

RENDERED: JANUARY 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000991-MR

DAVID JACOBS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 10-CI-002220

M.A. MORTENSON COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, LAMBERT, AND NICKELL, JUDGES.

COMBS, JUDGE: David Jacobs appeals from the summary judgment of the Jefferson Circuit Court entered in favor of M.A. Mortenson Company (“Mortenson”). After our review, we affirm.

The action underlying this appeal arose out of the construction of the KFC Yum! Center located in Louisville. The owner of the premises, Louisville Arena

Authority, hired M.A. Mortenson Company to serve as the general contractor for the construction project. Mortenson subcontracted some of the concrete work to F.A. Wilhelm Construction Co., Inc., (“Wilhelm”). Appellant Jacobs was an employee of Wilhelm and was assigned to work on the project.

During construction, a structure supporting one of Wilhelm’s concrete features at the arena collapsed, and Jacobs suffered a work-related injury. Jacobs filed a personal injury action against Mortenson and others associated with the construction project. Since both Mortenson and its subcontractor, Wilhelm, provided workers’ compensation insurance to its employees in accordance with Kentucky’s requirements, Mortenson filed a motion to dismiss the action. The trial court denied the motion.

Subsequently, Mortenson filed a properly supported motion for summary judgment. Mortenson argued that, under the circumstances, Jacobs’s claims were barred by the exclusive remedy provision of the Workers’ Compensation Act. Kentucky Revised Statutes (KRS) Chapter 342. The trial court agreed that Mortenson was entitled to “up-the-ladder immunity” in tort. By summary judgment, the claims asserted by Jacobs against Mortenson were dismissed. This appeal followed.¹

Jacobs argues that the trial court erred by concluding that his claims against Mortenson were barred as a matter of law. He contends that his employer,

¹ By order of a panel of this court entered on December 20, 2011, Jacobs’s motion to add Mathis & Sons, Inc., (“Mathis”) as a party to the appeal was denied. Consequently, we do not address any of the arguments presented in Jacobs’s brief with respect to the entry of summary judgment in favor of Mathis.

Wilhelm, was an independent contractor for Mortenson and that, as a consequence, Mortenson was not shielded by the up-the-ladder immunity provided by provisions of the Workers' Compensation Act. Jacobs also contends that the trial court erred by failing to permit discovery to be completed before ruling on the motion for summary judgment.

Mortenson contends that Jacobs's substantive challenge to the trial court's summary judgment is not properly before this court because the issue was not adequately presented in Jacobs's pre-hearing statement. Additionally, Mortenson argues that no additional discovery was necessary for the trial court to reach its conclusion since Jacobs admitted that Mortenson is a general contractor, and general contractors are entitled to up-the-ladder immunity as a matter of law.

We agree with Mortenson that Jacobs made an imprecise presentation in his pre-hearing statement. However, having reviewed it carefully, we are satisfied that he adequately complied with the provisions of Kentucky Rule(s) of Civil Procedure (CR) 76.03(8). Thus, we shall proceed to undertake a review of the merits of the trial court's summary judgment.

Summary judgment is proper where the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56.03.

Under the provisions of KRS 342.690(1), an employee's recovery in tort for a work-related injury against his employer is limited to those benefits available under the Workers' Compensation Act. This exclusive remedy provision

effectively bars all personal injury claims asserted by an employee against his employer.

Under the exclusive remedy provision, an “employer” is broadly defined to include not only a worker’s direct employer but also a contractor utilizing the worker’s direct employer as a subcontractor. *Beaver v. Oakley*, 279 S.W.3d 527 (Ky. 2009). Consequently, a contractor is entitled to the same immunity as the worker’s direct employer -- a subcontractor. This is commonly referred to as “up-the-ladder” immunity. *Gen. Elec. Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007).

In this case, the parties agree that Mortenson was acting as the construction manager or general contractor responsible for overseeing the arena construction project; that Mortenson hired Wilhelm as its subcontractor; that Jacobs was Wilhelm’s employee; and that Mortenson provided workers’ compensation insurance coverage. Under the circumstances, no further evidence or discovery was necessary to establish that Mortenson was entitled to up-the-ladder immunity as a matter of law. Consequently, the trial court did not err by granting summary judgment -- nor did it err by doing so before Jacobs deposed Mortenson’s affiants.

We affirm the judgment of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Christopher H. Morris
Louisville, Kentucky

BRIEF FOR APPELLEE:

Robert M. Connolly
Angela R. Stephens
Louisville, Kentucky

