against an employer/contractor. *Zurich American Insurance Co. v. Haile*, 882 S.W.2d 681 (Ky. 1994). To be considered an employer/contractor entitled to immunity under the Act, the employer must demonstrate that (1) it is a contractor that is "up the ladder" from the subcontractor's employee and (2) the work performed by the subcontractor was a regular or recurrent part of the employer's business.

In the case *sub judice*, the facts are uncontroverted that a contract existed between Churchill Downs and Levy wherein Levy was to provide food and beverage services at Churchill Downs in Louisville, Kentucky.[7] Hence, Churchill Downs clearly contracted with Levy to provide certain services, and Petronis was an employee of Levy at the time of the accident. The circuit court correctly framed the issue as whether the these services provided by Levy were a "regular or recurrent part of the employer's [Churchill Downs] business." Petronis's primary argument regarding this issue is that the parties agreed and stipulated in the management agreement that Levy was a "vendor" of Churchill Downs and thus, as a matter of law, cannot be determined to be a subcontractor of Churchill Downs. This argument misses the mark because the parties cannot by agreement circumvent the terms of KRS 342.610(2) and KRS 342.690(1). As previously noted, whether one is a contractor or subcontractor is explicitly defined by the statute. Thus, a person who contracts with another to have work performed of a kind which is a regular or recurrent part of the work of the business of such person shall, for the purposes of KRS 342.610(2) and KRS 342.690(1), be deemed a contractor and the other shall be deemed a subcontractor. Regardless of how the parties wish to characterize their arrangement in a written agreement, the statute controls.

In *Daniels v. Louisville Gas and Electric Co.*, 933 S.W.2d 821 (Ky.App. 1996), a panel of this Court addressed the issue of "regular or recurrent." The Court concluded as follows:

[7] The contract between the parties is styled "Management Agreement" and was filed as part of the record on appeal.

> "Recurrent" simply means occurring again or repeatedly. "Regular" generally means customary or normal, or happening at fixed intervals. However, neither term requires regularity or recurrence with the preciseness of a clock or calendar.

Id. at 824.

There is no factual dispute that Churchill Downs is engaged in the horse racing business. However, this classification does not encompass the total business activities that Churchill Downs actually engages in. Horse racing in Kentucky requires a license pursuant to KRS Chapter 230. Churchill Downs operates a race track in accordance with KRS 230.300 *et seq*. More importantly for this case, the attraction of horse racing at Churchill Downs is enhanced by legalized gambling thereon in the form of pari-mutuel wagering as provided for in KRS 230.361. Simply put, Churchill Downs operates a race track and is a place of amusement or entertainment open to the general public.[8] Food and beverage concessions are synonymous with places of public amusement or entertainment. Obviously from the record in this case, the concessions at Churchill Downs generate a substantial income and have been an integral part of their business income in the operation of the race track for many years.

We think it beyond cavil that providing food and beverage services to patrons of Churchill Downs constitutes a regular and recurrent part of its business, and is in fact an integral part of its business. Thus, we are of the opinion that pursuant to KRS 342.610(2) and KRS 342.690(1), Churchill Downs and Levy's relationship was that of a

[8] 103 Ky. Admin. Regs. 28:010, Section 2, defines places of amusement or entertainment to include but not limited to theaters, motion picture shows, auditoriums where lectures and concerts are given, amusement parks, fair grounds, race tracks, baseball parks, football stadiums, street fairs, and the like.

contractor/subcontractor and that Levy provided services that constituted a regular and recurrent part of Churchill Downs' business.

Accordingly, we hold that the exclusive remedy provision of the Act shields Churchill Downs from liability in the instant negligence action. As the material facts are undisputed and Churchill Downs was entitled to judgment as a matter of law, we conclude the circuit court properly entered summary judgment dismissing Petronis's action.

For the forgoing reasons, the summary judgment of the Jefferson Circuit Court is affirmed.

ABRAMSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

BUCKINGHAM, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ABRAMSON, JUDGE, CONCURRING: I concur. In defining "contractor", KRS 342.610 (2) does *not* state that a person who "hires", "pays" or "employs" another person to perform the particular work at issue is a contractor for purposes of the workers' compensation statute. If the statute contained those words, we might be justified in focusing on the specific structure of the parties' contract and finding "contractor" status only if Churchill Downs was in fact "hiring", "paying" or "employing" Levy. However, the relevant statutory language is as follows:

> A person who contracts with another: . . .
>
> 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.

Under the statute as written, the only relevant inquiries are: (1) was there a contract between the parties and (2) was the work performed pursuant to that contract "of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person"? In this case, the answer to both inquiries is "yes" and thus Churchill Downs is a contractor. The payment structure adopted by the parties and the manner in which they identify themselves in the contract are simply irrelevant under KRS 342.610(2).

BUCKINGHAM, SENIOR JUDGE, DISSENTING. I respectfully dissent because, in my opinion, the business relationship between Churchill Downs and Levy is not one of contractor and subcontractor so as to give Churchill Downs immunity under Kentucky worker's compensation laws from Petronis's tort claim. Churchill Downs is not hiring Levy or paying Levy to do work for it, as in the typical contractor/subcontractor relationship. Rather, Churchill Downs charges Levy a fee, in the nature of a licensing fee, for the right to come on its premises to sell its products. All proceeds from the operation are Levy's, and Levy also has agreed to share its profit with Churchill Downs as further consideration for being allowed the right to do business on Churchill Downs' premises. All payments flow from Levy to Churchill Downs, not from Churchill Downs to Levy as would be the case were the relationship one of contractor/subcontractor. In short, Levy is a vendor, not a subcontractor, and Churchill Downs is not protected by this state's workers' compensation laws from liability for

injury to Petronis that may have been caused by its negligence. *See Wilson v. Daniel Intern. Corp.*, 197 S.E.2d 686 (S.C. 1973)(vendor held not to be a subcontractor within state's workers' compensation laws and vendor's employee thus not barred by those laws from bringing tort action against contractor). Furthermore, the express terms of the Management Agreement between Churchill Downs and Levy clearly specify that Levy is to be considered a "vendor" and not a "subcontractor".

There are no Kentucky decisions that directly address this situation. However, in *Meyer v. Piggly Wiggly No. 24, Inc.*, 527 S.E.2d 761 (S.C. 2000), the Supreme Court of South Carolina noted that in determining whether an employee is engaged in an activity that is part of an owner's trade, business, or occupation, it had applied three tests: 1) Is the activity an important part of the owner's business or trade, 2) Is the activity a necessary, essential, or integral part of the owner's business, and 3) Has the activity previously been performed by the owner's employees? *Id*. at 773. As those tests are applied to the facts in this case, the answer to all three questions is "no". It is clear that under the tests applied to these types of situations by South Carolina courts, Levy would not be considered a subcontractor for purposes of that state's workers' compensation laws.

I believe the consequences of the majority's decision may be significant. Under the majority opinion, owners of amusement businesses such as racetracks, ballparks, etc., will now have to provide workers' compensation insurance for the employees of all vendors and concessionaires to cover themselves in situations where the

vendor or concessionaire fails to procure such insurance. *See* KRS 342.610(2). The financial impact on owners could be great.

For example, ballpark owners will have to provide workers' compensation insurance for peanut vendors and souvenir vendors who do not work for the ballpark owners but work for private vendors who have contracted with the owners for the right to come on the owners' premises to sell their products. Furthermore, mall owners may now be required to provide workers' compensation insurance for all employees of every business within its mall. The financial impact for mall owners would be great. Perhaps, even owners of flea markets would need to procure workers' compensation insurance for employees of all vendors who pay a fee to sell their goods on the owner's property. Although Churchill Downs has prevailed in this case, it now must provide workers' compensation insurance for the employees of Levy and any other vendor operating on its premises in order to protect it from potential liability. *See* KRS 342.610(2). Covering liability exposure for injuries to employees of vendors with its premises liability policy surely would have been less expensive than now having to carry workers' compensation insurance on all such persons.

BRIEF FOR APPELLANT:

Diane Bluhm
Kevin B. Sciantarelli
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Kevin B. Sciantarelli
Louisville, Kentucky

BRIEF FOR APPELLEE:

John F. Parker, Jr.
William P. Swain
Patricia C. Lemeur
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Patricia C. Lemeur
Louisville, Kentucky