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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001399-MR

DEBBIE ELLEN REHM, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF JAMES DAVID REHM;
NICHOLAS JAMES REHM AND CHRISTINA MARIE REHM,
BY AND THROUGH THEIR PARENT, GUARDIAN AND
NEXT FRIEND, DEBBIE ELLEN REHM APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS B. WINE
ACTION NO. 01-CI-001344

NAVISTAR INTERNATIONAL, A/K/A INTERNATIONAL
TRUCK & ENGINE CORPORATION; ALLIED CHEMICAL
CORPORATION; AMERICAN STANDARD, INC.;
BROWN & WILLIAMSON TOBACCO CORPORATION;
BROWN-FORMAN CORPORATION; COLGATE-PALMOLIVE
COMPANY; E.I. DUPONT DE NEMOURS; FORD MOTOR
COMPANY; GENERAL ELECTRIC COMPANY; KENTUCKY
UTILITIES; LORILLARD, INC.; LOUISVILLE GAS
& ELECTRIC; PHILIP MORRIS, INC.; REYNOLDS
METALS COMPANY; ROHM & HAAS;
THE B.F. GOODRICH COMPANY APPELLEES

OPINION
AFFIRMING

* * * * * * * *

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

PAISLEY, SENIOR JUDGE:

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

FACTUAL AND PROCEDURAL BACKGROUND

Debbie Ellen Rehm, individually and as executrix of the estate of James David Rehm, and Nicholas James Rehm and Christina Marie Rehm, by and through their Parent, Guardian, and Next Friend, Debbie Ellen Rehm, appeal from an order of the Jefferson Circuit Court granting summary judgment to appellees Navistar International (a/k/a International Truck & Engine Corporation); General Electric Company; Ford Motor Company; Rohm & Haas Company; American Standard, Inc.; Philip Morris, Inc.; Colgate-Palmolive Company; Brown Forman Corporation; E.I. Dupont de Nemours; The B.F. Goodrich Company; Reynolds Metals Company; Kentucky Utilities Company; Louisville Gas & Electric Company; Brown & Williamson Tobacco Corporation; Lorillard, Inc.; and Allied Chemical Corporation, in a lawsuit alleging that James was exposed to asbestos while working on the premises of the appellees. As a result of his exposure to asbestos James developed an incurable form of cancer, which eventually resulted in his death. For the reasons stated below, we affirm.

Because this is an appeal from an award of summary judgment in favor of the appellees, we review the factual background in the light most favorable to the appellants' position in the case.

James was employed as a millwright by Rapid Installation (now Rapid Industries) from approximately 1975 until 1982. According to James, during the relevant time frame, Rapid Installation was a company primarily engaged in the business of manufacturing, selling, installing, and maintaining industrial conveyor systems and the associated machinery. In his job as a millwright for Rapid Installation, James was involved in the demolition, tearing out, and installation of conveyors, furnaces, ovens, machinery, and other equipment at facilities owned by the appellees. During the jobs at the facilities owned by the appellees, James was exposed to insulation products on the pipes, furnaces, ovens, machinery, and other equipment on the appellees' property.

In February 2001, James was diagnosed with malignant mesothelioma, an incurable form of cancer caused by exposure to asbestos. On February 23, 2001, James and Debbie and Nicholas James and Christina Marie, by and through their parents, guardians, and next friends, James and Debbie, brought this action to recover damages for personal injuries caused from James's exposure to asbestos. Among other things, the plaintiffs sued under a theory of premises liability alleging that the appellees failed to exercise reasonable care in maintaining their properties contaminated with asbestos. The plaintiffs alleged negligence, gross negligence, willful

misconduct, and intentional and outrageous conduct in that the appellees knowingly failed to warn James of the dangers of working around asbestos products and that their negligence caused James’s disease.

Within a short time after the action was filed, each of the sixteen property-owner appellees filed a motion for summary judgment alleging that the appellants’ claims were barred under Kentucky Workers’ Compensation law pursuant to the “up-the-ladder” immunity provisions of Kentucky Revised Statutes (KRS) 342.610 and KRS 342.690. Under these provisions a contractor is immunized against common law tort claims brought by the employees of a subcontractor if, among other things, the work performed by the subcontractor is a regular or recurrent part of the contractor’s business.

The plaintiffs attempted to depose the defendants’ corporate witnesses regarding the asbestos located on their properties; however, based upon the defendants’ motions for summary judgment, the trial court entered an order limiting discovery to the defendants’ up-the-ladder defenses.

On May 31, 2002, the trial court entered an order granting summary judgment to each of the sixteen property owner defendants who are the appellees in this case. The trial court

determined that each of the defendants was entitled to up-the-ladder-immunity. This appeal followed.[2]

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991) (citing Paintsville Hospital Co. v. Rose, 683 S.W.2d 255 (Ky. 1985)). The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, 807 S.W.2d at 480 (citing Dossett v. New York Mining & Manufacturing Co., 451 S.W.2d 843 (Ky. 1970)). However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." Hubble v. Johnson, 841 S.W.2d 169, 171 (Ky. 1992)(citing Steelvest, supra at 480). This Court has previously stated 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.

[2] On July 5, 2002, James died of the asbestos-induced cancer. On August 28, 2002, this Court entered an order granting the appellants' motion to substitute Debbie Ellen Rehm for James David Rehm as executrix of his estate.

There is no requirement that the appellate court defer to the trial court since factual findings are not at issue” [citations omitted]. Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996).

UP-THE-LADDER-IMMUNITY ISSUES

The appellants contend that the trial court erred in granting summary judgment to the appellees because there are questions of fact regarding whether the work performed by James on each of the appellees properties was a regular or recurrent part of each business so as to qualify each of the appellees to the exclusive remedy provisions of the Workers’ Compensation Act and the Act’s up-the-ladder immunity defense.

ELEMENTS OF UP-THE-LADDER-IMMUNITY

The elements of up-the-ladder immunity are set forth in KRS 342.690(1) and KRS 342.610(2). KRS 342.690(1) provides, 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, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. 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), in relevant part, 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.

These statutes make it clear that if an appellee is a contractor, then it has no liability in tort to an injured employee of its subcontractor, Rapid Installation. It is also apparent from the statute that an appellee is a contractor if the work it subcontracted to Rapid Installation is a kind which is a "regular or recurrent" part of the work or trade of the appellee. Daniels v. Louisville Gas and Electric Company, 933 S.W.2d 821, 823 (Ky.App. 1996).

"REGULAR OR RECURRENT": QUESTION OF FACT OR LAW

We first address the appellants' contention 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 or presents a question of law to be decided by the presiding court.

When the underlying facts concerning the type of business engaged in and/or the type of work the employee performed in his association with the company are disputed, the resolution of the factual disputes is a question of fact to be decided by a jury. However, 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. See Daniels v. Louisville Gas & Electric Co., 933 S.W.2d 821, 824 (Ky.App. 1996); See 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). The underlying facts in this case are not in dispute. It is the legal interpretation of those facts that is in dispute, which is a question of law.

The appellants rely upon Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378 (Ky. 1992), to support their argument that the issue of “regular or recurrent” is an issue of fact rather than an issue of law. However, the appellants’ reliance on Goldsmith is misplaced. Goldsmith turned upon the

issue of whether the subcontractor was an up-the-ladder employer of the plaintiff rather than turning on the question of what constitutes a "regular or recurrent" business activity. This Court affirmed the trial court's award of summary judgment in favor of the subcontractor; however, the Supreme Court reversed and remanded after concluding that genuine issues of material fact existed regarding whether the plaintiff was in the employment ladder. The majority opinion concluded as follows:

> Prior to concluding, we observe that if it should be determined that Components is up the ladder from Goldsmith, KRS 342.610 and our decision in Fireman's Fund [Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459 (Ky. 1986)], impose an additional requirement for Components to prevail. To have benefit of the immunity provision of the Act, Components must also demonstrate to the satisfaction of the trier of fact that providing rough carpentry labor was a regular or recurrent part of its business. (Emphasis added.)

Id. at 381.

Although this excerpt refers to a possible future determination of the "regular or recurrent" issue by the "trier of fact," Goldsmith specifically did not address or attempt to resolve that issue, and the language is clearly dicta. Dicta in an opinion is not authoritative or binding on a reviewing court. Stone v. City of Providence, 236 Ky. 775, 778, 34 S.W.2d 244, 245 (1930); Cawood v. Hensley, 247 S.W.2d 27, 29 (Ky. 1952); Board of Claims of Kentucky v. Banks, 31 S.W.3d 436,

439 (Ky.App. 2000). We believe that we are neither bound by the dicta in the Goldsmith opinion nor do we believe that the Kentucky Supreme Court intended to pronounce in that case that the issue of “regular or recurrent” is an issue of fact to be decided by a jury when the underlying facts concerning the business operations of the contractor and the work performed by the subcontractor are not in dispute. Daniels v. Louisville Gas and Electric, supra, decided the issue as a matter of law, and we believe that is the proper disposition.

“REGULAR OR RECURRENT”: STATUTORY INTERPRETATION

When analyzing a statute, we must interpret statutory language with regard to its common and approved usage. KRS 446.080. In so doing, we must refer to the language of the statute rather than speculating as to what may have been intended but was not expressed. Commonwealth v. Allen, 980 S.W.2d 278, 280 (Ky. 1998). In other words, a court "may not interpret a statute at variance with its stated language." Id. (citation omitted); See also Gurnee v. Lexington-Fayette Urban County Government, 6 S.W.3d 852, 856 (Ky.App. 1999). Therefore, any statutory analysis must begin with the plain language of the statute. In so doing, however, our ultimate goal is to implement the intent of the legislature. See Wesley v. Board of

Education of Nicholas County, 403 S.W.2d 28, 29 (Ky. 1966); AK Steel Corp. v. Commonwealth, 87 S.W.3d 15, 17 (Ky.App. 2002).

Although dictionary definitions can sometimes offer guidance as to statutory construction, they are not conclusive. The predominant element is the legislative intent. Commonwealth v. Plowman, 86 S.W.3d 47, 49 (Ky. 2002). By way of guidance, then, we note that "regular," in the context relevant here, is defined as "orderly, methodical . . . recurring, attending, or functioning at fixed or uniform intervals . . . constituted, conducted, or done in conformity with established or prescribed usages, rules or discipline." Merriam Webster's Collegiate Dictionary (10th ed. 1999). Similarly, "routine" is defined as "of a commonplace or repetitious character: ordinary . . . of, relating to, or being in accordance with established procedure." Id.

The term "regular or recurrent" was addressed by the Supreme Court in Fireman's Fund Insurance Co. v. Sherman & Fletcher, 705 S.W.2d 459 (Ky. 1986). The principal point made in that case is that it makes no difference whether the work at issue is of a type which the contractor-company usually does for itself or usually subcontracts out to others. Fireman's Fund, supra at 461. Even though a company may never perform a particular job with its own employees, it is still a contractor if the job is one that is usually a regular or recurrent part of

its trade or occupation. Id. Fireman's Fund 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 [.]" Id. at 461. Consequently, the Supreme Court held that pursuant to KRS 342.690, Sherman & Fletcher was immune from tort liability for claims arising out of the death of Elder's employee. Id. at 462.

In Daniels v. Louisville Gas & Electric Co., 933 S.W.2d 821 (Ky.App. 1996), this Court addressed the term "regular or recurrent." We stated "'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." Based upon this construction of the term we concluded that emissions testing required by the EPA constituted a regular or recurrent part of a coal-fired electric plant's business.

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. In the only other published opinion in which a Kentucky state court specifically addressed the "regular or recurrent" issue, 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. See Tom Ballard Co. v. Blevins, 614 S.W.2d 247, 249 (Ky.App. 1980).

Several federal courts have addressed the issue. 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).

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

> The dominant purpose of the movement to adopt workmen's compensation laws in the early decades of this century was Not (sic) 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 at the turn of the century were inadequate to protect them.
>
> . . . .

> 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.

_Id._ at 658-59.

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 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.

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").

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.

Our conclusion that immunity protection should be strictly construed is supported by the previous interpretation

of the Supreme Court that KRS 342.610(2) was enacted to discourage owners and contractors from hiring financially irresponsible subcontractors and thus eliminate workmen's compensation liability. Elkhorn-Hazard Coal Land Corp. v. Taylor, 539 S.W.2d 101, 103 (Ky. 1976).

APPLICATION OF UP-THE-LADDER IMMUNITY TO APPELLEES

With the foregoing in mind, we now turn to the trial court's award of summary judgment in favor of the sixteen appellees in this case.

To avoid redundancy, we first address the evidence the appellants filed in opposition to the appellees' motions for summary judgment. In opposition to summary judgment the appellants submitted various affidavits of expert and lay witnesses. Because we believe the trial court did an exemplary job of addressing the issues presented by these affidavits, we adopt its discussion of the issue:

> **Affidavit of James Rehm**
>
> [James] testified that each company employed its own maintenance staff for the regular maintenance of the property. However, "[e]ven though he may never perform that particular job with his own employees, he is still a contractor if the job is one that is usually a regular or recurrent part of his trade or occupation." Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459, 462 (Ky. 1986). In Fireman's Fund, while the deceased employee's estate attempted to argue that the "subcategory of carpentry

which is designated as 'rough framing' was a type of carpentry [that the employer] did not do for itself but usually subcontracted to others," the Court concluded that it could "not be disputed 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 in which Sherman & Fletcher was engaged." Id. at 461.

While [James] generally testifies that the work he performed for the defendants "did not occur at fixed intervals" and that it was not the "regular and/or routine maintenance" for the companies, (Rehm Aff., ¶19), he did not testify that he had personal knowledge of the companies' respective regular maintenance procedures and thus, he is not competent to testify as to the maintenance work performed by others. Furthermore, even assuming that the work he performed was not regular and recurrent *maintenance*, the statute does not require "maintenance." The statute merely requires that the work be a "regular or recurrent part of the work of the trade, business . . . ." Thus, any type of work, whether it is maintenance or otherwise, that is regular or recurrent to the business, even if not performed by its own employees, may transform a contractor into a statutory employer for purposes of workers' compensation coverage and thus provide "up-the-ladder" immunity.

Furthermore, [James's] affidavit presents no affirmative evidence contradicting the evidence submitted by the property owners regarding the quantity or types of work that they engaged in or whether the work was instrumental to their business. Thus [James's] affidavit fails to present any affirmative evidence that the work he performed was not regular or recurrent to the defendants' respective businesses.

Affidavit of Dr. Suraj M. Alexander

[The appellants] submit[ted] the affidavit of Dr. Suraj M. Alexander, a professional engineer on faculty in the Department of Industrial Engineering at the University of Louisville. Alexander testifies to the following in pertinent part:

I hold the opinion that major capital expenditures for tear down and renovation are as a result of strategic level decisions and they would not be regular and recurrent at a specific plant owing to cost/benefit tradeoffs and uncertainty; i.e. major capital expenditures decisions [sic] are made considering the return on investment over a longer time horizon, over which the forecasts of benefits, such as increased demand, is uncertain. These decisions, in a sense, bind a company to a certain course of action for several years. Hence, by definition, they cannot be regular and recurrent at a specific plant. (Alexander Aff. ¶11.)

Alexander then proceeds to list projects at Ford, GE, International Harvester, B.F. Goodrich, DuPont, Phillip Morris, and Reynolds that he considers not to be "regular or recurrent." While the Court appreciates Dr. Alexander's opinion, the issue is not whether the decision to make a capital expenditure is "regular or recurrent," but whether the work contracted for is "of a kind which is a regular or recurrent part of the work of the trade [or] business . . . ." Even Alexander agreed that manufacturers would have to regularly replace or repair motors and pumps and that the repair and replacement of those would occur over and over. (Alexander Depo., p. 211-12.) In addition, Alexander admits that he had no personal knowledge regarding the defendants' maintenance procedures. For example, regarding Allied Chemical, Alexander testified that he had "no reason

to disagree" that the repair, periodic removal and replacement of pumps, motors, piping, [and] lines "was a necessary element of the maintenance and operation" of Allied's plant and that the same work was [a] "regular and reoccurring [sic] activity performed by Allied's own employees." (Id. at 135-136.) Regarding DuPont, he testified that he had no personal knowledge of DuPont or its operations, (Id. at 123-24, 227) that he had no opinion as to whether the work performed by [James] at DuPont was a regular or recurrent part of DuPont's business, and that he had no personal knowledge about how regularly DuPont replaced equipment. (Id. at 126-27.) Furthermore, Alexander testified that he would have no reason to disagree that the maintenance of equipment was a regular and recurrent part of DuPont's business. (Id. at 227-28.) Regarding Ford, Alexander also agreed that he could not dispute the factual information provided by V. Bruce Hepke and William McKinney in their affidavits in support of Ford's motion for summary judgment, that he had no knowledge of Ford's assembly line replacement strategies, and that he was "not expressing any opinions as to whether the work performed by James Rehm at the Ford Louisville Assembly Plant was a regular or recurrent part of the work or business of Ford Motor Company." (Id. at 215-16). Alexander further agreed that he had no knowledge of "the frequency with which Ford was involved in tearing out portions of assembly lines and related components in plants . . . ." (Id. at 72-73.) Thus, not only does Alexander admit to having no knowledge of the defendants' businesses, the information which he provided was not relevant to the precise issue at question.

Affidavit of Thomas J. Feaheny

[The appellants] submitted the affidavit of Thomas Feaheny, a mechanical engineer who

was employed by Ford for twenty-six years. Feaheny submits that, after reviewing Rehm's deposition, the work performed was "clearly not 'regular and recurrent' work but rather an important part of the implementation of the very major Product Program "that he described as a "very major strategic program for Ford as it involved numerous complex and risky product, marketing, legal and competitive issues . . . ." (Feaheny Aff., ¶7.) Feaheny concludes with stating that the affidavits and depositions of V. Bruce Hepke and William McKinney regarding the conversion of Ford's LAP being regular and recurrent were "both wrong." (Feaheny Aff. ¶8.)

While Feaheny attempts to testify that the work was not a regular or recurrent part of Ford's business, he submits no facts to support his legal conclusion. Feaheny has completely failed to present any facts to dispute those presented by the defendants, as discussed below. The fact that he disagrees with a legal conclusion does not present an issue of *material fact* that would preclude judgment as a matter of law. Furthermore, Feaheny testifies only to the work at Ford, and thus, even if this Court were to consider the legal conclusion submitted in his affidavit, the only defendant that it could impact would be Ford.

Affidavits of Richard Sweazy, Mark Draper, and Rick Williams

[The appellants] submit[ted] the affidavits of Richard Sweazy, Mark Draper, and Rick Williams, all former employees of Rapid Industries who worked as millwrights with [James] on various projects in the Louisville area. These co-workers testified that the projects that they and [James] performed were "specially customized," that they "were not [] regular and routine maintenance," and did not occur at "fixed

intervals.” (Sweazy Aff., ¶¶7-8; Draper Aff., ¶¶8, 10; Williams Aff., ¶¶ 7-8.)

First, considering these affidavits in a light most favorable to [the appellants], the fact that the work did not occur at “fixed intervals” does not preclude a finding that the work was routine. In fact, neither “regular” nor “recurrent” requires “regularity or recurrence with the preciseness of a clock or calendar.” Daniels, 933 S.W.2d at 824. In addition, the fact that the work was not “maintenance” does not eliminate it from the category of “work.” There may be other types of “work” besides “maintenance” that will transform a contractor into a statutory employer for workers’ compensation purposes.

The co-workers submit no facts which contradict the regular or recurrent nature of the work other than the mere conclusion that the work was not “regular and recurrent maintenance.” As previously stated, such a conclusory statement does not raise a material issue of fact. In addition, some of the general statements from the affidavits are contradicted by the affiant’s own specific testimony. For example, Williams testified that he knew nothing about Reynolds’ staff of mechanics and maintenance workers and he had no knowledge of what work Reynolds might consider regular or recurring, (Williams Depo., Vol I, pp. 103-4), that he knew nothing about how often or at what intervals Reynolds performed the type of work that he and [James] performed at Reynolds, that he could not classify the work that he performed for Reynolds as “major construction,” and that he could not say whether the work was “special or customized.” (Williams Depo., Vol II, pp. 195-98).

Affidavit of James King

[The appellants] submit[ted] an affidavit from James King, a certified public accountant who rendered an opinion that major tear-downs and renovations of industrial plants are capital expenditures and thus not properly classified as a regular or recurrent expense from an accounting standpoint. (King Aff., ¶8.)

However, King agreed that he was "not able to offer any opinion whether the work performed by Mr. Rehm at . . . Allied Chemical's Ashland Coke Plant was a regular or recurrent part of Allied Chemical's business." (King Depo., pp. 118-119.) He also testified that he had no personal knowledge of DuPont or its operations and that he had no personal knowledge as to whether [James] worked on any particular project. (King Depo., pp. 67-70.) He agreed that he was "not familiar with how Ford Motor company routinely makes modifications, repairs, changes or additions to its conveyor system" (King Depo., p. 76) and stated that "it would be common sense that [Ford] would have to make modifications to their process to accommodate changes in models" and that he "certainly" thought that "the modification of the vehicles is probably predictable . . . ." (King Depo., pp. 82-83.)

Whether a business engaged in a "capital expenditure" has no bearing on whether the work to perform the capital expenditure was the type of work that was a regular or recurrent part of the business and there is no evidence that King considered the legal definitions of "regular or recurrent" for purposes of the exclusive remedy of workers' compensation coverage. In fact, King clearly offered his opinion based on his experience and knowledge "of Generally Accepted Accounting Principles and the relevant sections of the Internal Revenue Code," (King Aff., ¶6.) and agreed that standards set in the Workers' Compensation

law was not his area of expertise. (King Depo., p. 35.) While the Court appreciates this testimony, King's statements are conclusory assertions about ultimate legal issues which do not present factual evidence raising an issue of fact on the issue of whether the work performed by Rehm was a regular or recurrent part of the business of these defendants.

Don Boaz

[The appellants] submit[ted] the affidavit of Don Boaz, an engineer employed by Rapid [Installation] who testifies that Rapid [Installation] employees performed "customized" projects, that Rapid [Installation] was in the "business of manufacturing and installing conveyor systems and equipment," and that Rapid [Installation] was not responsible for the regular or routine maintenance of the companies with which it contracted. (Boaz Aff. ¶¶5-7.) Boaz also states that he could not testify as to whether [James's] work at Reynolds was "regular or recurrent," that he had no personal knowledge of [James] working at Reynolds, that he could not remember the type of work that Rapid [Installation] performed at Reynolds, and that he knew nothing about Reynolds' manufacturing process at the Louisville plant (Boaz Depo., pp. 133-35.)

Although the projects may have been "customized," such evidence has no relevance to whether the work performed in carrying out those projects was regular or recurrent. Certainly, each manufacturer would require specific or custom equipment and assembly lines. In addition, while Rapid may not have been "responsible" for regular maintenance, such evidence simply does not address whether the work performed by [James] was a recurrent part of the manufacturers' business.

> In addition, each of the defendants has presented evidence that the work performed by [James] was a regular or recurrent part of its manufacturing business.

In summary, while the appellants attempted to provide evidence in opposition to the appellees' motions for summary judgment so as to defeat an award of summary judgment, the testimony presented is either not based upon personal knowledge, applies the wrong standard in reaching a conclusion of whether the work performed by Rapid Installation was "regular or recurrent," provides a conclusory legal opinion on whether the work is "regular or recurrent," or applies irrelevant factors in determining whether the work performed by Rapid Installation is regular or recurrent. Notably absent from the affidavits and testimony is an alternative assertion of facts as to the specific work tasks performed by Rapid Installation, the frequency and regularity that those tasks are performed at the appellees' facilities, and whether the tasks performed by Rapid Installation are a part of the business of the various appellees. As such, the affidavits and deposition testimony presented by the appellants in opposition to summary judgment do not comprise affirmative evidence which would defeat the properly supported motions filed by the appellees.

Next, we review case-by-case our conclusion of why each of the appellees is entitled to summary judgment.

Allied Chemical Corporation (Allied Chemical)

Allied Chemical is a company in the business of processing coal into coke and various by-products. James testified that he worked at Allied Chemical’s metallurgical coke processing plant located in Ashland, Kentucky, for approximately two months sometime between 1975 and 1982 during a scheduled shut-down and retooling during which he removed, replaced, and installed approximately ten to fifteen pumps and pump motor assemblies.

In support of its motion for summary judgment Allied Chemical filed the affidavit of engineer H. D. Fuller. In his affidavit Fuller testified that Allied Chemical's Ashland coke plant contains numerous pumps, pump motors and associated pipes, and that these pumps and their components are required in the process of converting coal into coke; that pumps, pump motors and piping play an important and integral role in the coke production process, and that the repair, periodic removal and replacement of old pumps, pump motors and associated piping and the installation of new pumps, pump motors and associated piping is a necessary element of the maintenance and operation of Allied Chemical’s coke plant; and that the repair, periodic removal and replacement of pumps, pump motors and associated piping, as well as the setting and installation of new pumps,

pump motors and related piping, are regular and recurring activities performed at Allied Chemical's Ashland coke plant at times by Allied Chemical’s own employees and at times by outside contractors.

In his capacity as an employee for Rapid Installation James removed, replaced, and installed pumps and pump motor assemblies. Allied Chemical’s affidavit in support of summary judgment reflects that this equipment is required in the process of converting coal to coke, which is part of the business of Allied Chemical. The affidavit also reflects that the periodic repair, removal, and replacement of these pumps and pump motors is a regular and recurring part of Allied Chemical’s business. The appellants have failed to produce affirmative evidence refuting these sworn statements. While James did produce the affidavits of co-workers to the effect that the work performed by Rapid Installation at Allied Chemical was not regular or recurring, we agree with the trial court that these co-workers did not demonstrate sufficient qualifications to establish that they had personal knowledge of the maintenance procedures at Allied Chemical.

The appellants have failed to produce any affirmative evidence that the work James performed in his capacity as an employee for Rapid Installation was of a type that was not a regular or recurrent part of Allied Chemical’s business. There

are no genuine issues of material fact concerning up-the-ladder immunity regarding Allied Chemical, and Allied Chemical is entitled to judgment as a matter of law pursuant to the exclusive remedy provisions of the Workers' Compensation Act.

American Standard

The primary business of the American Standard Enamel Iron Plant in Louisville when it contracted with Rapid Installation was the manufacture of cast iron bathtubs, lavatories, and sinks. James testified that he worked at the American Standard plant on approximately six different occasions with each job lasting from a few weeks to a month. James testified that his work consisted of removing, replacing, and installing conveyor systems and manufacturing equipment, and repairing cupolas, which were used to melt scrap iron into a liquid form, when the line was shut down. With respect to the specific jobs he performed, James testified that he worked on a conveyor system which ran from the foundry into the enamel shop, and repaired or replaced the system's chains as they would wear out. James also stated that he worked on the conveyors and other types of machinery in the faucet facility and that on one or two occasions, he helped repair the cupola. As James described it, because of the high temperatures at which the cupola operated, its steel shell would sometimes burn through.

When this happened the cupola would be shut down, and the bad area would be cut out and replaced with new steel. James admitted that all of the machinery and equipment on which he worked was equipment used by American Standard in order to make the bathtubs and other products manufactured at the facility.

In support of its motion for summary judgment, American Standard submitted affidavits to the effect that the cupolas, furnaces, conveyer systems and other types of equipment serviced by Rapid Installation were essential to the manufacturing process at the plant; that to keep its plant in operation American Standard was required to conduct regular maintenance and periodic repairs and replacement of the equipment; that in addition to day-to-day maintenance, major maintenance repair and replacement work had to be performed at least once a year and that this work was typically performed when the plant was shut down for three weeks in the summer and/or winter; that American Standard maintained a maintenance staff of approximately 100 people who performed most of the day-to-day maintenance, but that outside contractors were retained to assist whenever a job was more specialized or needed immediate attention and the regular maintenance staff was either too small or too busy to handle it; and that the maintenance, repair and periodic replacement of parts of the cupolas, furnaces and conveyor systems were regular and recurrent

activities required for American Standard to continue its manufacturing operations.

James admitted that the work he performed at American Standard was on equipment used by American Standard to manufacture its products. Moreover, the appellants have failed to come forward with affirmative evidence refuting American Standard's affidavit that regular maintenance and periodic repairs were necessary to maintain this equipment, and that it would employ outside entities, such as Rapid Installation, to assist its maintenance staff as necessary in this ongoing process, and that the type of work performed by Rapid Installation was a regular and recurrent part of its business operations.

There is no genuine issue of material fact concerning whether the work performed by Rapid Installation at American Standard's facilities, i.e., removing, replacing, and installing conveyor systems and manufacturing equipment, and repairing cupolas when the line was shut down, was regular or recurrent work necessary to American Standard's manufacturing process. Thus, American Standard is entitled to judgment as a matter of law.

<u>Brown & Williamson</u>

Brown & Williamson manufactures tobacco products.

The manufacture of those products requires the use of machinery, equipment, and their component parts, which were serviced by Rapid Installation on several occasions during James's employment at the company. James testified that he worked at Brown & Williamson for approximately two months on and off over a period of five to seven years and that the work he performed involved the removal and installation of equipment used to make cigarettes.

In its motion for summary judgment, Brown & Williamson attached the affidavit of Thomas L. Sarver, which stated that the machinery, equipment and component parts serviced by Rapid Installation was used to produce cigarettes and tobacco products, which was the principal business of the plant; that the machinery and equipment had to be regularly maintained, repaired, and on occasion, replaced; and that the maintenance, repair, and replacement of this machinery and equipment was a regular and recurrent part of the business of the company.

James's own testimony supports the position that the machinery and equipment he worked on was a part of Brown & Williamson's business. James testified that his work involved the removal and installation of equipment used to make cigarettes. The only remaining issue is whether the removal and installation of such equipment is regular and recurrent.

The affidavit produced by Brown & Williamson asserted that the maintenance, repair, and replacement of its cigarette production machinery and equipment is a regular and recurrent part of its business, and the appellants have produced no affirmative evidence challenging this assertion. To defeat a properly supported motion for summary judgment, the party opposing summary judgment must produce affirmative evidence demonstrating that there is a genuine issue of material fact. There are no genuine issues of material fact concerning up-the-ladder immunity as relates to Brown & Williamson, and the cigarette manufacturer is entitled to summary judgment as a matter of law.

Brown-Forman Corporation

Brown-Forman manufactures and sells alcoholic beverage products and consumer products such as Hartmann luggage and Lenox China. James testified that he worked at Brown-Forman for approximately six weeks at a bottling line at a distillery in the Shively area of Louisville. Brown-Forman maintains that it never operated a bottling line at the facility where James claims to have worked, and that James therefore could not have worked at a Brown-Forman facility. However, for purposes of summary judgment, the company accepts James's claim that he worked at one of its facilities, assumes the facility where

James worked to be its Howard Street facility, and argues in the alternative that it is entitled to up-the-ladder immunity.

James testified that he worked at a Brown-Forman facility for approximately six weeks repairing and removing an old bottling system and installing a new bottling line. His work involved removing machinery, plumbing and piping systems.

In support of its motion for summary judgment Brown-Forman submitted the affidavit of Gerald Hubbs. Hubbs stated that during 1975-1982, the period James was employed by Rapid Installation, that sixteen engineering projects were performed by or for Brown-Forman relating to its bottling lines at the Howard Street facility; that some of these projects were performed entirely by Brown-Forman employees and some were performed in whole or in part by outside contractors; that none of the projects were considered by Brown-Forman to be routine maintenance of its bottling lines and all were capitalized; that it was normal and customary for Brown-Forman to perform, or to contract with outside contractors to perform, renovations to its bottling lines from time to time; that although these projects are not performed at fixed intervals, they are usually scheduled for plant shutdowns during the Christmas holidays or summer vacation shutdowns; that each of the projects performed at the facility included the installation or replacement of one or more pieces of equipment, usually on a single bottling line; that the

equipment replaced or installed during these projects were standard components of bottling lines, including uncasers, cappers, stamp machines, air cleaners, automatic packers, labelers, fillers, cartons, work tables, checkweighers, and exhaust systems; that each project was designed to improve the efficiency of Brown-Forman's bottling operations or to replace an obsolete piece of equipment; that each project was necessary to permit Brown-Forman to operate its bottling operations in an efficient and economically competitive manner; and that renovation of one or more of Brown-Forman's bottling lines is a regular part of Brown-Forman's business and is performed on a yearly or semiannual basis.

James testified that his work at the distillery involved repairing and removing an old bottling system and installing a new bottling line. The bottling line is part of the business of a distiller. Further, James failed to produce affirmative evidence that the renovation of the bottling lines is not a regular part of Brown-Forman's business and is not performed on a yearly or semiannual basis. There is no genuine issue of material fact concerning whether the installation or replacement of bottling line equipment is an essential part of Brown-Forman's liquor bottling business and is performed on a regular or recurrent basis. Because there are no genuine issues

of material fact on the up-the-ladder immunity issue, Brown-Forman is entitled to judgment as a matter of law.

Colgate-Palmolive

Colgate-Palmolive is a manufacturer of detergents, soaps, and toothpaste. James testified that he worked at Colgate-Palmolive's Louisville area cleaning and hygiene products plant for approximately six weeks. James testified that at the facility he removed and installed "machinery, pipes, boilers, just every type of equipment that was used in the process of making whatever they were making." James also testified that Colgate-Palmolive employees did not help on the six-week job.

In support of its motion for summary judgment Colgate-Palmolive submitted the deposition testimony and affidavit of facilities manager/plant engineer Michael Hubbs. Hubbs testified to the effect that the manufacturing process at the facility involves the use of machinery, equipment, and their component parts; that the machinery and equipment must be regularly maintained, repaired and/or replaced in order to manufacture the various products; that while certain jobs are large, capitalized projects, such renovation and repair projects are a regular or recurrent part of Colgate-Palmolive's business; that the work performed by Rapid Installation usually involved

the renovation or replacement of part or all of a conveyor system, but sometimes involved the replacement of tanks or moving of a boiler; and that although the projects do not occur at fixed intervals, they occur with sufficient frequency so as to demonstrate that they are a part of an ongoing process of updating, renovating and reconfiguring the machinery and equipment at Colgate-Palmolive's business in order to accommodate the production of new products or to improve efficiency.

James conceded that the equipment he worked on was "equipment that was used in the process of making" the products Colgate-Palmolive manufactured, which is a part of its business. Colgate-Palmolive filed an affidavit to the effect that this equipment must be regularly maintained, repaired, and/or replaced. James did not submit affirmative evidence refuting this sworn statement. It follows that for purposes of summary judgment the work that Rapid Installation performed at Colgate-Palmolive was a regular or recurrent part of Colgate-Palmolive's business and that pursuant to the up-the-ladder immunity provisions of the Workers' Compensation Act Colgate-Palmolive is entitled to judgment as a matter of law.

E.I. duPont de Nemours and Company (DuPont)

DuPont is in the business of manufacturing and selling chemicals and related products. James testified that he worked at DuPont for approximately three months removing insulated pipes, pumps, steel, and other equipment and that he maintained, replaced and installed pumps, motors and piping at the facility.

The evidence is undisputed that James was involved in the removal, maintenance and installation of pumps and other equipment and the grinding of concrete pads; however, James asserted that he had worked on a tear out at Dupont's Baghouse project, whereas DuPont asserts that the Baghouse project was a new construction project performed exclusively by DuPont's Construction Division. James conceded that he did not work on the construction of the Baghouse project.

In support of its motion for summary judgment, DuPont submitted the affidavit of Terry L. Tempel. In his affidavit Tempel stated that maintenance, replacement and installation of pumps, motors and pipes, including work with flanges and gaskets, was a regular and recurrent part of the work of DuPont's business; that DuPont used its own employees, in addition to contract employees, to perform portions of this routine maintenance work at its facilities; that during the relevant period the installation of new pumps, motors and pipes, including work with flanges and gaskets, as well as the maintenance, removal and replacement of old pumps, motors and

pipes, including flanges and gaskets, at the Louisville facility was an ongoing and frequently recurring part of DuPont's operations at the facility; that maintenance of adequate pumps, motors and pipes, including flanges and gaskets was necessary to DuPont's manufacturing process; that, among other things, these machines were necessary to transfer raw feedstock materials, intermediate materials, and finished products through the tanks as part of the manufacturing process; that without adequate pumps, motors and pipes, including flanges and gaskets, DuPont's operations would cease to exist; and that the work James described as having performed was not only regular maintenance work performed routinely at the Louisville site, but was often performed by DuPont employees themselves.

The pumps, motors, and piping Rapid Installation maintained and replaced at the DuPont facility had a direct nexus to DuPont's regular business of manufacturing and selling chemicals and related products. This machinery and equipment was part of that business. Moreover, the appellants have failed to present affirmative evidence that the upkeep, maintenance, repair, and replacement of these assets is not a regular and recurring part of DuPont's business. There is no genuine issue of material fact concerning DuPont's qualification for up-the-ladder immunity, and thus DuPont is entitled to judgment as a matter of law.

Ford Motor Company (Ford)

Ford is in the business of designing, manufacturing, and selling motor vehicles. James testified that he worked at two Ford plants while employed at Rapid Installation, the Louisville Assembly Plant (LAP) and the Kentucky Truck Plant (KTP).

James testified that he demolished an assembly line and installed a new one at LAP, repaired or replaced metal sheeting on furnaces at LAP which were used to bake the paint onto newly produced automobiles, and installed a new conveyor system equipment at KTP. James also testified that he worked for approximately six months in a changeover project involving the demolition and tear out of an assembly line for conversion from the LTD to the Ranger. The tear out included the removal of furnaces, pipes and other equipment and the plant was completely shut down while he worked there.

In support of its motion for summary judgment, Ford submitted the affidavits of engineer William McKinney and Ford's manager of plant facilities, Bruce Hepke. According to these affidavits, all Ford Motor Company automotive and truck assembly plants have assembly lines, ovens, steel components, and extensive conveyor systems which are necessary and essential to the production and manufacture of automobiles and trucks; in order to accommodate changes to existing vehicles or to convert

assembly lines from one vehicle to a newer vehicle, it is necessary for Ford to demolish all or portions of existing assembly lines and components, and install new assembly lines, including conveyor systems; the demolition of assembly lines, machinery, related components and ovens, and the installation of new assembly lines and new conveyor systems, has been done on a regular and recurrent basis at Ford assembly plants for decades; that significant reconfiguration of the LAP assembly line system occurred in 1984, 1985, 1988, 1995, 1998, and 1999; that in order to maintain the assembly line equipment, including the conveyor systems involved in the manufacturing and production process, Ford must routinely replace, modify, update and repair equipment; that although the repairs, updates and modifications vary from year to year in accordance with necessity, some portion of the assembly line is replaced, repaired or modified each year during one of the annual shutdowns; and that the very nature of Ford's business is one of constant, year-to-year change.

Historically, Ford Motor Company was instrumental in the development of the assembly line manufacturing process, and the assembly line systems of Ford and similar manufacturing companies are an essential part of the work of such businesses. In his deposition testimony James agreed that it is "fair to say" that "building new vehicle assembly lines was part of

Ford's regular business" and that it was "something that they do on a recurrent basis."

The appellants failed to present affirmative evidence challenging Ford's position that the work performed by Rapid Installation was a regular or recurrent part of its business. The record demonstrates that Ford's conveyor systems were torn out on a regular and recurrent basis and that Rapid Installation performed this type of work at Ford. Because the type of work performed by Rapid Installation was a regular or recurrent part of the work at the Ford facility, Ford is entitled to up-the-ladder immunity.

General Electric Company (GE)

GE is in the business of manufacturing various consumer appliances. James testified that he worked at GE for nine months to one year on a job that included the removal of an old conveyer system along with associated furnaces, pipes equipment and machinery equipment and the installation of a new conveyer and rack system. The work was required because GE was putting in a new assembly line system to build its refrigerators. The new assembly line system was built and installed by GE.

In support of its motion for summary judgment, GE submitted the affidavit of Michael Phillips. In his affidavit

Phillips stated that during the relevant period GE recurrently contracted with Rapid Installation to do the demolition, redesign, rebuilding, and reinstallation of conveyor systems that are a regular part of GE’s manufacturing business. GE submitted evidence that from 1970 to 1985 GE paid Rapid Installation over $30 million for 3,840 separate jobs, which amounts to over 250 jobs per year. Phillips stated that all of these jobs were necessary to GE’s business.

The work performed by Rapid Installation was directly connected to the manufacture of the products produced at the GE facilities. The assembly line conveyor systems Rapid Installation was employed to convert were central to the production of appliances at the GE facility. Rapid Installation performed, on average, approximately 250 jobs per year at the facility, or almost five jobs per week. Based upon this volume of work, the type of work performed by Rapid Installation was a regular or recurrent part of GE’s business. James did not present any affirmative evidence contradicting the affidavit filed by GE in support of its motion for summary judgment; there are no genuine issues of material fact concerning the up-the-ladder immunity issue; and GE is entitled to judgment as a matter of law.

Goodrich Corporation f/k/a B.F. Goodrich Company (Goodrich)

The Louisville Goodrich plant was in the business of manufacturing vinyl resins and compounds, vinyl latex, various rubbers, and chlorinated polyvinyl chloride. James testified that he worked at Goodrich on two or three different occasions for approximately one to two weeks each time removing and installing insulated machinery, pumps, motors, and other equipment.

In support of its motion for summary judgment, Goodrich submitted the affidavits of Bill Simpson and Ron Kaminski. These affidavits stated that every processing area throughout the Louisville plant contained pumps and motors used to transport raw materials, in-process goods, and finished goods; that pumps and motors played an important role in the manufacturing process and were also used as component parts of hydraulic systems; that repair of pipes and machinery, including replacement of pumps and motors on the production lines, was an almost continuous ongoing process, and outside contractors were present somewhere at the Louisville plant virtually 365 days a year; that in addition to periodic updates, replacement of pumps and motors also occur when a production line is shifted from one product to another and when equipment is repaired; that these activities are ongoing and one or more processing areas at the Louisville plant is being renovated much of the time; that replacement of pumps and motors is a routine and essential part

of the regular maintenance of Goodrich’s physical plant; and that without routine work on its production equipment Goodrich would have been unable to manufacture and sell its chemical products.

The work performed by Rapid Installation at Goodrich involved the removal and installation of machinery, pumps, motors, and other equipment and it is unrefuted that such machinery, pumps, motors, and other equipment were fundamental to the production of the products produced at the Louisville Goodrich plant. The appellants also failed to submit affirmative evidence to contradict Goodrich’s claim that the repair and replacement of its equipment is a continuous process in its business. Hence there are no genuine issues of material fact concerning up-the-ladder immunity as it relates to Goodrich, and the company is entitled to judgment as a matter of law.

<u>International Truck and Engine Corporation (ITEC) f/k/a International Harvester Company and Navistar International Transportation Corp.</u>

ITEC is a leading producer of mid-range diesel engines, medium trucks, school buses, heavy trucks, service vehicles, and parts and service sold under the International brand. The company also is a private label designer and

manufacturer of diesel engines for the pickup truck, van and SUV markets.

James testified that he worked at International Harvester on "different occasions" and that his work "involved the tear out of the entire assembly line and all equipment in the foundry to mechanize the line," . . . "including furnaces, piping, and boilers." In his deposition James stated that he worked at ITEC on "maybe 50 different jobs" during a five-year period and that the jobs would involve routine repairs as well as updating assembly equipment.

In support of its motion for summary judgment, ITEC presented affidavits and deposition testimony to the effect that ITEC employed its own millwrights who did the same kinds of work as that performed by James, but would bring in outside millwrights if they needed them; that the work performed by James, including the relining and repair of furnaces, the update of production equipment, and the repair of various pieces of machinery, was a regular and recurrent part of ITEC's business; that the relining and repairing of furnaces, updating of production equipment, and repairing of various pieces of machinery was a regular and recurrent part of ITEC's business; and that Rapid Installation provided millwright services and day-to-day maintenance to ITEC on a daily basis from 1975 to 1982.

James stated that he worked approximately 50 different jobs at ITEC during his tenure at Rapid Installation, and ITEC stated in its affidavit in support of summary judgment that it employed Rapid Installation on what amounted to a daily basis to perform repair and maintenance on its manufacturing machinery and equipment. The machinery and equipment was used to manufacture the products produced by ITEC. As such the work performed by Rapid Installation was a regular or recurrent part of the work of ITEC, and ITEC is entitled to up-the-ladder immunity against any common law tort claims of Rapid Installation employees.

Kentucky Utilities (KU)

KU is a utility company engaged in the business of providing electricity and natural gas to customers in Kentucky and Virginia. James alleges that he was exposed to asbestos while repairing and replacing equipment that powered the coal-burning furnaces at KU's Ghent Powerhouse. James testified that he worked at KU for approximately one month removing power-generating equipment such as motors, furnaces and piping.

In support of its motion for summary judgment, KU filed the affidavit of Larry E. Byrd. The affidavit stated that KU generates electricity by burning coal in furnaces to generate steam, which turns large turbine-generators; that the combustion

process is aided and controlled by fans, pulverizers and other equipment driven by hundreds of electric motors such as those serviced by Rapid Installation; that each motor and related equipment and machinery is an essential link in the chain that constitutes the power generation process at its plants, the periodic repair and/or replacement of which when they fail is vital to achieve KU's primary business objective of reliably and consistently furnishing electricity to its customers; that such repairs and replacements are an ordinary part of plant maintenance, without which KU could not function or operate as a utility company; that such repairs and maintenance are performed by both its employees and on occasion by an outside company such as Rapid Installation; and that the repair and replacement of motors and associated equipment and machinery that powers its coal-burning furnaces is, therefore, a regular and recurrent part of the work of KU's business.

The appellants failed to produce affirmative evidence refuting KU's affidavit that equipment and machinery serviced by Rapid Installation is an essential link in the chain that constitutes the power generating process in its power plants. The appellants also failed to refute KU's assertion that the removal, repair, maintenance, and replacement of this equipment and machinery is an ordinary part of the functioning of the utility company. Because the evidence is undisputed that this

was the type of work performed by Rapid Installation and that this type of work was regular or recurrent in KU's business operations, there are no remaining issues of fact concerning up-the-ladder immunity and KU is entitled to summary judgment on the issue.

Lorillard, Inc.

Lorillard is a manufacturer of tobacco products, including cigarettes, cigars, and chewing tobacco. James testified that he worked at Lorillard for approximately one month removing, replacing, and installing the assembly lines and machines used in the cigarette manufacturing process.

In support of its motion for summary judgment, Lorillard submitted the affidavit of Sherwood G. McNiel. McNiel's affidavit stated to the effect that the machinery at Lorillard's Louisville facility included assembly lines and conveyor systems; that this machinery was necessary for Lorillard's production of products at the facility; that the repair, maintenance, and replacement of the machinery was necessary for Lorillard's production of products at the facility; and that the use of the machinery and equipment, as well as the replacement, maintenance, and repair of the machinery and equipment, and their components, was a regular and recurrent part of the business at the facility.

In his deposition testimony James admitted that the machinery and equipment he worked on in the performance of his duties for Rapid Installation was machinery used in the cigarette manufacturing process, and it follows that the work performed by Rapid Installation was a part of the business of Lorillard. The appellants cite the affidavit of Sherwood G. McNiel, a Lorillard witness, for the proposition that Lorillard admitted that all regular and recurrent work was performed by its own employees and, therefore, any outside work would not be regular or recurrent. However, we agree with the trial court that the appellants misconstrue McNiel's testimony and that McNiel's statement regarding "regular and recurrent" was in reference to Lorillard's contracts with Rapid Installation. McNiel's testimony is not affirmative evidence that the type of work performed by Rapid Installation was not regular and recurrent.

As the appellants failed to present affirmative evidence to refute Lorillard's affidavit that the replacement, maintenance, and repair of its cigarette machinery and equipment is a regular or recurrent part of the business of the cigarette company, Lorillard is entitled to summary judgment on the issue of up-the-ladder immunity.

Louisville Gas & Electric Company (LG&E)

LG&E is a utility company engaged in the business of providing natural gas and electricity to customers. James alleges that he was exposed to asbestos while repairing and replacing equipment that powered the coal-burning furnaces at LG&E's Cane Run and Mill Creek electric generating plants. James testified that he worked at LG&E for approximately three months on three separate jobs removing, replacing, and installing motors, equipment, and piping on six to eight different units.

In support of its motion for summary judgment, LG&E submitted the affidavits of Charles R. Jacobs and Joseph M. Didelot. The affidavits stated that the motors and related equipment and machinery serviced by Rapid Installation are an essential link in the chain that constitutes the power generating process at its power plants; that the periodic repair and/or replacement of the motors and related equipment and machinery is vital to achieve LG&E's primary business objective of reliably and consistently furnishing electricity to its customers; that such repairs and replacements are an ordinary part of plant maintenance without which LG&E could not function or operate as a utility company; and that the repair and replacement of motors and associated equipment and machinery that power its coal-burning furnaces is a regular and recurrent part of the work of LG&E's business.

The appellants failed to produce affirmative evidence refuting LG&E's affidavit that equipment and machinery serviced by Rapid Installation was an essential link in the chain that constitutes the power generating process in its power plants. The appellants also failed to refute LG&E's assertion that the removal, repair, maintenance, and replacement of this equipment and machinery is an ordinary part of the functioning of the utility company.

Because the evidence is undisputed that this was the type of work performed by Rapid Installation and that this type of work was regular or recurrent in LG&E's business operations, there are no remaining issues of fact concerning up-the-ladder immunity and LG&E is entitled to summary judgment on the issue.

Philip Morris Incorporated

Philip Morris is in the business of manufacturing cigarettes. James testified that he worked at Philip Morris for approximately one year installing a conveyor and rack system. James stated that his work at the Louisville Philip Morris facility involved the tearing out of old equipment and the installation of new equipment used in the manufacture of cigarettes. More specifically, James's work involved repairs to the furnace or dryer in the stemmery and on the conveyor system running into the dryer. Furthermore, James testified that he

worked on approximately 15 different job assignments at the Philip Morris facility.

In support of its motion for summary judgment, Philip Morris attached the affidavit of Terry W. Bowman. The affidavit stated that the cigarette manufacturing process involves many different steps and operations which are conducted at numerous areas of the manufacturing facility; that the conveyor systems such as those serviced by Rapid Installation were used to transport tobacco through dryers and were an integral component of the manufacturing process; that conveyor systems of various types were likewise used to transport tobacco throughout the remainder of the manufacturing process, and were an integral component of the manufacturing process; that like all equipment used in the cigarette manufacturing process, conveyor systems must be regularly maintained and occasionally repaired and replaced; that the dryers in the stemmery required occasional maintenance and repair as well; that as part of its business operations in Louisville, Philip Morris contracted with companies such as Rapid Installation to perform this type of work, which was a necessary incident to its manufacturing of cigarettes; and that the type of work Rapid Installation performed at Philip Morris' Louisville facilities was a regular and recurrent part of its business operations.

James admitted in his deposition that the old equipment that he tore out and the new equipment he installed was equipment used in the manufacture of cigarettes, and thus his work was part of the business of Philip Morris. Philip Morris' affidavit reflected that this equipment was an integral component of the business of manufacturing cigarettes. James testified that he worked on about 15 different job assignments at the facility and Philip Morris' affidavit reflected that it was necessary to regularly maintain, repair, and replace the equipment. The appellants did not present any affirmative evidence that it was not necessary to regularly maintain, repair, and replace the cigarette manufacturing equipment and to the contrary admitted that maintaining cigarette manufacturing equipment was a regular part of Philip Morris' business.

The appellants failed to present any affirmative evidence refuting Philip Morris' assertion that the work performed by Rapid Installation at its cigarette manufacturing facility was a regular or recurrent part of its business, there are no genuine issues of material fact concerning the up-the-ladder immunity issue, and Philip Morris is entitled to judgment as a matter of law.

Reynolds Metals Company

Reynolds manufactures aluminum foil and other consumer packaging products. James testified that he worked at Reynolds for approximately six weeks removing and installing machinery, piping, and other equipment. James further stated that he performed intermittent work at the Reynolds plant replacing machines and repairing overhead cranes.

In support of its motion for summary judgment, Reynolds submitted the affidavit of William Darden. The affidavit stated that the manufacture of aluminum foil and Reynolds Metals' other products is a highly mechanized process and consists of numerous conveyors, machines and equipment; that although Reynolds employs various laborers to operate the machinery and equipment, the bulk of the manufacturing process at its facilities is performed by machines; and that the installation, removal and maintenance of these machines is a regular and necessary part of Reynolds Metals' operations at its facilities.

The machinery, piping, and equipment worked on by Rapid Installation was crucial to the highly mechanized process utilized by Reynolds to produce its aluminum products. The appellants failed to produce affirmative evidence demonstrating that the maintenance, installation, and removal of these assets is not a regular or recurrent part of Reynolds Metals' business operations. There are no genuine issues of any material facts

concerning whether Reynolds qualifies for up-the-ladder immunity under the Workers' Compensation Act. Since the work performed by Rapid Installation was a regular and recurrent part of Reynolds' business of producing aluminum products, the company was entitled to summary judgment as a matter of law.

Rohm and Haas

Rohm and Haas is a chemical manufacturer which uses pumps, blowers, and motor or turbine driven appliances in its manufacturing processes. James testified that he removed and installed pumps, pipes, motors, and blowers at the Rohm and Haas plant at various times during his career with Rapid Installation. James testified "they had a lot of pumps with that - - in the process of making what they make out there, piping and pumps, and we would come in and install, set the pump, align the motor to it with dial indicators, set all that up for the manufacturing process." James testified that he worked at the Rohm and Haas site "throughout his career."

In support of its motion for summary judgment, Rohm and Haas filed the affidavit of Dennis E. McCormick, who during his thirty-year career with Rohm and Haas served as a maintenance engineer, maintenance manager, maintenance utility production manager, and maintenance superintendent. The affidavit stated that Rohm and Haas employs a full-time

maintenance crew which is responsible for the maintenance of the manufacturing plant, including removal and installation of manufacturing equipment, including piping, pumps, blowers, motors, and any motor or turbine driven appliances; that employees in the full-time maintenance crew would perform these functions on a daily basis; that Rohm and Haas would periodically subcontract work, including millwright and ironwork to either supplement the full-time maintenance crew's functions, or participate in engineering projects to increase the manufacturing plant's capacity or correct manufacturing problems; that Rohm and Haas periodically subcontracted with Rapid Installation to perform necessary millwright work, including installation and removal of pumps, blowers, motors and motor or turbine driven appliances; and that the pumps, blowers, motors and motor or turbine driven appliances move various substances, including water, air and chemicals about the manufacturing plant, and are a necessary function for production of the end product from which Rohm and Haas derives its profit.

By James's own testimony the pumps, pipes, motors and blowers he worked on were part of the manufacturing process at Rohm and Haas and thus the work performed by Rapid Installation was part of the work of the business. Similarly, James worked there "all through his career," which is in effect an admission that the work performed there by Rapid Installation was regular

and recurrent. Rohm and Haas employed its own full-time maintenance crew to do the same type work performed by Rapid Installation which, again, indicates that the work performed by Rapid Installation was regular and recurrent.

Viewing the evidence in the light most favorable to the appellants, there is no genuine issue of material fact regarding the work performed by Rapid Installation at Rohm and Haas, and that the work performed was of a kind that was a regular or recurrent part of this defendant's business. Rapid Installation was engaged by Rohm and Haas to perform work on the manufacturers' equipment and machinery to accommodate new technology or products and to improve the efficiency of the business. Thus Rohm and Haas was a contractor and Rapid Installation was a subcontractor under the provisions of the Kentucky Workers' Compensation Act. Rohm and Haas is thus entitled to judgment as a matter of law.

JURAL RIGHTS DOCTRINE

Next, the appellants contend that the application of the up-the-ladder immunity defense under KRS 342.610 and 342.690 is unconstitutional when applied to a landowner in a premises liability suit pursuant to the jural rights doctrine. The appellant contends that application of the defense under these circumstances violates Kentucky Constitution §§ 14, 54, and 241.

Together these constitutional provisions form this jurisdiction’s constitutional "jural rights" doctrine, which precludes any legislation that impairs a right of action in negligence that was recognized at common law prior to the adoption of the Commonwealth’s 1891 Constitution. See McDowell v. Jackson Energy RECC, 84 S.W.3d 71, 73 (Ky. 2002).

> Kentucky Constitution §14 provides that:
>
> All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Section 54, a constitutional counterpart to Section 14, prohibits the legislature from abolishing jural rights established prior to the enactment of our constitution. Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347, 350 (1932). Specifically, the section provides as follows:

> The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.

Section 241 provides as follows:

> Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal

> representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person.

The Kentucky Workers' Compensation Act is a legislative remedy which affords an injured worker a remedy without proof of the common law elements of fault. It is, however, exclusive of the remedies available under common law. KRS 342.690. The earliest version of the Act was compulsory, giving the employee no right to reject or accept coverage under the Act, and it failed to pass constitutional scrutiny. Ky. State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S.W. 437 (1914). The right to accept or reject the Act, now embodied in KRS 342.395, was added and the Act was later upheld:

> It is quite correct to say that this section operates as a restraint on the General Assembly and prohibits it from attempting to limit the amount of recovery in the cases described in the section. But in this legislation the General Assembly did not arbitrarily or at all undertake to limit the amount of recovery. It merely proposed a statute to a certain class of people for their individual acceptance or rejection. It did not assume to deprive these classes or individuals without their consent of any constitutional rights to which they were entitled. The General Assembly merely afforded by this legislation a means by and through which individuals composing classes might legally consent to limit the amount to which the individual would be entitled if

injured or killed in the course of his employment.

Greene v. Caldwell, 170 Ky. 571, 580-581, 186 S.W. 648 (1916).

Greene v. Caldwell held in effect that if the employer and employee voluntarily agreed to operate or work under the Act, they would be bound by its provisions. Whitney v. Newbold, 270 Ky. 209, 109 S.W.2d 406, 408 (1937).

In 1952, the legislature amended the provisions of the Workers’ Compensation Act relating to acceptance of the Compensation Act by employees. Prior to 1952 the Act had provided that an employee must indicate his elections to accept the Act by signing a written notice of acceptance. The 1952 amendment provides, in substance, that an employee is deemed to have accepted the Act unless and until he files with his employer a written notice of rejection. Wells v. Jefferson County, 255 S.W.2d 462 (Ky. 1953).

There is no allegation by the appellants that James ever filed a written notice of rejection of coverage under the Act, and thus he is deemed to have consented to coverage under the Act. James’s consent to the provisions of the Act, including its remedies and limitations, negates any argument that the application of KRS 342.610 and KRS 342.690 in this case is unconstitutional under the jural rights doctrine. The legislature's decision to provide up-the-ladder immunity to

contractors who hire subcontractors to perform functions which are a regular and recurrent part of the contractors business is a provision which James accepted when he elected coverage under the Act.

FAILURE TO PLEAD UP-THE-LADDER DEFENSE

The appellants contend that the trial court erred in granting summary judgment to Brown-Forman, GE, Ford, Lorillard, LG&E, KU, Brown & Williamson, Colgate, and DuPont because these defendants failed to affirmatively plead up-the-ladder immunity as a defense in their answers to the original complaint.

The nine defendants identified by the appellant did in fact fail to plead up-the-ladder immunity in their answers to the original complaint. However, each of the nine subsequently moved to amend its answer to include the defense, and in each instance the trial court granted the motion to amend.

Kentucky Rules of Civil Procedure (CR) 15.01 states in pertinent part that a party may amend its pleading, following the twenty-day period after it is served, "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." CR 15.01. "Amended pleadings should be permitted to the extent that they are an aid in the proper disposition of the controversy, provided the party acts in good faith and not for the purpose of delay, and the opposing party is not prejudiced or the trial

unduly delayed." Philipps, 6 Kentucky Practice § 15.01 (5th ed. 1995). The trial court should permit a pleading to be amended absent a suggestion that the filing of the amended pleading could prejudice the opposing party or work an injustice. Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489, 493 (Ky. 1983). Although leave to amend shall be freely given when justice so requires, the decision is within the discretion of the trial court. Lambert v. Franklin Real Estate Co., 37 S.W.3d 770, 779 (Ky.App. 2000). Furthermore, the discretion of the trial court will not be disturbed absent an abuse of discretion. Id.; M.A. Walker Co., Inc. v. PBK Bank, Inc., 95 S.W.3d 70, 74 (Ky.App. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." The Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 581 (Ky. 2000).

The appellants have not identified any prejudice associated with the trial court's decision to permit the nine defendants to amend their answers pursuant to CR 15.01. The appellants had ample notice of the defense and were given an adequate opportunity to respond. For these reasons the trial court did not abuse its discretion when it granted the appellees leave to amend their answers to assert the up-the-ladder defense.

FAILURE TO SECURE COVERAGE

The appellants contend that summary judgment was improper because the defendants failed to establish that they qualified for up-the-ladder immunity by demonstrating that they had secured workers' compensation coverage for James or his employer, Rapid Installation, as required by KRS 342.690(1). In order for up-the-ladder immunity to apply, an appellee, in its capacity as a contractor, must have had in force and effect workers' compensation insurance which would have covered the employees of its subcontractor, Rapid Installation, including James.

In conjunction with their respective motions for summary judgment, each of the defendants submitted evidence that it had complied with the Workers' Compensation Act by either securing coverage through an insurance policy or by being self-insured. On the other hand, the appellants failed to present affirmative evidence to the contrary so as to defeat summary judgment. We would note that the Act does not require that each subcontractor used by a statutory employer or contractor be specifically named on the workers' compensation coverage policy.

The appellants have failed to demonstrate that there is a genuine issue of material fact as to whether any of the appellees had secured coverage which would apply to Rapid Installation and its employees, and summary judgment on this issue was proper.

COMPLETION OF DISCOVERY

Finally, the appellants contend that the trial court erred in refusing to allow the completion of discovery prior to entering summary judgment.

In early May 2001, several of the appellees moved the trial court to enter a protective order limiting the scope of the appellants' discovery. The appellees stated that they would soon be moving for summary judgment based on up-the-ladder immunity and requested that the trial court limit discovery to that issue. On May 15, 2001, the trial court entered an order granting the motion to limit discovery to up-the-ladder immunity issues.

The May 15, 2001, order provided the appellees with forty-five days to submit their motions for summary judgment. On July 13, 2001, the trial court entered an order granting the appellants thirty days to depose the individuals who provided affidavits in support of the appellees' motions for summary judgment and thirty days from the expiration of that time to respond to the motions for summary judgment. Discovery during this time was extensive. Counsel for the appellants took twenty-one depositions relating to the issues of workers' compensation coverage, and counsel for the appellees took eight depositions.

The appellees then filed their respective motions for summary judgment and the appellants filed their response. In their reply briefs to the appellants' response, several of the appellees filed affidavits from witnesses who had not previously been disclosed. The appellants then filed a motion to depose the newly-disclosed witnesses or, in the alternative, to strike their depositions. On May 31, 2001, the trial court entered an order denying the motion on the basis that issues raised in the affidavits had either been previously raised; were cumulative; or were outside the scope of the up-the-ladder immunity issue.

The trial court enjoys broad discretion in matters pertaining to discovery. Berry v. Commonwealth, 782 S.W.2d 625, 627-28 (Ky. 1990); see also Crawford-El v. Britton, 523 U.S. 574, 598-99, 118 S.Ct. 1584, 1597, 140 L.Ed.2d 759 (1998) (noting trial court's "broad discretion" to tailor and limit discovery). Metropolitan Property & Cas. Ins. Co. v. Overstreet, 103 S.W.3d 31, 36 (Ky. 2003).

Based upon the reasoning stated in its May 31, 2001, order, we cannot say that the trial court abused its broad discretion by denying the appellants' motion to depose the newly-disclosed witnesses or, in the alternative, to strike their affidavits.

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

MILLER, SENIOR JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent. I conclude that summary judgment was improperly granted because as a matter of law the work at issue in this case was not "a regular or recurrent part of the work" of the appellees.[3] Further, based on the record before the trial court there was a genuine issue as to whether the appellees had secured payment of workers' compensation coverage for employees such as James.[4]

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.[5] Thus, 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

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[3] KRS 342.610(2)(b).

[4] KRS 342.690(1); and KRS 342.340(1).

[5] <u>Elkhorn-Hazard Coal Land Corp. v. Taylor</u>, 539 S.W.2d 101, 103 (Ky. 1976).

KRS 342.610(2)(b) 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 of the Workers' Compensation Act, which is to aid injured or deceased workers, or their dependents.

The mere fact that the appellees had workers' compensation coverage during the relevant time period does not establish that they had the appropriate coverage, i.e., while some workers may have been covered, workers such as James 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 the appellees had secured workers' compensation coverage as required by the statute. Regardless, based on my proposed disposition of the "regular or recurrent" issue, there would be no need for additional proof or for the trial court to make a factual finding as to whether the appellees met the statutory requirement of providing workers' compensation coverage on James or hiring contractors which provided such coverage.

I now turn to the question of whether, pursuant to KRS 342.610(2)(b), the appellees contracted with another "[t]o have work performed of a kind which is a regular or recurrent part of the work of [their] business[.]" More specifically, I will

examine whether the work performed by James at the appellees' businesses 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).[6]

In Fireman's Fund Insurance Co. v. Sherman & Fletcher,[7] 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[.]"[8] Consequently, the Supreme Court held that pursuant to KRS 342.690, Sherman & Fletcher was immune from

[6] 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., 887 S.W.2d 360, 362-63 (Ky. 1994). Thus, the burden of establishing that the work performed by James was of a kind which was a regular or recurrent part of the work of their business was on the appellees.

[7] 705 S.W.2d 459 (Ky. 1986).

[8] Id. at 461.

tort liability for claims arising out of the death of Elder's employee.[9]

In Daniels v. Louisville Gas & Electric Co.,[10] this Court concluded that emissions testing required by the EPA constituted a regular or recurrent part of a coal-fired electric plant's business.[11] 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."[12] The Court noted, however, that "neither term requires regularity or recurrence with the preciseness of a clock or calendar."[13] 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.[14]

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[9] Fireman's Fund, 705 S.W.2d at 462.

[10] 933 S.W.2d 821 (Ky.App. 1996).

[11] Id. at 822.

[12] Id. at 824.

[13] Id.

[14] 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, 614 S.W.2d 247, 249 (Ky.App. 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.[15] 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.:[16]

> 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

[15] 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).

[16] 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].
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> . . .
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> 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.
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> 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.
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> . . .
>
> Courts have responded by liberally construing the coverage provisions of workmen's compensation acts while narrowly construing the immunity provisions.[17]

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

[17] Boggs, 590 F.2d 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."[18]

Thus, when a person, who has contracted with another to have work performed of a kind which it claims is a regular or recurrent part of the work of the person, asserts a defense of 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. I would hold that the work performed by James for the appellees was not of a kind which was a regular or recurrent part of the work of the appellees' businesses.

Since all of the appellees are either in the business of manufacturing a product or providing electricity or natural gas and since all the work James performed at these businesses involved replacement of or repair to equipment when the plant

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[18] Boggs, 590 F.2d 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) (stating "[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) (stating "[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").

was either partially or totally shut down, I will briefly summarize my reasons for concluding that the work at issue was not regular or recurrent. For example, James presented evidence that his work for Rapid Installation took place at Allied Chemical Corporation during a plant shutdown when he helped remove, replace, and install pumps and pump motor assemblies. Obviously, the business of installing pumps is distinct and separate from the business of producing chemicals. James's work was not a regular or recurrent part of Allied Chemical's business of producing chemicals because it was only performed when the plant was shut down and it was not regularly performed by maintenance employees. If the type of work James performed had been the type of routine maintenance work that a maintenance employee would perform on a regular basis, such as replacing filters or gaskets, then the result would be different. However, it required more specialized skills and was performed when the plant was shut down or production was stopped or limited. The same can be said about the work that James performed while working for Rapid Installation at all of the other appellees' businesses.

Perhaps the impact of the Majority's decision can be demonstrated more clearly by using an example involving a different type of work. The Majority's holding would also apply to a technician who, while working for a computer services

company, went to the offices of a business such as a medical clinic for the purpose of repairing, updating, or replacing the office's computers. Even if the medical clinic employed computer specialists in-house and even if the technician went to the clinic to perform those computer repairs, updates, or replacements only periodically, the Majority would hold his work to be regular and recurrent. Thus, he would be entitled to workers' compensation coverage from the medical clinic and he would be barred from making any common-law negligence claims against the medical clinic. If the technician, while making a periodic service call at the clinic, ruptured a disc by lifting one of the clinic's computers, the clinic would be responsible for workers' compensation coverage. Concurrently, if the technician was injured through the negligence of the clinic, e.g., he slipped on a substance on the floor or an item fell and struck him, the clinic would be immune from any premises liability claim. This would be an absurd result.[19]

Accordingly, since Rapid Installation's business and James's work of installing equipment is distinct and separate from the appellees' businesses of manufacturing products or providing electricity or natural gas, I would reverse the

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[19] Commonwealth, Central State Hospital v. Gray, 880 S.W.2d 557, 559 (Ky. 1994) (stating that "[i]n construing statutory provisions, it is presumed that the legislature did not intend an absurd result").

Jefferson Circuit Court's granting of summary judgment to the appellees.

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