RENDERED: DECEMBER 19, 2003; 2:00 p.m.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001843-MR

DANIEL L. CAIN AND MARY HELEN CAIN,
HIS WIFE; JOHN T. CAIN AND BECKY CAIN,
HIS WIFE; AND VINCENT J. BECKER AND
KATHLEEN BECKER, HIS WIFE — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NOS. 97-CI-006559, 97-CI-006560, AND 97-CI-006564

GENERAL ELECTRIC COMPANY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: JOHNSON AND PAISLEY,[1] JUDGES; AND JOHN D. MILLER, SENIOR JUDGE.[2]

JOHNSON, JUDGE: Daniel and Mary Cain, John and Becky Cain, and Vincent and Kathleen Becker have appealed from an order of the

[1] This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

[2] 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.

Jefferson Circuit Court entered on July 18, 2002, which granted summary judgment in favor of General Electric Company (GE) as to their asbestos-related products liability and premises liability claims.[3] Having concluded that GE was entitled to a judgment as a matter of law as to John and Becky's products liability claim,[4] we affirm in part. Having further concluded that the trial court erred in its determination that GE had secured workers' compensation coverage as required by the statute and that the work performed by Daniel, John, and Vincent at Appliance Park in Louisville, Kentucky, was of a kind which was a regular or recurrent part of the work of GE's business, we reverse in part, and remand.

Daniel, John, and Vincent all suffer from asbestos-related illnesses as a result of being exposed to asbestos over the course of their respective employment. In their complaints, Daniel, John, and Vincent alleged, inter alia, that they were exposed to asbestos over a 34-year period spanning from 1950 to 1984, during which they performed various jobs on the premises of GE's Appliance Park in Louisville, Kentucky. Daniel, John, and Vincent further alleged that they were exposed to asbestos-

[3] Daniel and Mary Cain, John and Becky Cain, and Vincent and Kathleen Becker filed separate complaints in which they named several defendants, including GE. The claims of Mary Cain, Becky Cain, and Kathleen Becker were derivative. This appeal concerns only the claims brought against GE.

[4] Daniel and Mary Cain and Vincent and Kathleen Becker chose not to appeal the trial court's ruling with respect to their products liability claims.

related products that were manufactured, distributed, sold and/or installed by multiple defendants, including GE, at various job sites. None of the three men were ever employed by GE.

Daniel Cain testified in his deposition that he first worked at Appliance Park in 1950, while employed by James E. Smith & Son. Daniel explained that he was a plumber and a gasfitter and that he helped install the plumbing during the initial construction of Appliance Park in the early 1950's. Daniel stated that after the construction was completed, he remembered working at Appliance Park on another occasion; however, he could not remember exactly what kind of work he performed, when he performed it, or how long it took to perform the tasks he was assigned.

John Cain testified in his deposition that over the course of his career as a plumber and a pipefitter, he worked at Appliance Park on several occasions. John stated that he first worked at Appliance Park in August 1967, while employed by John L. Zehnder Company. John testified that from August 1966, until February 1967, he assisted in the installation of a furnace used by GE to bake enamel-coated appliance parts. John stated that he also worked at Appliance Park for a 12-month period starting in 1969, while employed by James E. Smith & Son. John testified that he assisted in the installation of the underground plumbing

system, gas lines, water lines, and glass piping for a new building that was being constructed. John further testified that he worked at Appliance Park "a couple of times a year" over a two-to-three-year period during the early 1970's, while employed by Roark Mechanical & Systems. John stated that he performed "pipefitting work" in several buildings during this period. In addition, John testified that during a six-week period in 1974, while he was working at Calvert Cliffs Nuclear Power House in Prince Frederick, Maryland, he assisted in the installation of several steam pipes leading to and from two turbines manufactured by GE which he believed were insulated with asbestos. This work performed by John on premises not owned by GE was the basis for his products liability claim.

Vincent Becker testified in his deposition that over the course of his career as an ironworker, he worked at Appliance Park on a regular basis while employed by various contractors.[5] Vincent stated that he assisted in the initial construction of Appliance Park, and, more specifically, that he helped install the insulation and mezzanine floors in several of the buildings.[6] Vincent testified that he used "asbestos

[5] Vincent was unable to remember the exact dates that he worked at Appliance Park, however, he testified that he worked at Appliance Park "off and on" until he retired in 1984. Vincent also stated that he spent a couple of days working at a GE facility in Evansville, Indiana, however, he was unable to remember exactly what kind of work he performed.

[6] Vincent also stated that he removed machinery from several of the buildings.

sheet/blankets" on a regular basis during the time that he worked at Appliance Park.

On July 17, 2002, the trial court entered an order granting summary judgment in favor of GE as to the products liability and premises liability claims filed by the appellants. As to their products liability claims, the trial court found that Daniel, John, and Vincent had failed to demonstrate that they were exposed to any asbestos-related products manufactured or distributed by GE. As to their premises liability claims, the trial court concluded as a matter of law that the work performed by Daniel, John, and Vincent at Appliance Park was of a kind which was a regular or recurrent part of the work of GE's business.[7] Consequently, the trial court concluded that GE was an "up-the-ladder" employer and therefore pursuant to KRS[8] 342.690(1), it was immune from liability on these tort claims.[9] This appeal followed.

John and Becky argue on appeal that the trial court erred by granting summary judgment as to their products liability claim against GE. In addition, Daniel and Mary, John

[7] The trial court placed a great deal of emphasis on the fact that the work performed by Daniel, John, and Vincent "was necessary to enable GE to manufacture its products[.]"

[8] Kentucky Revised Statutes.

[9] On August 14, 2002, the appellants filed a motion for clarification regarding the order entered on July 17, 2002. On August 20, 2002, the trial court entered an order stating that the order entered on July 17, 2002, was final and appealable.

and Becky, and Vincent and Kathleen argue that the trial court erred by granting summary judgment as to their respective premises liability claims against GE.

The standard of review governing an appeal of a summary judgment is well-settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law.[10] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the 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."[11] In Paintsville Hospital Co. v. Rose,[12] the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor."[13] Since factual

[10] Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

[11] Kentucky Rules of Civil Procedure (CR) 56.03.

[12] Ky., 683 S.W.2d 255, 256 (1985).

[13] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991).

findings are not at issue,[14] there is no requirement that the appellate court defer to the trial court. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[15] Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial."[16]

In a products liability action, the plaintiff has the burden of establishing legal causation.[17] In Bailey v. North American Refractories Co.,[18] this Court noted that "'legal causation may be established by a quantum of circumstantial evidence from which a jury may reasonably infer that the product was a legal cause of the harm.'"[19] In Holbrook, supra, the former Court of Appeals explained that "the essence of the test concerning the sufficiency of plaintiff's circumstantial evidence concerning causation is that the proof must be

[14] Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[15] Steelvest, 807 S.W.2d at 480.

[16] Id. at 482. See also 7 Philipps, Kentucky Practice, CR 56.03, p. 321 (5th ed. 1995).

[17] Holbrook v. Rose, Ky., 458 S.W.2d 155, 157 (1970).

[18] Ky.App., 95 S.W.3d 868, 872-73 (2001).

[19] Id. (quoting Holbrook 458 S.W.2d at 157).

sufficient to tilt the balance from 'possibility' to 'probability.'"[20]

In Bailey, supra, this Court was presented with an appeal from a summary judgment that had been granted in favor of North American Refractories (NARCO) in an asbestos-related products liability action. John Bailey and several other aggrieved parties, all of whom suffered from asbestos-related illnesses, alleged that they had been exposed to asbestos-related products manufactured by NARCO over the course of their respective careers. Each appellant introduced evidence indicating that they had been employed by Armco Steel (Armco) during a time period in which asbestos-related products were in use at Armco's plant in Ashland, Kentucky. NARCO admitted to selling asbestos-containing products to Armco during the period that the appellants were employed by Armco.[21] In addition, the appellants introduced evidence illustrating precisely how certain asbestos-containing products manufactured by NARCO were used at the plant. In particular, the appellants submitted the testimony of an Armco employee, which indicated that asbestos-containing materials manufactured by NARCO were mixed by workers at the plant resulting in the release of dust particles into the

[20] Holbrook, 458 S.W.2d at 158.

[21] Bailey, 95 S.W.3d at 871.

air.[22] The appellants also submitted an affidavit from Dr. Arthur L. Frank, who stated that "'[o]nce released into the air, asbestos fibers . . . often remain airborne for long periods of time and travel substantial distances from the point of their liberation.'"[23] Dr. Frank opined that "'each asbestos-containing material . . . installed . . . [at] the Armco Steel plant was a substantial contributing factor in the induction of the asbestosis . . . contracted by Armco Steel plant workers.'"[24] Dr. Frank further opined that "'no safe level of asbestos exposure has [ever] been documented.'"[25] Notwithstanding the extensive amount of circumstantial evidence introduced by the appellants, the Boyd Circuit Court entered an order granting summary judgment in favor of NARCO.

In Bailey, this Court reversed the trial court on the grounds that genuine issues of material fact existed as to whether NARCO's asbestos products were a substantial factor in causing the appellants' asbestos-related illnesses. More specifically, this Court concluded that in light of the facts before it, "Dr. Frank's expert testimony created a sufficient 'quantum of circumstantial evidence' to raise a factual issue as

[22] Id. at 872.

[23] Id.

[24] Id.

[25] Id. at 873.

to legal causation" [footnote omitted].[26] In reaching this conclusion, the Court relied primarily upon Dr. Frank's theory that, once released into the air asbestos fibers could travel for long periods of time and substantial distances, and his opinion that the asbestos-containing materials manufactured by NARCO were a substantial contributing factor to the appellants' diseases.[27]

The evidence presented by John and Becky in the case sub judice stands in stark contrast to the evidence presented by the appellants in Bailey. As previously discussed, John testified in his deposition that he believes he was exposed to asbestos-related materials during a six-week period in 1974. During this time while John was working at Calvert Cliffs Nuclear Power House in Prince Frederick, Maryland, he assisted in the installation of several steam pipes leading to and from two turbines manufactured by GE.[28] Notwithstanding, John has failed to introduce any evidence indicating that he was exposed to asbestos during the time that he worked at Calvert Cliffs Nuclear Power House.

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[26] Id. at 872.

[27] Id. at 872-73.

[28] John has failed to introduce any evidence in support of his contention that the turbines at Calvert Cliffs Nuclear Power House were either manufactured by GE or insulated with asbestos. Nevertheless, since John has appealed from an order granting summary judgment in favor of GE, we will assume that the turbines located at Calvert Cliffs were manufactured by GE and that they were insulated with asbestos.

Thus, the case sub judice is distinguishable from Bailey, since John has failed to demonstrate that he was exposed to any dust particles during the time in which he worked at Calvert Cliffs Nuclear Power House. Moreover, John has failed to introduce any evidence indicating that the insulation associated with the turbines at the Calvert Cliffs Power House was ever disturbed in such a manner that could have resulted in the release of asbestos fibers into the air.[29] In addition, John has not proffered any expert testimony similar to the evidence presented in Bailey to establish a causal connection between his illness and his alleged exposure to asbestos. Accordingly, we cannot conclude in John's products liability action that he has "created a sufficient 'quantum of circumstantial evidence' to raise a factual issue as to legal causation."[30] Thus, the trial court correctly concluded that GE was entitled to a summary judgment as a matter of law in respect to John and Becky's products liability claim.

Daniel and Mary, John and Becky, and Vincent and Kathleen also contend that the trial court erred by granting

[29] In fact, John testified in his deposition that "pains were taken" to keep the rooms in which the turbines were located clean and free of dust.

[30] Bailey, 95 S.W.3d at 873. See also Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1431-32 (7th Cir. 1996) (in order to establish causation "plaintiff 'must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product'") (quoting Peerman v. Georgia-Pacific Corp., 35 F.3d 284, 287 (7th Cir. 1994)); and Parks v. A.P. Green Industries, Inc., 754 N.E.2d 1052, 1056 (Ind.App. 2001).

summary judgment as to their respective premises liability claims against GE. The appellants' argument in this respect is two-fold. First, the appellants contend that GE has failed to establish, as required by KRS 342.690(1), that it had secured workers' compensation coverage which included Daniel, John, and Vincent. Second, the appellants contend that a genuine issue as to a material fact exists concerning whether the work Daniel, John, and Vincent performed at Appliance Park was of a kind which was a regular or recurrent part of the work of GE's business.

We agree in part with the appellants' contention that GE was required to prove that workers' compensation coverage had been secured on Daniel, John, and Vincent. From our review of the record, we conclude that there is a genuine issue as to a material fact concerning the extent of GE's workers' compensation coverage or whether the contractors for whom Daniel, John, and Vincent were working had secured coverage on them.

We begin our analysis by noting that it is well-established that workers' compensation statutes are to be interpreted in a manner consistent with their munificent and beneficent purpose.[31] KRS 342.690(1) states, in relevant part,

[31] See Dick v. International Harvester Co., Ky., 310 S.W.2d 514, 515 (1958) ("[w]e approach [this issue] under the influence of the remedial principle of

as follows:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee[.] . . . For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.

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

> A person who contracts with another . . .
>
> (b) [t]o have work performed <u>of a kind</u> which is a regular or recurrent part <u>of the work</u> of the trade, business, occupation, or profession of such person . . .
>
> shall . . . be deemed a contractor, and such other person a subcontractor [emphases added].

Furthermore, KRS 342.340(1) provides:

> Every employer . . . 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.

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workmen's compensation and the development and progress of legislation to accomplish its humane and beneficent purpose").

Thus, in order for GE to rely on the exclusivity provision of KRS 342.690(1), it must establish that workers' compensation coverage was provided for Daniel, John, and Vincent.

Nevertheless, GE contends that it is entitled to invoke the exclusivity provision of KRS 342.690(1) by simply obtaining workers' compensation coverage as required by KRS 342.340(1). We reject this argument. It is well-established that KRS 342.610(2) was enacted primarily to "discourage owners and contractors from hiring financially irresponsible contractors and subcontractors[,]" in an attempt to eliminate the expense of workers' compensation coverage.[32] That is to say, the purpose of the statute is not to shield owners or contractors from potential tort liability; but rather, to protect the employees of contractors or subcontractors in the event of a work-related injury. Had the Legislature intended the former result, surely it would have simply omitted the phrase "of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person[.]" The "regular or recurrent" provision contained in KRS 342.610(2) was intended by the Legislature as a limitation, not an expansion, of the immunity granted to employers under KRS 342.690(1). To hold otherwise would contravene the very purpose

[32] Elkhorn-Hazard Coal Land Corp. v. Taylor, Ky., 539 S.W.2d 101, 103 (1976).

of the Workers' Compensation Act, which is to aid injured or deceased workers, or their dependents.

The record indicates that GE submitted an affidavit from the Deputy Commissioner of the Department of Workers' Claims demonstrating that it had secured workers' compensation insurance during the time that Daniel, John, and Vincent worked at Appliance Park. However, the mere fact that GE had workers' compensation coverage during the relevant time period does not establish that it had the appropriate coverage, i.e., while some workers may have been covered, workers such as Daniel, John, and Vincent may not have come within the coverage. Consequently, the evidence presented at this stage of the proceedings was insufficient to support the trial court's finding that GE had secured workers' compensation coverage as required by the statute. Regardless, based on our disposition of the "regular or recurrent" issue, there is no need for additional proof or for the trial court to make a factual finding as to whether GE met the statutory requirement of providing workers' compensation coverage on Daniel, John, and Vincent or of hiring contractors which provided such coverage.

We now turn to the question of whether, pursuant to KRS 342.610(2), GE contracted with another "to have work performed of a kind which is a regular or recurrent part of the work of [its] business[.]" More specifically, we must determine

whether the work performed by Daniel, John, and Vincent at Appliance Park comes within the coverage of the statute. The resolution of this issue turns upon the application of KRS 342.690(1) and KRS 342.610(2).[33]

In Fireman's Fund Insurance Co. v. Sherman & Fletcher,[34] the Supreme Court of Kentucky was asked to interpret the "regular or recurrent" provision contained in KRS 342.610(2). The case arose out of the death of an employee of a framing subcontractor, Elder, Inc. A contract existed between Sherman & Fletcher and Elder whereby Elder agreed to perform the rough framing carpentry work for Sherman & Fletcher on a townhouse construction project. Sherman & Fletcher was in the building construction business. The Supreme Court concluded that "rough framing carpentry is work of a kind which is a regular or recurrent part of the work of the occupation or trade of building construction[.]"[35] Consequently, the Supreme Court held that pursuant to KRS 342.690, Sherman & Fletcher was immune

[33] The exclusive remedy provision of KRS 342.690 is an affirmative defense, which must be pled and proven by the employer. Gordon v. NKC Hospitals, Inc., Ky., 887 S.W.2d 360, 362 (1994). Thus, GE bears the burden of establishing that the work performed by Daniel, John, and Vincent was of a kind which was a regular or recurrent part of the work of its business.

[34] Ky., 705 S.W.2d 459 (1986).

[35] Id. at 461.

from tort liability for claims arising out of the death of Elder's employee.[36]

In Daniels v. Louisville Gas & Electric Co.,[37] this Court concluded that emissions testing required by the EPA constituted a regular or recurrent part of a coal-fired electric plant's business.[38] In arriving at this conclusion, the Court explained that "'[r]ecurrent' simply means occurring again or repeatedly" and that "'[r]egular' generally means customary or normal, or happening at fixed intervals."[39] The Court noted, however, that "neither term requires regularity or recurrence with the preciseness of a clock or calendar."[40] In sum, the Court reasoned that since the testing was mandated by the EPA, it fell within the definition of regular or recurrent.

Aside from Fireman's Fund and Daniels, Kentucky law is rather undeveloped as to what work is of a kind which is a regular or recurrent part of the work of a particular business.[41]

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[36] Id. at 462.

[37] Ky.App., 933 S.W.2d 821 (1996).

[38] Id. at 822.

[39] Id. at 824.

[40] Id.

[41] We are aware of only one other published opinion in which a Kentucky state court specifically addressed the "regular or recurrent" issue. In Tom Ballard Co. v. Blevins, Ky.App., 614 S.W.2d 247, 249 (1980), this Court concluded that the work of transporting coal was of a kind which was a regular or recurrent part of the work of the business of coal mining.

However, several federal courts have addressed the issue.[42] For the most part, the federal courts have broadly applied Fireman's Fund and Daniels to create an expansive interpretation of the definition of "contractor" as it appears in KRS 342.610(2). However, the approach followed in the majority of these federal cases interpreting KRS 342.610(2) runs counter to the basic principles that most courts have traditionally adhered to in interpreting the coverage and immunity provisions contained in workers' compensation acts. As the Sixth Circuit Court of Appeals stated in Boggs v. Blue Diamond Coal Co.:[43]

> The dominant purpose of the movement to adopt workmen's compensation laws in the early decades of this century was Not to abrogate existing common law remedies for the protection of workmen. It was to provide social insurance to compensate victims of industrial accidents because it was widely believed that the limited rights of recovery available under the common law

[42] See, e.g., Thompson v. The Budd Co., 199 F.3d 799 (6th Cir. 1999)(holding that changing the filters in a heating, ventilation, and air conditioning system was "part" of the business of stamping automotive parts); Granus v. North American Philips Lighting Corp., 821 F.2d 1253, 1257 (6th Cir. 1987) (holding that the renovation of a glass melting furnace was a regular and recurrent part of the manufacturing operations at a glass making factory); Smothers v. Tractor Supply Co., 104 F.Supp.2d 715, 718 (W.D.Ky. 2000) (holding that the transporting of merchandise from a storage facility to a retail store was "part" of a tractor supply store's retail operation); and Sharp v. Ford Motor Co., 66 F.Supp.2d 867, 869-70 (W.D.Ky. 1998)(holding that loading and unloading vehicles from railcars was a regular and recurrent part of the business of manufacturing and distributing automobiles). But see Davis v. Ford Motor Co., 244 F.Supp.2d 784, 789 (W.D.Ky. 2003)(holding that a mere purchaser of goods is not a statutory contractor of the seller under KRS 342.610(2)); and Gesler v. Ford Motor Co., 185 F.Supp.2d 724, 728 (W.D.Ky. 2001)(holding that the demolition, removal, and replacement of an anti-corrosion system for automobiles was not a regular or recurrent part of the business of designing, manufacturing, and selling automobiles).

[43] 590 F.2d 655 (6th Cir. 1979), cert. denied 444 U.S. 836, 100 S.Ct. 71, 62 L.Ed.2d 47 (1979).

> at the turn of the century were inadequate to protect them [emphasis original].
>
> . . .
>
> Employers generally opposed the movement for "reform"; labor generally favored it. Workmen's compensation laws were adopted as a compromise between these contending forces. Workmen were willing to exchange a set of common-law remedies of dubious value for modest workmen's compensation benefits schedules designed to keep the injured workman and his family from destitution.
>
> Since the adoption of workmen's compensation laws, common law tort principles have been modified gradually. Liability has expanded. The defenses of contributory negligence, assumption of the risk and the fellow servant rule have been narrowed or abolished. But workmen's compensation benefits have remained low, and the compromise which extended immunity from common-law liability to employers has remained in place.
>
> . . .
>
> Courts have responded by liberally construing the coverage provisions of workmen's compensation acts while narrowly construing the immunity provisions.[44]

The justification for this approach has been explained as follows:

> "[T]here is no strong reason of compensation policy for destroying common law rights . . . [and] [e]very presumption should be on the side of preserving those rights, once basic compensation protection has been assured . . . . The injured employee has a

[44] Id. at 658-59.

> right to be made whole not just partly whole . . . . [A]ll the reasons for making the wrongdoer bear the costs of his wrongdoings still apply, including the moral rightness of this result as well as the salutary effect it tends to have as an incentive to careful conduct and safe work practices."[45]

Thus, when a person, who has contracted with another to have work performed of a kind which is a regular or recurrent part of the work of the person, claims immunity from liability in a tort action based on workers' compensation being the exclusive remedy pursuant to KRS 342.690(1) and KRS 342.610(2), the entitlement to such protection should be strictly construed.

We hold that the work performed by Daniel, John, and Vincent at Appliance Park was not of a kind which was a regular or recurrent part of the work of GE's business.[46] As previously

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[45] Id. at 660 (quoting 2A Larson, The Law of Workmen's Compensation, § 72.50 at 14-95 (1976)). See also Roberts v. Sewerage & Water Board of New Orleans, 634 So.2d 341, 346 (La. 1994)("[b]ecause workers' compensation benefits have lagged far behind the expansion of liability and the curtailment of tort defenses, courts have responded by liberally construing the coverage provisions of workers' compensation acts while narrowly construing the immunity provisions"); and Larson's, Workers' Compensation Law, Vol. 3 § 47.42(a)(1997)("[i]f this seems to be lack of perfect symmetry, it should be remembered that there also is not perfect symmetry in what is at stake in the two situations: The first is a matter of providing protective statutory benefits, while the second is a matter of destroying valuable common-law rights that have existed for centuries").

[46] The appellants contend that the determination of whether certain work is of a kind which is a regular or recurrent part of the work of a particular business, trade or occupation, presents a question of fact for a jury to decide. We disagree. When the underlying facts are undisputed, the question of whether certain work is of a kind which is a regular or recurrent part of the work of a particular business, trade or occupation, becomes a question of law for the court to decide. The underlying facts in the case sub judice are not in dispute. It is the legal interpretation of those facts that is in dispute. The appellants' reliance on Goldsmith, 833 S.W.2d at 378 is misplaced. The underlying facts in Goldsmith were disputed, and, as such, summary judgment was inappropriate. See Daniels, 933 S.W.2d at 824. See

discussed, Daniel testified in his deposition that he helped install the plumbing during the initial construction of Appliance Park.[47] John testified in his deposition that he assisted in the installation of a new furnace and that he assisted in the installation of the underground plumbing system, gas lines, water lines, and glass piping for a new building that was being constructed at Appliance Park. John also stated that he performed "pipefitting work" in several of the buildings at Appliance Park. Vincent testified in his deposition that he helped install the insulation and mezzanine floors in several of the buildings at Appliance Park. Vincent also stated that he removed machinery from several of the buildings on various occasions. We cannot accept GE's contention that the various tasks performed by Daniel, John, and Vincent were a regular or recurrent part of its work of manufacturing household appliances.

It is obvious that the work of installing new plumbing, gas and water lines, piping, insulation, and flooring is work of a kind which is a regular or recurrent part of the

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also Schuck v. John Morrell & Co., 529 N.W.2d 894, 897 (S.D. 1995) (mixed questions of law and fact arise when the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard).

[47] Daniel was able to remember one other occasion when he worked at Appliance Park, however, he was unable to remember any details concerning the nature or duration of the work he performed.

work of a business which constructs buildings.[48] It is undisputed for purposes of this appeal that GE is in the business of manufacturing household appliances. Obviously, the building construction business is distinct and separate from the business of manufacturing household appliances. Moreover, the installation of a furnace or the removal of machinery and equipment is not work of a kind which is a regular or recurrent part of GE's work of manufacturing household appliances.[49]

Based on the foregoing reasons, the order granting GE's motion for summary judgment is affirmed as to John and Becky's products liability claim, but reversed in part as to Daniel and Mary's, John and Becky's, and Vincent and Kathleen's premises liability claims, and this matter is remanded to the Jefferson Circuit Court for further proceedings consistent with this Opinion.

ALL CONCUR.

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[48] See, e.g., Fireman's Fund, 705 S.W.2d at 462.

[49] As previously discussed, the trial court placed a great deal of emphasis on the fact that the work performed by Daniel, John, and Vincent "was necessary to enable GE to manufacture its products[.]" We take issue with this line of reasoning as we are convinced that such an approach would lead to absurd results. For example, compliance with local, state, and federal laws regarding the reporting of income is a prerequisite to the successful operation of any legitimate business. Consequently, most large corporations hire independent accounting firms to audit their financial records on a regular basis. Under the trial court's reasoning, the argument follows that a household appliance manufacturer, such as GE, would be deemed an "up-the-ladder" employer with respect to an auditor employed by an independent accounting firm hired to audit the company's financial records. To construe the Legislature's intentions in enacting KRS 342.690(1) and KRS 342.610(2) in such a manner would be absurd.

BRIEF FOR APPELLANTS:

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ORAL ARGUMENT FOR APPELLANTS:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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