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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2002-CA-001342-MR & 2002-CA-001387-MR

DEBBIE HENSLEY AND MARK HENSLEY, AND
VENCARE, INC. APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 98-CI-04142

FIRST HEALTHCARE CORPORATION
A/K/A LEXINGTON CENTRE FOR HEALTH
AND REHABILITATION A/K/A VENTAS
REALTY, LTD. PARTNERSHIP
F/K/A VENTAS, INC. APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF AND SCHRODER, JUDGES; AND MILLER, SENIOR JUDGE[1].

KNOPF, JUDGE: In April 1998, Debbie Hensley slipped on the freshly waxed hallway just outside her workplace and suffered a

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

disabling injury. Her employer, Vencare, Inc., a provider of respiratory therapy services, paid her workers' compensation benefits. Hensley brought suit seeking negligence damages against First HealthCare Corporation (a/k/a Lexington Centre for Health and Rehabilitation), a Lexington nursing home, which owned and operated the premises where the injury occurred.[2] At the time of the accident, both Vencare and First HealthCare were wholly owned subsidiaries of Vencor, Inc. By order entered May 21, 2002, the Fayette Circuit Court dismissed Hensley's suit. First HealthCare, the court ruled, was Hensley's up-the-ladder employer and thus was immune from Hensley's negligence action under the exclusive-remedy provision of the Workers Compensation Act. Hensley maintains that First HealthCare is not entitled to the statutory immunity. We believe that it is, and so affirm.

It is observed in Larson's highly regarded treatise on workers' compensation law that

> [t]he definition of employment status almost always takes the form of distinguishing an employee from an independent contractor. The reason is simple. If one wants to get something done without doing it oneself, there are really only two ways open: to hire

[2] Joining Hensley's suit is her husband, who seeks damages for the loss of his wife's consortium. They have brought appeal no. 2002-CA-1342. Also joining Hensley's suit is Vencare, which seeks reimbursement of the compensation benefits it has provided. Vencare has brought appeal no. 2002-CA-1387.

> an employee to do it, or to contract out the work to an independent entrepreneur.[3]

This case raises the possibility of a third way to get work done and forces us to consider whether that third way is covered by the compensation act. We conclude that is.

It is well settled that under the Workers' Compensation Act (KRS Chapter 342) an employer accepts insurance liability for workplace injuries in exchange for immunity from "all other liability," and that "employer" includes both those who, as Larson says, depend on employees as well as those who depend on independent subcontractor entrepreneurs.[4]

The preliminary evidence in this case indicates that prior to Hensley's injury both Vencare and First HealthCare had obtained compensation insurance and thus were entitled to rely on the Act's exclusive remedy provision with respect to covered workers. The evidence also indicates that First HealthCare contracted with Vencor to receive respiratory therapy services, a necessary and regular part of First HealthCare's nursing-home business. The parties dispute, however, how Vencare came to be involved. The trial court found that a contract between Vencare and First HealthCare was implicit in their relationship, but

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[3] Larson, *Larson's Workers' Compensation Law,* § 60.02 (2003).

[4] KRS 342.690, KRS 342.610(2), Fireman's Fund Insurance Company v. Sherman & Fletcher, Ky., 705 S.W.2d 459 (1986).

Hensley denies this, suggesting instead that Vencor, as Vencare's controlling parent, simply directed Vencare to service the nursing home and that no Vencare contract, either with Vencor or with First HealthCare, existed.

We agree with Hensley that for summary judgment purposes the trial court's finding of a contract between First HealthCare and Vencare was premature. Although there is apparently no dispute that First HealthCare contracted with Vencor, Hensley may well be able to prove that Vencare's involvement came about as she suggests, by corporate direction rather than by contract. If this fact is material, therefore, then summary judgment ought not to have been granted.

Hensley, of course, insists that the basis of Vencare's involvement is material. She relies on a Sixth Circuit case, Boggs v. Blue Diamond Coal Company,[5] in which the court was confronted with the same possibility of a third way of having work performed—not by direct employment or by independent contract, but by corporate direction. In that case a mine holding company obtained mining services from subsidiary corporations. An explosion at one of the mines killed several miners and their survivors sued the holding company in tort. The court ruled that the holding company qualified as an

[5] 590 F2d 655 (6th Cir. 1979).

employer in neither of the usual ways and so was not entitled to immunity from the tort claim. The subsidiary rather than the holding company had employed the miners, the court noted, and there was no reason to disregard the subsidiary's independent existence. Furthermore, there was no evidence of a contract between the subsidiary and the holding company, which precluded, the court believed, deeming the holding company a "contractor" under the Act. The Sixth Circuit Court of Appeals rejected the trial court's inferring a contract because there was no evidence to support the inference, and, the court noted, parent corporations commonly deal with subsidiaries without resort to contract. When they do, the court held, they do so outside the Workers' Compensation Act.

Hensley urges us to reach the same result. Obviously she was not First HealthCare's direct employee, and she contends that she was not the employee of a subcontractor either because Vencare was not performing under a contract. The Act's exclusive remedy provision should not then, she insists, bar her claim.

We disagree, both with Hensley and with the Boggs court. Even if Vencare technically had no contract, its obligation to perform under Vencor's direction would supply the functional equivalent of a contract and so would bring the Act's "contractor" provisions into play. With those provisions the

General Assembly has made clear its intention that coverage under the Act not be thwarted by indirect modes of employment. The result Hensley urges would run counter to that legislative purpose. We hold that under the Act's contractor provisions, First HealthCare qualifies as an up-the-ladder employer and is therefore immune from Hensley's negligence claim. Thus, although the existence of a Vencare contract is a disputed issue of fact, it is not a material issue, and the trial court did not err when it entered summary judgment dismissing Hensley's suit. Accordingly, we affirm the May 21, 2002, order of the Fayette Circuit Court.

ALL CONCUR.

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