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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
OCTOBER 15, 2008
(FILE NO. 2007-SC-000419-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001587-MR

WANDA SUE JOHNSTON — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 03-CI-011343

LABOR READY, INC.;
SYLVAN HUDSON — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Wanda Sue Johnston appeals from an order of the Jefferson Circuit Court granting the Appellees' motion for summary judgment. For the reasons set forth below, we reverse and remand.

The underlying facts are not in dispute. Mid-America Auto Auction (Mid-America) conducts auctions of motor vehicles and has eight to twelve full-time employees. Mid-America's employees perform various duties, including cleaning and otherwise preparing vehicles for sale. On days when Mid-America is conducting an auction, it obtains additional workers (temporaries) from Labor Ready, Inc. (Labor Ready) to assist with vehicle preparation and with moving the vehicles from the parking lot, into the auction site, and back to the parking lot. Labor Ready pays the temporaries, takes care of withholding taxes, and provides workers' compensation coverage for them.

When the temporaries arrive at the Mid-America site, a Mid-America employee checks their driver's licenses. The Mid-America manager of operations then instructs the temporaries regarding Mid-America's rules and regulations. The temporaries are divided into groups and each group is assigned a Mid-America full-time employee, who acts as a supervisor. The Mid-America employees then instruct the temporaries regarding their duties during the auction. While the temporaries primarily move vehicles, they can and do perform a number of different jobs throughout the course of their work day. The Mid-America employees provide all supervision for the temporaries during the day and can, if a temporary's work is not adequate, recommend that a temporary be asked to leave and not return. At the end of the day, the temporaries return to Labor Ready, where they receive their pay. Labor Ready does not provide any on-site supervision of the temporaries.

On February 12, 2002, Johnston was a full-time employee for Mid-America. She suffered a low back injury when she was struck by a car driven by a temporary, Appellee Hudson. Following the injury, Johnston filed a workers'

compensation claim against Mid-America. An administrative law judge approved the settlement on June 12, 2003. The settlement provided Johnston with permanent partial disability benefits in the amount of $6,968.50 based on an 11% permanent impairment rating. Pursuant to the settlement, Mid-America remains liable for ongoing injury-related medical expenses.

On December 31, 2003, Johnston filed a civil complaint against Labor Ready alleging that her injuries were caused by the negligence of Labor Ready's employee. At that time, Johnston did not know the identity of Labor Ready's employee. Johnston subsequently discovered that Hudson was the involved Labor Ready employee and, on January 11, 2005, Johnston amended her complaint to add Hudson as a defendant.

Based on these facts, the circuit court granted the Appellees' motion for summary judgment and dismissed Johnston's claims. In doing so, the circuit court first determined that there was a contractor/sub-contractor relationship between Mid-America and Labor Ready. The circuit court noted that Mid-America, as a contractor, has up-the-ladder immunity from civil suit pursuant to KRS 342.610, KRS 342.690, and related case law. Furthermore, the circuit court noted that, if a Labor Ready employee had been injured while working at Mid-America, that employee would have been foreclosed from bringing a civil suit against Mid-America. Having made that determination, the circuit court stated that,

> if . . . a *permanent* employee of the contractor-employer were allowed to receive workers' compensation benefits from her employer *and* also assert a tort claim against the subcontractor-employer, then a substantially greater right would be possessed by the permanent employee than the temporary employee, despite the possibility that both might

> be performing exactly the same work . . . . Such a disparate result simply cannot be the correct application of the law and would quite possibly violate one or more of the due process, equal protection or other constitutional rights of the temporary worker and constitute an arbitrary exercise of power in violation of Section 2 of the Kentucky Constitution. (Emphasis in original.)

Next, the circuit court found that Johnston and Hudson should be deemed to be co-employees and, as such, they are entitled to the same rights, including immunity from civil suit.

Finally, the circuit court noted that a "Work Ticket" set forth the terms of the contract between Mid-America and Labor Ready. That work ticket states, in pertinent part, that Mid-America will "indemnify and hold harmless LABOR READY from any claims for bodily injury (including death) made by [Mid-America's] employees, and [Mid-America] agrees to waive any immunity provided by workmen's compensation or other industrial insurance laws."

Based on this language, the circuit court concluded that, if Johnston "were allowed to proceed against Labor Ready, ultimately Mid-America might possibly be forced to compensate Ms. Johnston *twice* for her injuries, once through workers' compensation and once through its indemnification of Labor Ready." (Emphasis in original.) The circuit court concluded that such a result would be "unreasonable" and "contravene the purposes of Kentucky's Workers' Compensation Act by effectively abrogating the limitation of tort liability contained therein." It is from this order that Johnston appeals.

In her brief, Johnston argues that the Appellees are not entitled to immunity from civil suit because they had no potential exposure to workers' compensation liability,

that Johnston and Hudson were not co-employees, that Johnston's claims do not violate equal protection guarantees, and that the indemnification language on the work ticket does not constitute a contract sufficient to bar Johnston's claim. The Appellees argue that they have immunity from civil suit pursuant to KRS 342.690(1), that permitting Johnston's suit would violate the Equal Protection Clause, and that permitting Johnston to recover from the Appellees would subject Mid-America to double liability.

STANDARD OF REVIEW

The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Summary judgment is only proper when it would be impossible for the plaintiff to produce any evidence at trial warranting a judgment in his favor. *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record in a light most favorable to the party opposing the motion. *Id.* at 480.

IMMUNITY

The initial issue we must address is whether the Workers' Compensation Act provides immunity from civil suit to the Appellees. In order to address that issue, we must first determine what relationship existed between Mid-America and Labor Ready. KRS 342.610(2) provides that:

> A person who contracts with another . . . 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.

It is undisputed that the temporaries performed the type of work that was a regular and recurrent part of Mid-America's business. Therefore, we hold that, under KRS 342.610(2), Mid-America was a contractor and Labor Ready was a subcontractor. As a contractor, Mid-America is liable to Labor Ready's employees for workers' compensation benefits, but is immune from civil suit by Labor Ready's employees. *See* KRS 342.610(2); KRS 342.690(1); and *United States Fidelity & Guaranty Co. v. Technical Minerals, Inc.*, 934 S.W.2d 266 (Ky. 1996).

Next, we must determine what relationship existed between Mid-America and Hudson. KRS 342.690(1) provides that, absent factors that are not applicable here, co-employees, like employers, are immune from civil suit. Therefore, if Mid-America was Hudson's employer for purposes of the Workers' Compensation Act, Johnston and Hudson were co-employees and Hudson is immune from civil suit.

KRS 342.640(1) defines an employee as:

> Every person, including a minor, whether lawfully or unlawfully employed, in the services of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer.

Based on the language of KRS 342.640(1), there must be a "contract of hire . . . [either] express or implied" in order for an employment relationship to exist. Although the contract of hire need not be in writing, all of the elements of a contract must be present. *Rice v. Conley,* 414 S.W.2d 138, amended 419 S.W.2d 769 (Ky. 1967).

One of the key elements of any contract is a meeting of the minds. *King v. Ohio Valley Fire & Marine Ins. Co.*, 212 Ky. 770, 280 S.W. 127 (1926).

The record before us contains no evidence that Mid-America believed that Hudson was its employee. In fact, Greg Sharp, the operations manager for Mid-America, testified that Hudson was not Mid-America's employee. Furthermore, Labor Ready, in its Answers to Interrogatories, admitted that Hudson was its employee. Thus, the record reveals that, if there was a meeting of the minds, it was that Hudson was not Mid-America's employee.[1] Therefore, we hold that there was no contract of hire between Mid-America and Hudson and that pursuant to KRS 342.640(1), Hudson was not Mid-America's employee.

The Appellees argue that, as a contractor, Mid-America is deemed to be Hudson's employer for workers' compensation purposes. However, there is no support in KRS Chapter 342 for that proposition. In fact, a reading of KRS 342.615 leads inexorably to the opposite conclusion. KRS 342.615(1)(e) states that a temporary worker is "a worker who is furnished to an entity to . . . meet short-term workload conditions for a finite period of time." KRS 342.615(1)(f) states that a temporary help service "hires its own employees and assigns those employees to clients for finite periods of time to support or supplement the client's workforce . . . ." KRS 342.615(5) states that "[a] temporary help service shall be deemed the employer of a temporary worker and shall be subject to the provisions of this chapter."

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[1] We note that there is no testimony in the record from Hudson. In light of Sharp's testimony that Hudson was not a Mid-America employee, any testimony by Hudson is irrelevant. If Hudson testified that he believed he was a Mid-America employee that would be further evidence that there was no meeting of the minds. If Hudson testified that he believed he was a Labor Ready employee that would confirm Sharp's testimony and Labor Ready's answers to interrogatories.

Labor Ready hired employees, including Hudson, and provided those employees to Mid-America in order to meet Mid-America's short-term work load conditions for finite periods of time. As defined in KRS 342.615, Labor Ready is a temporary help service and Hudson was a temporary worker. Therefore, we hold that, pursuant to KRS 342.615(5), Hudson is deemed to be the employee of Labor Ready, not the employee of Mid-America.

The Appellees also argue that Hudson can be considered Mid-America's employee based on the "loaned servant" doctrine. In order to establish that Hudson was a loaned servant, the Appellees must establish that three conditions have been met: (1) that there was a contract of hire, either express or implied, between Hudson and Mid-America; (2) that the work Hudson performed was essentially the work of Mid-America; and (3) that Mid-America had the right to control the work performed by Hudson. *Allied Machinery, Inc. v. Wilson*, 673 S.W.2d 728 (Ky. 1984). There is essentially no dispute that the Appellees have established conditions two and three. However, as we previously held, the Appellees cannot establish the first condition as there was no contract of hire between Mid-America and Hudson. Therefore, we hold that Hudson was not a loaned servant.

Finally, we note that Johnston is correct with regard to Professor Larson's analysis. As noted by Professor Larson:

> When . . . an employee of the general contractor, or the general contractor as subrogee, sues the sub-contractor in negligence, the great majority of jurisdictions have held that the subcontractor is a third party amenable to suit. The reason for the difference in result is forthright: the general contractor has a statutory liability to the subcontractor's employee, actual or potential, while the subcontractor has no

> comparable statutory liability to the general contractor's employee.

Larson's, *Workers' Compensation, Desk Edition*, §111.04(2). In other words, immunity follows liability. A contractor who has potential liability should have the benefit of immunity. However, there is no reason to grant immunity to a sub-contractor when that sub-contractor has no potential liability.

As correctly noted by Johnston, Mid-America had potential workers' compensation liability for any Labor Ready employees injured on the job at Mid-America. Therefore, Mid-America appropriately has immunity from civil suit by any such Labor Ready employees. However, there are no circumstances under which Labor Ready would be responsible for paying workers' compensation benefits to any Mid-America employees. Therefore, there is no reason, absent a specific statutory provision, for Labor Ready to have immunity from civil suit.

In summary, we hold that Mid-America and Labor Ready had a contractor/sub-contractor relationship. Furthermore, we hold that Hudson was Labor Ready's employee, not Mid-America's. Therefore, Hudson and Johnston were not co-employees and Hudson is not immune from civil liability under KRS Chapter 342.

INDEMNITY

The right of common law indemnity exists when two parties are liable to an injured party, but one is less culpable. *Union Carbide Corp. v. Sweco, Inc.*, 610 S.W.2d 932, 934 (Ky.App. 1981) *citing Brown Hotel Co. v. Pittsburg Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (Ky. 1949). The Appellees argue that if Johnston's civil suit is permitted to proceed, Labor Ready may have a right to seek common law indemnification against Mid-America. According to the Appellees, since Mid-America had the sole right and

obligation to supervise Hudson, Hudson's alleged negligence may be attributed to Mid-America. In that situation, Labor Ready would be able to seek indemnification from Mid-America thus forcing Mid-America to pay for Johnston's losses twice – once under KRS Chapter 342 and again under common law indemnity.

Setting aside the speculative nature of the Appellees' argument, we note that KRS 342.690 provides that:

> The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner.

In other words, an employer's common law liability to indemnify a third party tort-feasor is limited to the amount of workers' compensation benefits payable by the employer. *Capps v. Herman Schwabe, Inc.*, 628 F.Supp. 1353, 1359 (W.D. Ky. 1986); *See also, Burrell v. Electric Plant Bd.*, 676 S.W.2d 231 (Ky. 1984), *overruled on other grounds, Dix & Assocs. Pipeline Contractors v. Key*, 799 S.W.2d 24 (Ky. 1990). In the event that a jury determines that Hudson was negligent and is liable for Johnston's injuries, any indemnification by Mid-America is, unless the parties have contracted otherwise, limited to Mid-America's exposure under KRS Chapter 342. Therefore, Mid-America will not be forced to pay twice for Johnston's loss.

The Appellees also argue that the work ticket amounts to a contract and that pursuant to the terms of that contract, Mid-America has agreed to indemnify Labor Ready. According to the Appellees, this contract could require Mid-America to

compensate "Johnston twice for her injuries, a result abhorrent to the Kentucky workers' compensation laws." The language on the work ticket, even if it constitutes a contract, does not require Mid-America to pay anything to Johnston; therefore, Mid-America will not be "compensating Johnston twice for her injuries." Furthermore, KRS 342.700 states that an employee may recover both under the workers' compensation act and civilly; however, an employee may not collect from both. Therefore, even if successful in her civil suit against Hudson, Johnston will not receive a double recovery.

Finally, with regard to the work ticket we note that KRS 342.690 sets forth that, when another person may be liable, the employer's liability is limited to the amount of compensation payable under KRS 342. However, that is a default provision. As clearly stated in KRS 342.690, the parties are free to alter how they choose to share liability, as long as they do so by written contract. If Mid-America and Labor Ready have chosen via the work ticket to share liability in a manner different from what is set forth in KRS Chapter 342, they are free to do so and doing so is not only not abhorrent to Kentucky's workers' compensation laws, it is permitted by KRS 342.690.

EQUAL PROTECTION

When the constitutionality of a statute is being challenged as an issue on appeal, a copy of the prehearing statement shall be served on the Attorney General. CR 76.03(5). The Appellees are challenging the constitutionality of KRS 342.690 and 342.610. They failed to serve a copy of the prehearing statement on the Attorney General; therefore, we will not address those arguments.

CONCLUSION

For the above reasons we reverse the circuit court's order granting summary judgment and remand this matter for further proceedings consistent with this Opinion.

ALL CONCUR.

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