IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

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RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 5-15-03 ELA Grauman DC

2002-SC-0597-MR

LEECO, INC., AND
HERSCHEL ASHER — APPELLANTS

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0361
PERRY CIRCUIT COURT NO. 00-CI-0639

DOUGLAS C. COMBS, JUDGE
PERRY CIRCUIT COURT — APPELLEE

AND

CHRISTOPHER GIBSON — REAL PARTY IN INTEREST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellants, Leeco, Inc. and Hershel Asher (hereinafter collectively "Leeco"), appeal from the Court of Appeals' denial of their motion for a writ of prohibition against Judge Douglas C. Combs of the Perry Circuit Court. Leeco alleges that pursuant to the provisions of KRS 342.690, the trial court does not have jurisdiction to proceed with Appellee's tort action against Leeco. For the reasons set forth herein, we affirm the decision of the Court of Appeals.

On November 17, 1999, Appellee, Christopher Gibson, was injured in a mining-

related accident in Perry County, Kentucky. At the time of the accident, Gibson was an employee of Fultz Construction Company, which was providing contract labor to Leeco. The accident occurred while Gibson was operating a low track fork lift at one of Leeco's underground mining sites. Following the accident, Gibson began receiving workers' compensation benefits from Fultz's compensation carrier, including but not limited to indemnity benefits and medical benefits. Gibson is also pursuing a claim against Fultz for permanent disability benefits.

On November 16, 2000, Gibson filed a tort action in the Perry Circuit Court against Leeco and Hershel Asher, the superintendent at the job site where Gibson was injured. Gibson alleged that Leeco was negligent in the maintenance of the forklift he was operating, and that Leeco made negligent repairs, alterations and/or modifications of the equipment. Further, Gibson alleged that both Leeco and Asher were negligent in their supervision of the job site, and failed to warn him about the dangerous condition of the equipment.

In June 2001, Leeco filed a motion for summary judgment arguing that Gibson's action should be dismissed as being barred by the exclusive remedy provisions of the Kentucky Workers' Compensation Act. Leeco argued that the work Gibson was performing at the time of his injury was a "regular or recurrent part" of its trade or business and, as such, Leeco was a statutory employer of Gibson under KRS 342.610(2).

In September 2001, prior to the trial court ruling on the motion for summary judgment, Gibson filed a motion for declaration of rights asserting that Leeco was not entitled to the protection of the exclusive liability provisions of the Workers' Compensation Act because Gibson's employer, Fultz Construction Company, was an

independent contractor of Leeco.

The trial court rendered findings of fact and conclusions of law in January 2002, denying Leeco's motion for summary judgment and granting Gibson's declaration of rights motion. The trial court relied upon the following provision found in the "Master Service Contract" between Leeco and Fultz Construction:

> [Fultz] shall be an independent contractor with respect to the performance of all work hereunder . . . . **Neither [Fultz] nor anyone employed by [Fultz] shall be deemed for any purpose to be the employee, agent, servant or representative of [Leeco]** in the performance of any work or service or part thereof in any manner dealt with herein. **[Leeco] shall have no direction or control of [Fultz] or its employees and agents except in the results to be obtained.** (emphasis in trial court's order).

Accordingly, the trial court ruled that as a result of Fultz's status as an independent contractor, Leeco was not entitled to the protection of the exclusive remedy provisions. The trial court did not address the issue of whether Gibson's work was a "regular or recurrent" part of Leeco's business.

Leeco thereafter filed a motion for a writ of prohibition in the Court of Appeals arguing that the circuit court was without jurisdiction to proceed with the case. In denying such, the Court of Appeals found that the jurisdictional argument was not ripe for consideration:

> There are a number of matters impacting on the relationship between Leeco, Gibson, and his employer, Fultz Construction Company, under the Workers' Compensation Act, that have yet to be adjudicated below. In particular, we believe it would be premature for us to review the merits of Leeco's "up the ladder" defense when there clearly exists a disputed material issue of fact regarding whether, at the time of the injury, Gibson was performing work which is a "regular or recurrent part" of Leeco's trade or business. KRS 342.610(2). For that reason, we are of the opinion that summary judgment would have been improper and the respondent trial court correctly declined to issue one. (Slip Op. p. 2) (citations omitted).

In its matter of right appeal to this Court, Leeco takes issue with the Court of

Appeals' finding that there exists a disputed material issue of fact regarding whether Gibson was performing work that is a regular or recurrent part of Leeco's business. Leeco argues that pursuant to KRS 342.690, it was entitled to summary judgment and, thus, the Court of Appeals erred in refusing to grant a writ of prohibition. Leeco urges this Court to reverse the Court of Appeals and enter an order directing the trial court to dismiss Gibson's action against Leeco.

We are of the opinion that Leeco has failed to recognize the extraordinary nature of interlocutory relief. Citing Corns v. Transportation Cabinet, Ky., 814 S.W.2d 574 (1991), Leeco states, "It is undisputed that Writs of Prohibition are appropriate in situations in which a lower court is acting without or beyond its jurisdiction." However, in Southeastern United Medigroup, Inc. v. Hughes, Ky., 952 S.W.2d 195, 199 (1997), this Court recently reiterated that a writ of prohibition should be granted only upon a showing that:

> 1) the lower court is proceeding or is about to proceed outside its jurisdiction **and** there is no adequate remedy by appeal, or 2) the lower court is about to act incorrectly, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury would result. (emphasis added)

Citing Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989); see also Smith v. Shamburger, 314 Ky. 850, 238 S.W.2d 844 (1951) (same grounds govern the issuance of a writ of mandamus).

While Leeco believes that the trial court lacks jurisdiction to adjudicate Gibson's tort action, at no point has it alleged that it is without an adequate remedy by appeal. Nor do we find it is without such remedy. Error, if any, in the trial court's denial of Leeco's motion for summary judgment can be raised on direct appeal.

The Court of Appeals found that the jurisdictional question is not ripe for

consideration since there remain disputed issues of fact necessary to the determination of whether the Workers' Compensation Act is applicable. Notwithstanding the jurisdictional question, we conclude that Leeco has failed to demonstrate its entitlement to extraordinary relief. Southeastern United Medigroup, Inc., supra. As such, we affirm the Court of Appeals' denial of the writ.

Lambert, C.J., Graves, Keller, Stumbo, and Wintersheimer, J.J. concur.

Cooper, J., dissents by separate opinion in which Johnstone, J. joins.

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DISSENTING OPINION BY JUSTICE COOPER

Appellants Leeco, Inc., and Herschel Asher, Leeco's safety superintendent, have been sued in tort in the Perry Circuit Court by Christopher Gibson, an employee of Fultz Construction Company, a subcontractor hired by Leeco to lay rail track in its underground coal mines. As will be discussed infra, the evidence adduced in the Perry Circuit Court is undisputed that Leeco is the "up-the-ladder" employer of Gibson and that both Leeco and Asher are therefore entitled to immunity from tort liability under the exclusive remedy provision of the Workers' Compensation Act. KRS 342.690(1).

Appellants have attempted to invoke that immunity first by motion for summary judgment in the Perry Circuit Court, then by a petition for a writ of prohibition in the Court of Appeals, and finally by this matter-of-right appeal to this Court from the Court of Appeals' denial of its petition. Remarkably, they have been subjected to a new and different error at all three levels of the Court of Justice. First, the Appellee trial judge erroneously held that a subcontractor's status as an "independent contractor" somehow strips the defendant/contractor of its immunity from tort liability and vests the circuit court with subject matter jurisdiction over a claim specifically precluded by KRS 342.690(1). Ignoring this obvious error, the Court of Appeals then erroneously held that there was a disputed issue of material fact as to whether the work Fultz was hired to perform (laying tracks) was a "regular or recurrent part" of Leeco's business, an issue not addressed by the trial court and clearly refuted by the record and our case law. Finally, declining to address the errors of either lower court, the majority of this Court invokes the "adequate remedy by appeal" defense to a petition for a writ even though that issue was neither raised nor addressed at the Court of Appeals and was not preserved by a cross-appeal to this Court.

I. FACTS.

Leeco owned and operated a coal mining business consisting of five underground mines. All five mines used rail tracks to transport workers, equipment, and supplies by rail runner from the mine entrance to the face of the seam being mined and vice versa. The necessity for such a system is obvious. For example, Mine No. 74, where Gibson was injured, extended one and one-half miles underground at the time of the accident. Rather than walking the length of the tunnel, workers were

transported over the track by rail runner. Equipment and supplies also were transported over the track by rail runner as needed. Although some underground mining companies use other devices to meet this need, Leeco considered tracks to be the superior method of transportation and installed them in all five of its underground mines. Asher testified that Leeco's underground mining operations would not be economically feasible without the installation and use of these tracks. Gibson, himself, testified:

Q. What do they use the track for?

A. They use the track to haul supplies to the face.

Q. And, is that something you all did there on an everyday basis, or pretty much a regular basis?

A. On a regular basis, yeah. Not every day.

Q. Okay. And, you say that you -- so, as basically I understand it, you all lay track as the mine advances, is that right?

A. Yeah.

Q. And, in order to get those supplies at the front, you have a locomotive or something that would take those supplies up on that track to, for example, roof bolts and various supplies that were needed to run the mining machine and so on and so forth?

A. Yeah. What we done is lay the track for them. They had supply men and everything that brought everything in.

Q. When you're saying "them," you"re talking about Leeco?

A. Yeah. Fultz -- I laid track for Fultz.

Q. Right.

A. They give me the directions on what had to be laid, how many had to be laid, how it was to be laid.

Q. Right.

A. Other than that, we were just -- I was told by Fultz to keep the track as close as I could to the power box. That way, they didn't have to haul supplies as far with scoops.

Q. All right. And, I guess if they can't get supplies up to the face, then they can't run the miner, they can't run the roof bolter, and so on and so forth?

A. Right.

Leeco representatives confirmed that track was laid "pretty much every day." The only days track would not be laid would be when the end of the track would "catch up" with the end of the tunnel. Obviously, no additional track could be laid until the mine was further extended.

At the time of Gibson's accident, Leeco had contracted with Fultz to install virtually all of the track laid in Leeco's underground mines. Fultz's contract was automatically renewable unless affirmatively canceled by either party. At the time of the accident, Fultz had been working with Leeco for two or three years and was being paid by the foot of track laid. Sometime after the accident, Leeco canceled its contract with Fultz. However, it continued to install track as an integral part of its business, using its own employees to lay the track.[1]

Leeco's contract required Fultz, like all of Leeco's subcontractors, to carry workers' compensation insurance. Fultz did carry such insurance and, in fact, Gibson has been paid workers' compensation benefits. His claim for permanent benefits is

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[1] It does not appear that Leeco terminated Fultz's contract because of this lawsuit. However, as Justice Graves forewarned in United States Fidelity & Guaranty Co. v. Technical Minerals, Inc., Ky., 934 S.W.2d 266 (1996), if employees of a subcontractor can both draw workers' compensation benefits and bring civil lawsuits against their employer's contractor, "no employer in his right mind would hire such a [subcontractor]," and the effect would be to destroy the subcontractor's business. Id. at 269.

presently pending before the Workers' Compensation Board. The contract also specified that Fultz and its employees were not employees of Leeco but that Fultz was an "independent contractor."

II. INDEPENDENT CONTRACTOR.

At the trial level, Appellants moved for summary judgment, correctly asserting that Leeco was a "contractor" under KRS 342.610(2) and, therefore, Gibson's suit was barred by the exclusive remedy provision of the Worker's Compensation Act, KRS 342.690(1). Gibson responded with a "Motion for Declaration of Rights," requesting that the trial court declare that:

> [D]efendant, Leeco, Inc. is not entitled to the protection of the exclusive liability provisions the [sic] Kentucky Worker's Compensation Act because plaintiff's employer, Fultz Construction Company, Inc., was an independent contractor of Leeco.

Of course, there is no such thing as a "Motion for Declaration of Rights" within the context of an action for damages in tort. KRS 418.040, et seq., the "Declaratory Judgment Act," was enacted to permit a separate cause of action where an actual controversy exists but consequential relief is not sought. Obviously, Gibson's tort action was not an action for declaratory judgment. In fact, the Declaratory Judgment Act cannot be resorted to for the purpose of resolving issues within the exclusive jurisdiction of the workers' compensation board. Motorists Mut. Ins. Co. v. Terry, Ky., 536 S.W.2d 472, 473-74 (1976); Moore v. Louisville Hydro-Electric Co., 226 Ky. 20, 10 S.W.2d 466, 467 (1928). Nevertheless, the trial court granted Gibson's motion, finding that Leeco had admitted that Fultz was an independent contractor (a fact Leeco has never contested) and concluding:

1. This court has jurisdiction over the subject-matter and the parties hereto.

2. Based on the agreement between Defendant, Leeco, Inc., and Fultz Construction Company, Fultz and its employees are independent contractors.

3. Said agreement is binding and does not violate public policy.

4. The statement by Joe Evans, president and chief operating officer of Defendant, Leeco, Inc., that Fultz was an independent contractor is an admission under KRE 801A(b).

5. Under the Kentucky Worker's Compensation Act, an independent contractor is not an employee and is not entitled to workers' compensation benefits. See KRS 342.640; Ratliff v. Redmon, Ky., 396 S.W.2d 320 (1965).

6. As a result of Fultz Construction Company's status as an independent contractor, Defendant, Leeco, Inc., is not entitled to the protection of the exclusive liability provisions of the Kentucky Workers' Compensation Act.

The trial court then granted Gibson's motion for a "Declaration of Rights" and denied Appellants' motion for summary judgment.

KRS 342.690(1) provides:

> 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. . . . The exemption from liability given an employer by this section shall also extend . . . to all employees, officers or directors of such employer . . . .

(Emphasis added.)

KRS 342.610(2) provides:

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

(b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person

shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

Thus, with the joint operation of these two provisions, a "contractor" enjoys the same immunity from liability as an "employer."

> The statutes make it plain that if [Appellant] is a contractor, it has no liability in tort to an injured employee of a subcontractor. It is also clear that [Appellant] is a contractor if the work subcontracted to [plaintiff's] employer is work of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of [Appellant].

Fireman's Fund Ins. Co. v. Sherman & Fletcher, Ky., 705 S.W.2d 459, 461 (1986).

The reason immunity is extended to the contractor is that the contractor is liable for payment of workers' compensation benefits to the subcontractor's injured employees if the subcontractor has failed to secure payment thereof. KRS 342.610(2). Here, if Fultz had not secured workers' compensation coverage for Gibson's injury, Leeco would have been liable for it. Nothing in the statutory framework or in Fireman's Fund qualifies the contractor's immunity on whether the subcontractor is an "employee" of the contractor or an "independent contractor." Indeed, in cases addressing "up-the-ladder" immunity, the subcontractor is always an independent contractor. See, e.g., Technical Minerals, supra, note 1, at 267; Gordon v. NKC Hosps., Inc., Ky., 887 S.W.2d 360, 361 (1994); Goldsmith v. Allied Bldg. Components, Ky., 833 S.W.2d 378, 379 (1992); Fireman's Fund, supra, at 461-62; Simmons v. Clark Constr. Co., Ky., 426 S.W.2d 930, 931 (1968); Matthews v. G & B Trucking, Inc., Ky. App., 987 S.W.2d 328, 329 (1998); Daniels v. Louisville Gas & Elec. Co., Ky. App., 933 S.W.2d 821, 822 (1996). Obviously, if the subcontractor were an employee of the contractor, the subcontractor's employees would also be employees of the contractor, ergo, the

exclusive remedy provision would apply automatically and the issue would never arise. The "independent contractor" issue arises only in the context of whether an alleged subcontractor is, himself, entitled to workers' compensation benefits because he is, in fact, an employee of the contractor. E.g., Ratliff v. Redmond, supra, at 323. It has nothing to do with whether an employee of a subcontractor can bring a civil action against the "up-the-ladder" employer. The trial court's conclusion that Leeco and Asher were not entitled to summary judgment because Fultz was an independent contractor was obviously erroneous.

II. REGULAR OR RECURRENT.

The Court of Appeals ignored the trial court's erroneous basis for denying summary judgment -- then created its own error by holding that:

> [T]here clearly exists a disputed material issue of fact regarding whether, at the time of his injury, Gibson was performing work which is "a regular or recurrent part" of Leeco's trade or business. KRS 342.610(2).

The Court of Appeals did not specify what material issue of fact is in dispute. However, the following material issues of fact are undisputed:

1. Leeco laid track in all five of its mines for the purpose of transporting persons, equipment and supplies from the entrance of the mine to the face of the seam being mined.

2. Track was laid on a regular and recurrent basis as the mine was extended.

3. Leeco hired Fultz to lay the track.

4. Gibson was employed by Fultz and worked on a crew whose job was to lay track in Leeco's mine.

5. Gibson was injured while laying the track.

6. After the termination of Fultz's contract, Leeco continued laying track in all of its mines using its own employees.

The only dispute is whether these undisputed facts establish the legal conclusion that "laying track" was a "regular or recurrent" part of Leeco's business. In Fireman's Fund, supra, we held that rough framing carpentry was a "regular or recurrent" part of the business of the owners and developers of a residential complex even though those owners and developers hired subcontractors to actually do the work. Id. at 460.

> Even 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.

Id. at 462.

Gibson argues that the work of laying track was not "regular or recurrent" because it was not performed every day. However, whether the work is continuous is not decisive of whether it is "regular or recurrent." See Daniels, supra, at 824 (periodic emissions testing); see also Granus v. North Am. Phillips Lighting Corp., 821 F.2d 1253, 1258 (6th Cir. 1987) (periodic maintenance of furnaces at glass factories). Gibson also argues that Leeco not only mines coal, but also develops, prepares and sells coal -- and that laying track is not involved in any of those other aspects of its business. However, "regular or recurrent" work need not to be related to every aspect of the contractor's business. See Simmons, supra, at 931 (cleaning exterior of building); Thompson v. The Budd Co., 199 F.3d 799, 805 (6th Cir. 1999) (changing air conditioning filters at automotive part stamping plant). Finally, Gibson notes that other types of mining, e.g., strip mining and auger mining, do not use tracks, and that some other underground mine operators transport workers and material by devices other than track. The issue, however, is not whether laying track is a "regular or recurrent" part of every mining company's business but whether it is a regular or recurrent part of Leeco's business.

> "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.

Daniels, supra, at 824. There can be no doubt that track was laid "repeatedly," or, in the alternative, "customarily" or "normally." As in Daniels, Leeco "simply [laid track] when and as required." Id. To suggest that laying track was not a "regular or recurrent part of the work or the trade, business, occupation, or profession of [Leeco]" is to ignore the plain meaning of KRS 342.620(2).

Thus, there was no disputed issue of material fact that precluded entry of summary judgment. Leeco was a "contractor" within the meaning of KRS 342.610 and, therefore, immune from tort liability pursuant to KRS 342.690(1). The Court of Appeals should have issued the requested writ of prohibition and ordered the trial court to dismiss the action for lack of subject matter jurisdiction.

III. WRIT OF PROHIBITION.

To its credit, the majority of this Court has declined to adopt the errors of the lower courts. However, instead of correcting those errors and granting Appellants the relief to which they are obviously entitled, the majority simply sidesteps the issues and, thus, guarantees years of future litigation that must inevitably conclude in the same result that could be reached now simply by ordering that the writ of prohibition be issued. The majority has accurately quoted Southeastern United Medigroup v. Hughes, Inc., Ky., 952 S.W.2d 195 (1997), with respect to the procedural grounds for denying a writ, slip op., at 4, but has failed to note the additional recognition in Hughes that "[t]he decision to grant or deny the petition is committed to the sound discretion of the court."

Id. at 199 (citing Haight v. Williamson, Ky., 833 S.W.2d 821, 823 (1992). See also St. Clair v. Roark, Ky., 10 S.W.3d 482, 485 (1999).

The majority forgets that the petition for a writ was not addressed to this Court but to the Court of Appeals. Appellees did not claim in response to the petition that it should be dismissed because there was an adequate remedy by appeal. They only asserted that the trial court had ruled correctly on the merits. Nor did the Court of Appeals deny the petition on the ground that there was an adequate remedy by appeal but, instead, exercised its discretion to address the substantive merits of the petition. In fact, writs of prohibition are routinely issued, without regard to whether there exists an adequate remedy by appeal to trial courts that are exercising jurisdiction exclusively vested by statute in another court or administrative body. E.g., Shamrock Coal Co., Inc. v. Maricle, Ky., 5 S.W.3d 130, 133 (1999) ("Shamrock, on the face of the complaint, was entitled to the protection of the exclusive liability provision. Consequently, the Leslie Circuit Court has no subject matter jurisdiction over this case and the writ is appropriate."); Beaven v. McAnulty, Ky., 980 S.W.2d 284, 288 (1998) ("As the trial court did not have the power to transfer the action to Marion County, it was acting beyond its jurisdiction when it did so, and a writ of prohibition is an appropriate remedy."); Corns v. Transp. Cabinet, Ky., 814 S.W.2d 574, 578 (1991) (Court of Appeals did not abuse discretion in issuing writ of prohibition to preclude circuit judge in condemnation case from exercising authority exclusively vested by statute in commissioners); Northern States Contracting Co. v. Swope, 271 Ky. 140, 111 S.W.2d 610, 615 (1937) (writ of prohibition held appropriate remedy where circuit judge was exercising jurisdiction exclusively vested by statute in the Federal Board of Labor Review); Commonwealth v. Yungblut, 159 Ky. 87, 166 S.W. 808, 811 (1914) (writ of prohibition held appropriate

remedy where circuit judge was exercising jurisdiction exclusively vested by statute in county court).

As the appellate court in this matter, we are bound by rules relating to appellate review. Appellees not only did not raise the "adequate remedy by appeal" defense in the Court of Appeals, they did not file a cross-appeal from the Court of Appeals' failure to address that issue sua sponte. Even if the issue had been raised, the Court of Appeals' failure to address it would now be the same as if the issue had been decided adversely to Appellees, and their failure to cross-appeal has finally settled that issue against them. Cf. Commonwealth, Transp. Cab. v. Taub, Ky., 766 S.W.2d 49, 51-52 (1988) ("It is the rule in this jurisdiction that issues raised on appeal but not decided will be treated as settled against the appellant in that court upon subsequent appeals unless the issue is preserved by cross-motion for discretionary review."). Thus, rather than dismissing this appeal on grounds that have already been settled against Appellees, we should address the merits of the appeal, reverse the erroneous holding of the Court of Appeals, and order the writ to issue.

Accordingly, I dissent.

Johnstone, J., joins this dissenting opinion.