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SUPREME COURT GRANTED DISCRETIONARY REVIEW:
DECEMBER 12, 2007
(FILE NO. 2007-SC-0066-D)

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-001785-MR

PEGGY HENSLEY, CO-ADMINISTRATRICE
& OF THE RICHARD SWARTZ ESTATE;
MICHELLE SWARTZ, CO-ADMINISTRATRICE
OF THE RICHARD SWARTZ ESTATE;
WYATT SWARTZ; AND WAYLON SWARTZ

APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE STANLEY BILLINGSLEY, SPECIAL JUDGE
ACTION NO. 04-CI-00593

RICHARD T. DAVIS; S.R.
HALLORAN; LARRY TRENKAMP;
SAMUEL H. BEVERAGE; PAUL S.
GRAHAM; GREG KREUTZANS; ANDY
DURBAN; AND JUDGE STANLEY BILLINGSLEY,
BOONE CIRCUIT COURT

APPELLEES

OPINION
REVERSING AND REMANDING

*** **

BEFORE: MINTON¹ AND SCHRODER, JUDGES; MILLER,² SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Peggy Hensley and Michelle Swartz, co-administratrices of the estate of Richard Swartz; Wyatt Swartz; and Waylon Swartz (appellants), bring this appeal from an order of the Boone Circuit Court granting summary judgment to appellees Richard T. Davis; S. R. Halloran; Larry Tremkamp; Samuel H. Beverage; Paul S. Graham; Greg Kreutzans; and Andy Durban (state employee defendants). Kentucky Rules of Civil Procedure (CR) 56.³ We reverse and remand.

On April 16, 2003, Richard Swartz was working on a road construction project for The Harper Company, a road construction firm. The project involved a stretch of highway located on I-275 in Boone County. Johnny Jenkins, a driver for Overnite Corporation, was driving a tractor-trailer through the construction zone. Traffic had been diverted to within two feet of the edge of the shoulder, along the edge of which there was a drop-off. It appears there were no warning signs in the area that there was a drop-off. The wheels of the vehicle dropped off the pavement causing Jenkins to lose control. Swartz was struck and killed.

¹ Judge John D. Minton, Jr. concurred in this opinion prior to his resignation effective July 25, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

³ The appellants also appeal from an order denying CR 60.02 relief. The issues related to that order, however, are not briefed and, accordingly, are presumed waived.

As Swartz was killed within the course of his employment, The Harper Company timely paid workers' compensation benefits. Kentucky Revised Statutes (KRS) Chapter 342.

On April 14, 2004, the appellants filed the instant litigation naming, among others, the state-employee defendants seeking recovery for Swartz's death. The circuit court eventually granted summary judgment to the employee defendants based upon what we commonly refer to as "up-the-ladder" immunity under the Workers' Compensation Act.

The appellants contend that the circuit court erroneously applied up-the-ladder immunity to the state employees. They argue that the road contract had nothing to do with their claims against the employees but, rather, arise from the employees' failure to perform their statutory duties to investigate all problems relating to the construction and maintenance of roads. The appellants maintain that these statutory duties cannot be contracted away by the state of Kentucky in any roadway construction agreement. The appellants also argue that, in any event, the Department of Transportation does not qualify as a contractor under the Workers' Compensation Act.

KRS 342.690(1) provides as follows:

(1) 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 such employer's carrier and to all employees, officers or directors of such employer or carrier, provided the exemption from liability given an employee, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer or director. (Emphasis added).

KRS 342.610(2) (b) provides as follows:

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. . . . 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. . . . (Emphasis added).

"The purpose of the provision of KRS 342.610 that a contractor is liable for compensation benefits to an employee [of] a subcontractor who does not secure compensation benefits is to prevent subcontracting to irresponsible people." Fireman's Fund Ins. Co. v. Sherman & Fletcher, 705 S.W.2d 459, 461 (Ky.1986). By the same token, if a defendant qualifies as a contractor, "it has no liability in tort to an injured employee of a subcontractor" once worker's compensation benefits are secured. Id. "In essence, the Act treats the employees of a subcontractor as de jure employees of the contractor for the purposes of guaranteeing worker's compensation benefits. The reverse of this coin is that contractors also benefit from the immunity from tort liability granted to employers." Giles v. Ford Motor Co., 126 Fed.Appx. 293, 295 (6th.Cir. 2005) (commenting on our compensation Act).

KRS 342.690(1) and KRS 342.610(2)(b) together combine to form the basis of the "up-the-ladder" defense, under which an entity "up-the-ladder" from the injured employee who qualifies as a "contractor" under KRS 342.610(2) is entitled to immunity under KRS 342.690. See Goldsmith v. Allied Bldg. Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992); Franke v. Ford Motor Co., 398 F.Supp.2d 833, 838 (W.D.Ky. 2005) (interpreting Kentucky law). The exemption from liability given an employer by KRS

342.690(1) extends to such employer's employees, officers, and directors. KRS 342.690(1). Therefore, if the Transportation Cabinet is a "contractor" under section 342.610(2), the state employee defendants are not liable in tort to plaintiffs as plaintiffs have already received workers' compensation benefits through The Harper Company, Richard Swartz's immediate employer. See U.S. Fidelity & Guar. Co. v. Technical Minerals, Inc., 934 S.W.2d 266, 267 (Ky. 1996).

We agree with the appellants that governmental entities are excluded from the up-the-ladder provisions of the Act. Pursuant to KRS 342.610(2)(b), only "persons" may qualify as a contractor. KRS 342.0011(16) defines a "person" as limited to

any individual, partnership, including a registered limited liability partnership, limited partnership, limited liability company, firm, association, trust, joint venture, corporation, limited liability company, or legal representative thereof.

Because governmental entities are excluded from this definition, the Department, and accordingly its employees, are not afforded up-the-ladder immunity pursuant to KRS 342.610(2)(b). We must presume that had the legislature intended to include governmental entities in the up-the-ladder provisions of the Act, it would have done so by including such entities in the definitional provisions of KRS 342.0011(16).

See, e.g., Louisville Water Co. v. Wells, 664 S.W.2d 525, 527 (Ky.App. 1984) (Stating: "a general rule of statutory construction is that enumeration of particular things excludes other items which are not specifically mentioned.") Inasmuch as the legislature did not so include governmental entities in the up-the-ladder statutory scheme, the circuit court improperly applied this doctrine as a basis for summary judgment.

Finally, we note that there appears to be a rational reason for excluding governmental entities from the definition of contractors for purposes of up-the-ladder liability and concomitant immunity. Those who contract with state entities must comply with the Workers' Compensation Act. See KRS 176.085 and KRS 45A.480.

For the foregoing reasons the judgment of the Boone Circuit Court is reversed and this cause is remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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