FILED
FEB 0 3 2006
SUPREME COURT CLERK

COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2005-SC-000242

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 — **APPELLANTS**

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. NO. 01-CI-001344
APPEAL FROM KENTUCKY COURT OF APPEALS
NO. 2002-CA-001399-MR

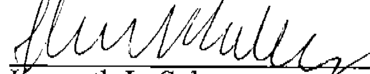
NAVISTAR INTERNATIONAL, A/K/A INTERNATIONAL TRUCK & ENGINE CORPORATION; ALLIED CHEMICAL CORPORATION; AMERICAN STANDARD, IND.; BROWN & WILLIAMSON TOBACCO CORPORATION; BROWN-FORMAN CORPORATION; COLGATE-PALMOLIVE COMPANY; E.I. DUPONT DE NEMOURS; FORD MOTOR COMPANY; GENERAL ELECTRIC COMPANY; KENTUCKY UTILITIES;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

APPELLANTS' REPLY TO APPELLEES' JOINT AND INDIVIDUAL BRIEFS

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was this 2nd day of February, 2006, mailed *via: FedEx* to Clerk, Kentucky Supreme Court, Room 209, Capitol Building, 700 Capital Avenue, Frankfort, KY 40601; and U.S. First Class Mail to Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon Thomas B. Wine, Jefferson Circuit Court, 700 West Jefferson Street, Louisville, KY 40202; and all counsel of record on the attached service list. It is further certified that the record on appeal has not been withdrawn by the Appellants.

SALES, TILLMAN, WALLBAUM CATLETT & SATTERLEY



Kenneth L. Sales
Joseph D. Satterley
Paul J. Kelley
325 West Main Street, Suite 1900
Louisville, KY 40202
Telephone (502) 589-5600
COUNSEL FOR APPELLANTS

INTRODUCTION

The Appellees have misconceived Rehm's arguments regarding how the regular or recurrent issue should be decided. Certainly, there are circumstances where the issue can be decided as a matter of law, either in favor or against the worker. However, the issue should be decided by the jury where there are disputed material facts regarding the nature of the work performed by the worker and the frequency it was performed.

In addition, the Appellees have misconstrued their affirmative obligation to prove that they complied with the requirements of the Workers' Compensation Act. There is no presumption under Kentucky law that purchasing insurance for their own employees satisfies their statutory obligation to persons such as James Rehm.

Furthermore, Rehm is not suggesting that the Workers Compensation Act is unconstitutional. This Court has previously upheld the Constitutionality of the Act. However, the Workers Compensation Act has been unconstitutionally applied to bar Rehm's recovery here. Rather than giving proper effect to the plain language of KRS 342.610 and this Court's opinions in *Fireman's Fund Insurance Company v. Sherman & Fletcher*, Ky., 705 S.W.2d 459 (1986) and *Goldsmith v. Allied Building Components*, Ky., 833 S.W.2d 378 (1992), the lower courts have interpreted the statute incorrectly and applied an impossible standard for workers to overcome workers compensation immunity.

Accordingly, Rehm respectfully request the court to reverse judgment in favor of each of the Appellees and remand to the Trial Court for a jury determination as to factual issues.

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION i

KRS 342.610 .... i, 9, 10, 11, 12, 13, 14, 15, 16, 17

Fireman's Fund Insurance Company v. Sherman & Fletcher, Ky., 705 S.W.2d 459 (1986) .... i, 1, 11, 12, 13

Goldsmith v. Allied Building Components, Ky., 833 S.W.2d 378 (1992) .... i, 1, 2, 10, 13, 16

STATEMENT OF POINTS & AUTHORITIES ii

ARGUMENT 1

A. WHERE MATERIAL FACT DISPUTES EXIST, THE REGULAR OR RECURRENT ISSUE SHOULD BE DETERMINED BY THE JURY 1

B. A JURY COULD REASONABLY CONCLUDE THAT THE WORK REHM PERFORMED ON EACH PROPERTY OWNER'S PROPERTY WAS NOT A REGULAR OR RECURRENT PART OF THEIR BUSINESSES 3

Gordon v. NKC Hospital, Ky., 887 S.W.2d 360, 362 (1994) 4, 8

C. THE PROPERTY OWNERS ARE NOT ENTITLED TO IMMUNITY UNDER THE WORKERS' COMPENSATION ACT BECAUSE THEY HAVE FAILED TO PROVIDE PROOF THAT THEY SECURED WORKERS COMPENSATION INSURANCE FOR REHM 5

Whittaker v. Hardin, Ky., 32 S.W.3d 497 (2000) 5, 6

D. THE APPLICATION OF THE WORKERS COMPENSATION ACT TO BAR REHM FROM RECOVERING IS UNCONSTITUTIONAL .. 9

KRS 342.690 9

Wells v. Jefferson County, Ky., 255 S.W.2d 462 (1953) 9

Kotila v. Commonwealth, Ky., 114 S.W.3d 226, 237 (2003) 11

Clevinger v. Board of Educ., Ky., 789 S.W.2d 5, 9 (1990) 13

E. IT IS THE LEGISLATURE'S RESPONSIBILITY TO DETERMINE WHETHER A CLASS OF PLAINTIFFS SHOULD BE ENTITLED TO MAINTAIN A CAUSE OF ACTION AND WHETHER A CLASS OF DEFENDANTS SHOULD BE ENTITLED TO IMMUNITY FROM A CAUSE OF ACTION 13

Steelvest, Inc. v. Scansteel Serv. Ctr., Ky., 807 S.W.2d 476 (1991) 15, 16

CONCLUSION 16

Kentucky Constitution §14, §54, §241 17

ARGUMENT

A. WHERE MATERIAL FACT DISPUTES EXIST, THE REGULAR OR RECURRENT ISSUE SHOULD BE DETERMINED BY THE JURY.

The Property Owners argue that Rehm's position is inconsistent regarding when the courts should determine the regular or recurrent issue or when it is the jury's function. However, there is nothing inconsistent with Rehm's position. It would be unreasonable for Rehm to suggest that this issue should always be decided as a question of fact when there are circumstances where a jury could draw only one conclusion. For example, in *Sherman & Fletcher, supra*, rough framing carpentry is clearly a regular or recurrent activity of the house building business as a matter of law. However, if an activity only occurred once, by definition, it could not be regular or recurrent as a matter of law. Absent an agreement between the parties, nearly everything in-between should be determined by a jury.[1]

This Court has previously addressed this issue contrary to the Property Owners' assertions. In *Goldsmith v. Allied Building Components*, Ky., 833 S.W.2d 378 (1992), this Court determined that whether an activity is regular or recurrent must be decided by a jury. The Property Owners continually insist that the holding in *Goldsmith* was mere dicta. However, the Court held that if it is determined that the party claiming immunity was up-the-ladder from *Goldsmith's* employer, then the next inquiry would have been whether the work he was performing was a regular or recurrent part of the defendant's business. *Id.* at 381. This Court explicitly held that the defendant must "demonstrate to the satisfaction of the **trier of fact**" that the work was regular or recurrent. *Id.*

One of the reasons why the jury should decide this issue is because of the subjective nature of the determination. The lower courts and federal courts have struggled with this

---

[1] Certainly if the party moving for summary judgment does not submit an affidavit or testimony regarding the nature of the work performed by the worker, summary judgment must be denied. Likewise, if the moving party's affidavits are general and conclusory, summary judgment would not be appropriate.

issue and rendered decisions which contradict this Court's holding in *Goldsmith*. To further compound the problem, the decisions have been inconsistent and have not assisted the trial courts in deciding the issue.

While "regular or recurrent" is a legal standard established by the Legislature, jurors are asked to apply legal standards to factual scenarios everyday. In negligence cases, the trial court provides the jury with instructions, defining negligence, and asks it to determine whether the facts of the case constitute negligence. In murder cases, jurors are instructed as to intent and asked to determine whether or not a defendant had specific intent to commit a murder based upon the facts. In products liability cases, jurors are asked to determine whether a product is defective and unreasonably dangerous. This requires them to be instructed as to the definition of defective and unreasonably dangerous and then asked to apply that standard to the facts.

The regular or recurrent issue is no different. This is not a question of law such as the interpretation of a contract or whether a duty exists. Jurors would be asked to determine whether the facts establish the individual's work to be a regular or recurrent part of the property owner's business. A properly crafted jury instruction would assist the jury in make the determination. Just like defining negligence or defining defective and unreasonably dangerous, the court can instruct a jury as to the meaning of regular and recurrent and then the jury can apply the definition and determine whether a particular activity is regular and/or recurrent.

Accordingly, because there is a dispute of material fact as to whether the work Rehm performed for each of the property owners' regularly or recurrently occurred on their property, this court should reverse the lower courts' decision and remand this case for a jury determination as to all factual issues.

B. A JURY COULD REASONABLY CONCLUDE THAT THE WORK REHM PERFORMED ON EACH PROPERTY OWNER'S PROPERTY WAS NOT A REGULAR OR RECURRENT PART OF THEIR BUSINESSES.

Rehm does not wish to rehash all of the facts set forth in the main brief, but there is a difference between the facts of the case and the Property Owners' characterization of the facts which is important to Rehm's argument. The dispute of material fact involves the distinction between major tearout and installation versus routine maintenance. Rehm performed substantial major construction work at each of the property owners' facilities. The Property Owners have characterized his work as maintenance and submitted affidavits from their representatives who describe maintenance activities. However, tearing out entire assembly lines, conveyor systems, pumps and motors and then installing new systems is not maintenance. Simply because one of the property owners' representatives says that they performed routine maintenance on a regular or recurrent basis, does not mean that the work Rehm performed was either maintenance or regular or recurrent.

Maintenance is an ambiguous term which can carry different meanings. Rehm described in his affidavit and in his deposition specific activities which he performed on each Property Owner's property. The Property Owners' witnesses spoke in general terms stating that they had people performing maintenance on a regular or recurrent basis. They never defined maintenance, or described something entirely different than what Rehm did on their properties. The lower courts just assumed that Rehm's work was the same thing as what the affiants described generally as maintenance or whatever general term they used. The Property Owners argued that Rehm mischaracterized the facts. However, he was the only one that set forth any facts to characterize.

For example, Rehm testified that he participated in a major demolition project at Ford. Tom Feaheny, a former corporate employee of Ford testified about the major changes Ford made to its production line call the "Yuma Project." Feaheny testified that the Yuma Project required an overhaul of its conveyor and assembly system for the purposes of Ford

changing out its product line. James Rehm participated actively in this project. Feaheny stated that Rehm's work on the Yuma Project was not a regular or recurrent activity. There has been no evidence that the Yuma Project occurred more than once. Ford's representative William McKinney stated in his affidavit that it was his understanding that Rapid was contracted to perform repairs, demolition, modification and installation at Ford. He said the projects would vary from year to year and it was essential. He further states that demolition of assembly lines was a regular or recurrent part of Ford's work.[2] He did not present any facts to support his conclusion. Perhaps a jury could find testimony such as that sufficient to conclude Rehm's work was regular or recurrent, but the lower courts should not have dismissed Rehm's case particularly in the face of Feaheny's testimony which clearly disputes McKinney's statements.[3]

The other Property Owners' submitted similar conclusory affidavits and testimony which did not speak to what Rehm did on their respective properties, or only spoke in general and ambiguous terms. In their individual briefs, they failed to reconcile the conclusory nature of their witnesses' statements with the facts of the case.

Immunity pursuant to the exclusivity provisions of the Workers Compensation Act is an affirmative defense which must be proven before the contractor will be granted tort immunity. *Gordon v. NKC Hospital*, Ky., 887 S.W.2d 360, 362 (1994). An affirmative defense is not a burden which the lower courts should take lightly as they have here. The question for the Court to answer, regarding each Property Owner, is whether the jury could reasonably conclude, based upon Rehm's, his co-workers and experts' testimony versus the Property Owners' witnesses' testimony, that the work he performed was regular or recurrent

---

2 See Apx. A to Ford's Individual Brief.

3 Ford attempts to impeach Feaheny's testimony by calling him a disgruntled employee. (Ford's Individual Brief at 9-10). While facts like that make for interesting cross examination, it has no bearing on the issue of regular or recurrent. Feaheny did not recant his statements in his affidavit that the Yuma Project was not a regular or recurrent event. A jury could certainly find in favor of Rehm as it relates to Ford.

part of their business. The Court should ignore the conclusory and general language of all of the witnesses, relying instead on specific facts set forth by Rehm and his witnesses.

Certainly, when viewing the facts in a light most favorable to Rehm, a jury could reasonably find the work he performed on each of the Appellees' properties to be an extraordinary activity not regularly or recurrently performed. Accordingly, this Court should reverse the lower courts' opinions and allow the jury to determine whether the evidence is sufficient to grant the Property Owners' tort immunity.

C. THE PROPERTY OWNERS ARE NOT ENTITLED TO IMMUNITY UNDER THE WORKERS' COMPENSATION ACT BECAUSE THEY HAVE FAILED TO PROVIDE PROOF THAT THEY SECURED WORKERS COMPENSATION INSURANCE FOR REHM.

The Property Owners have failed to offer any proof whatsoever that they secured workers compensation coverage which would have provided coverage to James Rehm in the event of a tragic injury like the one from which he ultimately died. Without any supporting law, they continue to assert that proof of general coverage for their own employees is sufficient to satisfy their affirmative burden.

The Property Owners cite to *Whittaker v. Hardin*, Ky., 32 S.W.3d 497 (2000) for the proposition that the employer must present a prima facie case of coverage, then the burden of going forward with contrary evidence shifts to the employee.[4] However, their citation to *Whittaker* is misplaced and a complete misrepresentation of what that case was about. In *Whitaker,* the employee was injured in an automobile wreck while on duty for the Department of Transportation (DOT). *Id.* at 497-98. She filed an injury claim against the driver of the other car and a workers compensation claim against the DOT. *Id.* at 498. The DOT intervened in the tort claim to recover medical expenses and income benefits it paid. *Id.* The tort case eventually settled. The employee was ultimately awarded money in the workers compensation case as well. The issue in the case involved the allocation of the

---

4 Joint Appellees' Brief at 38.

settlement proceeds from the tort claim to the employer and the special fund. The DOT argued that it was entitled to the entire amount recovered by the employee as a subrogation credit. *Id.* at 498-99.

> The holding which the Property Owners suggest is applicable here is as follows, the burden of proving the affirmative defense of entitlement to a credit is on the employer. Where prima facie evidence of a credit is introduced, the burden of going forward with evidence that a portion of the tort recovery is not available for subrogation credit should be properly placed on the employee. *Id.* at 499.

Insurance coverage was not an issue and neither was the exclusivity provisions of the Workers Compensation Act. Clearly, *Whittaker* has no application to these facts.

Contrary to the Property Owners' position, there is no presumption of coverage for employees of subcontractors such as Rehm. They have to show that their insurance would cover workers like Rehm. The Property Owners erroneously argued that it would be impossible for a contractor to foresee the identities of each subcontractor with whom they may contract, therefore it would be impossible to provide insurance coverage for any individuals employed by the subcontractor.[5] The Property Owners have misconceived Rehm's arguments regarding the proof they must provide to show they are entitled to tort immunity. Rehm never argued that the Property Owners had to name Rehm or Rapid specifically on their policy to prove they secured compensation for him (which they have not proven). Rehm agrees that would be a difficult burden to satisfy. However, they must prove that Rehm is among a class of individuals which their insurance covers.

The Property Owners argue that Rehm ignores the business realities of this issue in that it would be difficult to foresee when they would need a company such as Rapid do work on its property and who they would need, and thus difficult to procure coverage specifically for that contractor. However, the business reality is companies have to follow statutory requirements to conduct their businesses. Rehm will not begin to speculate how many laws

---

[5] Property Owners' Joint Brief at p. 36.

and regulations businesses are required to follow. This is a burden they have undertaken in order to enjoy the benefit of conducting business in this Commonwealth. Merely because something may be burdensome does not mean that it can be avoided.

While the Property Owners may be correct that they could not always foresee when they would need to employ individuals, other than their own employees, to do work on their property, or the identity of the other employees[6], they knew that they would hire such individuals to work on their property. It would not have been difficult for them to identify the types of workers that they anticipated would work on their property and to secure appropriate insurance for those individuals. This is especially true if the Court accepts the position that the work Rehm performed on their properties was a regular or recurrent part of their business. If they ordinarily employed millwrights and other laborers, why would it be difficult and burdensome to identify those trades to their insurance carriers and procure appropriate insurance for them? Clearly, it would not. Not only would it not be difficult, but they are required to do so by law.[7]

The Property Owners know the protection they enjoy by securing appropriate workers compensation for the benefit of all against whom they claim immunity. They should have purchased insurance and had the policy explicitly state that it covered various classes of employees including employees of subcontractors that worked on their property, and then maintained proof of the insurance throughout the years. The task is seemingly simple

---

6 Property Owners' Joint Brief at 38.

7 On page 36 of the Property Owners' Joint Brief, they offer a hypothetical where a production plant that operates three shifts a day, weekends included, suffers a mechanical failure on a key component. They ask whether they should sit idle until Monday waiting for the insurance agent to become available, or must they hire someone to do the repair work gambling that the independent contractor can perform the job without suffering injury. However, the Property Owners' suggestion that it is beyond the capabilities of their underwriter to write a policy which covers subcontractors, to which the Property Owners may become liable, insults the Court's intelligence. It is absurd to suggest that the Property Owners could not procure a policy which covered subcontractors.

especially considering the tremendous benefit they enjoy from satisfying their statutory obligation.

The best proof of insurance coverage would have been the policies themselves along with the declaration pages. None of the Property Owners produced the actual policies they owned. The Court should question why sophisticated companies such as the Property Owners would not maintain proof of adequate coverage when they know the tremendous benefit they gain from showing they owned adequate coverage. The Court can infer that either the evidence never existed because the Property Owners never secured compensation for the benefit of James Rehm and other employees of subcontractors, or that the policies and declarations confirm that they did not secure adequate compensation otherwise they would have been produced.

Some of the Property Owners submitted a policy attached to the affidavit of Kathleen McGrath, counsel for Liberty Mutual, which they claim was representative of the type of policy Liberty Mutual issued during the time Rehm worked on their properties. In her affidavit, McGrath does not point to any provision of the policy which answers the question whether the insurance purchased from Liberty Mutual covered employees of subcontractors. Moreover, Rehm was not entitled to depose McGrath to determine whether the Property Owners received this policy or some other policy.[8] Furthermore, McGrath's affidavit did not state how she has personal knowledge of this issue.

Tort immunity is an affirmative defense. *Gordon, supra*. An affirmative defense demands proof which does not require the courts to guess or speculate as to whether the

---

[8] While Rehm has abandoned the argument for this Court, Rehm was not entitled to conduct discovery regarding the insurance issue. The Property Owners' suggestion that Rehm had ample opportunity to complete discovery is undermined by the fact that many of them submitted new affidavits relevant to this issue for the first time in their replies to Rehm's objection to summary judgment. The Trial Court denied Rehm the opportunity to depose the new affiants on this issue. (Record at 5414-1515).

insurance secured by the Property Owners would have afforded coverage to Rehm. Here the lower courts were too quick to accept the Property Owners' affidavits as sufficient proof of coverage for Rehm particularly when other evidence existed which demonstrated otherwise. For example, Gary Bennett, Director or Custom Accounts for American Standard's insurance carrier, Travelers, testified that it only provided coverage for American Standard employees and no others. (Gary Bennet Depo. at p. 9-10). There was no justification for the lower courts' finding that American Standard secured appropriate coverage in the face of its insurance carrier's admission that its' insurance did not cover employees other than its' own.

Given the effect of the ownership of insurance on Rehm's right to maintain a lawsuit, the evidence must be conclusive to afford the Property Owners' tort immunity as a matter of law. It does a tremendous disservice to Rehm and others similarly situated for the lower courts to accept such flimsy and speculative evidence to afford tort immunity. The evidence presented here was simply insufficient for the lower courts to conclude that the Property Owners had satisfied their obligation to secure insurance as a matter of law. At a minimum, a question of material fact exists regarding the scope of coverage owned by each Property Owner. Thus, the Rehms respectfully request this Court to reverse the lower courts' opinions and remand this case to the Trial Court for a jury determination as to all triable issues.

D. THE APPLICATION OF THE WORKERS COMPENSATION ACT TO BAR REHM FROM RECOVERING IS UNCONSTITUTIONAL

Once again, the Property Owners have misconceived Rehm's arguments. They claim that Rehm is actually challenging the constitutionality of the Workers Compensation Act rather than its application to these facts. Rehm stated in his main brief and reiterates here, that he is not claiming that KRS 342.610 or KRS 342.690 are unconstitutional. *Wells v. Jefferson County*, Ky., 255 S.W.2d 462 (1953), made it quite clear that the Workers Compensation Act is constitutional. Thus, the Property Owners' discussion of the constitutionality of the Workers Compensation Act is meaningless.

However, it is Rehm's contention that it has been applied unconstitutionally to bar his recovery here. Merely because a statute is constitutional, does mean that it cannot be applied unconstitutionally. The lower courts have given a very broad meaning to the "regular or recurrent" language which has resulted in a class of workers, including Rehm, losing their right of recovery in tort in situations which the Legislature has never intended.

The point which the Property Owners obviously missed, is that the lower courts here, and traditionally, have failed to recognize that KRS 342.610 was intended to be a limitation, not an expansion, of up-the-ladder immunity. Otherwise, the Legislature would have omitted the language from the statute and afforded tort immunity to all companies who employ anyone to do anything on their property. This obviously was not the Legislature's intent. The Court of Appeals and Trial Court, made expedient decisions in concluding that the work Rehm performed on each of the Property Owners' properties was regular or recurrent part of their businesses as a matter of law. Rather than applying the law of *Goldsmith* and allowing the jury to decide the issue, the lower courts accepted the Property Owners' self serving conclusory affidavits and rejected Rehm's and his witnesses' testimony and affidavits.

If Rehm is going to lose his constitutional right to recover, the lower courts must give proper effect to the statute and this Court's precedent by properly applying the law. The lower courts have developed nearly unworkable standards wherein everything is regular or recurrent and "part of" a company's business particularly if it occurs more than once and it is "necessary". The lower courts have defined regular or recurrent but this Court has never had the opportunity to do so. The Legislature did not define the term in the statute, and there is no legislative history to suggest a meaning other than the ordinary definition of the words.

In *Daniels, supra*, the Court of Appeals defined "regular" as "customary or normal, or happening at fixed intervals," while "recurrent" means occurring again or repeatedly." *Id.* at 824. Rehm disagrees that this is the correct meaning of either of these terms. Merriam-

Webster New Collegiate Dictionary defines "regular" as "recurring, attending, or functioning **at fixed or uniform intervals**."[9] It further defines "recurrent" as "returning or happening **time after time**."[10] Clearly, if something is "regular", it must occur at fixed intervals. The *Daniels* court suggested that it does not need to occur with the preciseness of a clock or calendar, but it certainly should not occur sporadically. Recurrent is a more difficult standard for the Property Owners because it requires something to happen time after time not merely more than once as *Daniels* suggests. Certainly, given the effect of the exclusivity provisions of the Workers Compensation Act, workers such as Rehm are entitled to a proper definition of "regular or recurrent."

Despite the disparity in the definitions adopted by the Court of Appeals and the plain meaning of the words, the words mean something and must be given effect. The Property Owners criticize Rehm's contention that the "regular" or recurrent" language was intended as a limitation on tort immunity, but have failed to offer any other rationale for the inclusion of the language. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant." *Kotila v. Commonwealth*, Ky., 114 S.W.3d 226, 237 (2003). If it was not a limitation, the words would have been unnecessary. The lower courts and federal courts insistence to broadly interpret KRS 342.610 have rendered the language meaningless and result in an unconstitutional deprivation of workers' rights.

Moreover, there is no indication that the Legislature intended to extend Workers Compensation immunity to situations where the work performed by the worker is nowhere similar to the work of the Property Owners. The Court of Appeals[11] cited to *Sherman and*

---

[9] WEBSTER'S NINTH NEW DICTIONARY (1987).

[10] *Id.*

[11] The Property Owners rely upon this quote in their Joint Brief at p. 12.

Fletcher, supra, for the proposition that "[a]n activity beyond the primary business may still qualify as regular or recurrent." (Court of Appeals Opinion at 9). However, this is a mischaracterization of this Court's holding in *Sherman & Fletcher*. Instead, interpreting KRS 342.610, *Sherman & Fletcher* stated,

> We construe this to mean that a person who engages another to perform a part of the work which is a recurrent part of his business, trade or occupation is a contractor. 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. The business or occupation of *Sherman & Fletcher* was building construction, and rough carpentry is work of a kind which is a regular or recurrent part of the work of the business of building construction. *Id.* at 462.

This Court never said the work could be beyond the company's primary business. It merely said that it did not have to be something that its' own employees primarily or ever performed. The distinction is critical. The fact that a company's own employees do not do something does not mean it is beyond the primary activities of the company. *Sherman & Fletcher* is a perfect example of this fact. Building contractors often contract out various aspects of the construction of a home to subcontractors. Building contractors' business is building homes. Rough carpentry is a part of the home construction business, which no one would deny. *Sherman & Fletcher* was an easy application of the statute.

However, there must be a limitation as to what is considered "part of" a business or trade. While various machinery and equipment may be necessary to an appliance, cigarette or car manufacturing plant, tearing out and installing conveyor systems, pumps and motors is not "part of" the business of manufacturing appliances, cars or cigarettes. Pursuant to the Property Owners' rationale everything would be a part of the business. This logic simply does not give any meaning to the statute's language. It has to be a "part of" the business of each Property Owner.

The Property Owners accuse Rehm of interpreting it too narrowly, but there is justification for a narrow application which is the plain language of the statute. "Another cardinal principal of statutory construction is that words must be given their ordinary

meaning unless a contrary intention appears." *Clevinger v. Board of Educ.*, Ky., 789 S.W.2d 5, 9 (1990). The only justification for the Property Owners' overly broad interpretation of KRS 342.610 arises from misquoting this Court's holding in *Sherman & Fletcher*. Had the Legislature intended such a broad application of the statute it would have used less restrictive language.

By broadly interpreting and applying KRS 342.610, the lower courts have unconstitutionally denied Rehm his right to maintain an action in tort against negligent parties responsible for causing or contributing to his mesothelioma. While this Court has previously upheld the constitutionality of the Workers Compensation Act, it has not condoned applying it in contradiction to the Act's requirements. Instead, this Court has held that whether something is regular or recurrent must be proven to the "satisfaction of the trier of fact." *Goldsmith, supra.* Rehm has a constitutional right to have this case heard by a jury to make that factual determination. A jury could reasonably conclude that the work Rehm performed on the Property Owners' properties was neither "regular or recurrent" nor "part of" of their businesses.

Accordingly, Rehm respectfully requests the Court to reverse summary judgment and remand this case for a jury determination as to all factual issues.

E. IT IS THE LEGISLATURE'S RESPONSIBILITY TO DETERMINE WHETHER A CLASS OF PLAINTIFFS SHOULD BE ENTITLED TO MAINTAIN A CAUSE OF ACTION AND WHETHER A CLASS OF DEFENDANTS SHOULD BE ENTITLED TO IMMUNITY FROM A CAUSE OF ACTION.

The Property Owners further argue that, "[a]llowing plaintiffs like the Rehms to sue property owners and proceed to a jury in every case has a real-world consequence of extracting settlements, despite the fact that the Act already provides an adequate remedy of law."[12] In addition, they argue that Rehm's insistence that the courts give meaning to the

---

[12] *Id.* at 19.

plain language of KRS 342.610 will have a dramatic impact on Kentucky law. They further argue that should the Court reverse the lower court's decision regarding the regular or recurrent issue, then every property owner will henceforth be named in every toxic tort case.[13]

The Property Owners want the Court to make a policy determination that they should not be a class of defendants in asbestos cases. In so arguing, they inexplicably direct the court to cases and articles that have commented on the number of asbestos cases in America. (Appellees' Joint Brief at pp. 19-20). However, none of the cases cited by the Appellees did anything to limit liability for premises liability defendants. The problem as these courts suggested was the volume of cases. There is no suggestion by any of these courts that a category of defendants needs to be eliminated as a matter of law as suggested by the Property Owners.

The Property Owners are attempting to divert the Court's attention away from the actual issue which is whether the work Rehm performed on the Property Owners' property was a regular or recurrent part of their businesses and whether they secured appropriate insurance coverage for Rehm. Their discussion regarding the mass number of asbestos cases is irrelevant. The Judiciary is not entitled to make broad policy decisions limiting the liability of an entire category of defendants. Only the Legislature is entitled to deal with this alleged problem, which it has not as of this date. Because the Legislature has not provided blanket immunity to property owners in asbestos cases, the Property Owners' suggestion that this Court must find Rehm's work on their property to be regular or recurrent as a matter of law in order to avoid voluminous litigation is simply inappropriate and must be rejected.

The position advocated by the Property Owners suggest a "kill the messenger" attitude. Is asbestos litigation the fault of innocent workers who contracted a deadly disease, or the fault of manufacturers, distributors and those parties who maintain asbestos infested

---

13 *Id.* at 21.

facilities with knowledge of the known hazards and risks associated with exposure to asbestos? The Property Owners' arguments fail to take into account the hundreds of thousands of individuals in this country who have been stricken with horrific, debilitating, and often times deadly effects of asbestos. The large majority of these persons have been exposed to asbestos while working at facilities such as those owned by the Property Owners. To limit individuals like James Rehm's right to obtain a remedy from premises liability defendants, such as the property owners, promotes further negligence and wanton conduct by similarly situated property owners.

The Property Owners further argue that the Court should affirm the lower courts' holdings because, should it reverse, it will have the effect of requiring every case regarding workers' compensation exclusivity to go to trial, or having the effect of extracting settlements. One point to be made is that Kentucky has a well established policy that summary judgment should be granted cautiously. *Steelvest, Inc. v. Scansteel Serv. Ctr.*, Ky., 807 S.W.2d 476 (1991). The fact that a case or a substantial amount of cases may have to go to trial regarding the issue of workers compensation exclusivity is certainly not a reason to affirm an overly broad and unconstitutional application of the exclusivity provisions of the Workers Compensation Act, which fails to recognize that KRS 342.610 is a limitation on tort immunity not an expansion. Avoiding numerous trials, for the sake of avoiding them, is not the purpose of summary judgment. Summary judgment is intended to avoid a trial on an issue that no reasonable jury could find in favor of the plaintiff. *Steelvest, supra*, at 482. Where a jury could find in favor of the plaintiff on an issue, the case should proceed to trial.

A reversal of the lower courts would not have the wide sweeping implications that the Property Owners suggest. As the Court is likely aware from asbestos cases it has decided in the past, the determination would not end merely because a trial court denies summary judgment on the regular or recurrent issue. The plaintiff still has an obligation to demonstrate to the court the possibility of success on the merits of the case. Certainly, this

does not guarantee a trial or settlement.

Furthermore, the fact that a reversal may have the effect of "extracting" settlements is certainly not a reason for avoiding the law. Parties make determinations everyday to settle cases to avoid the risks of going to trial. A denial of summary judgment may factor into a party's decision to settle a claim. However, the fact that the Property Owners may be more likely to settle a claim is no reason not to follow the law, and has no bearing on the issues here.

What a reversal would guarantee is that property owners or other contractors will not be dismissed from a case merely because their legal counsel drafted an affidavit and had it signed by an someone who makes a legal conclusion that work, with which he or she may or may not have been familiar, was a "regular or recurrent" part of the their business. A reversal will require the property owners to match the work which the worker actually performed on its property with like work also performed on its property. It will require the property owners to demonstrate that it would be impossible for a jury to find in favor of the worker on the regular or recurrent issue before being dismissed from the case, which would not only afford meaning to KRS 342.610, but also properly recognize the stringent burden necessary to overcome to be granted summary judgment as set forth by this Court in *Steelvest, supra.*

Accordingly, the Court should reverse the lower courts' opinions.

CONCLUSION

Rehm respectfully requests this Court to reverse the lower courts' opinions that the work he performed on the Property Owners' property was a regular or recurrent part of their businesses as a matter of law. The lower courts' decisions were contrary to this Court's holding in *Goldsmith, supra*, which declared the regular or recurrent issue to be a question for the trier of fact. Moreover, immunity pursuant to the exclusivity provisions of the Workers Compensation Act is an affirmative defense which requires more proof than the self

serving conclusory affidavits submitted by the Property Owners. The lower courts erred in weighing the testimony and making credibility determinations in favor of the Property Owners.

Moreover, the lower courts' here and traditionally, have broadly interpreted KRS 342.610 regarding who is considered a statutory employer. The statute was intended to be a limitation on up-the-ladder immunity, not an expansion. Otherwise, the "regular or recurrent" language and the "part of" language contained in the statute is meaningless. The Property Owners' reading of the statute results in nearly everything being a regular or recurrent part of a company's business which clearly was not the Legislature's intent.

Furthermore, the Property Owners have not satisfied their stringent burden of proving that they secured workers compensation insurance which would have provided coverage to James Rehm. The proof each of them submitted requires the courts to presume or speculate that the insurance covered Rehm, which is not sufficient for the purposes of summary judgment. There is no presumption under Kentucky law that the general coverage secured by the Property Owners, extends to persons other than their own direct employees, which does not include Rehm.

The lower courts' application of the Workers' Compensation Act to bar Rehm's civil suit was unconstitutional. Immunity pursuant to the exclusivity provisions of the Workers' Compensation Act is a harsh result for the workers such as Rehm. The trial courts, appellate courts and federal courts application of the Act to bar a lawsuit should not occur unless the material facts are not in dispute. In most situations, such as this case, the issue of up-the-ladder immunity should go to the jury unless it would be impossible for the jury to find in favor of the worker [or the property owner] on the issue. The lower courts' insistence to make factual determinations and draw conclusions therefrom have categorically eliminated causes of action which existed at common law in contravention of Sections 14, 54 and 241 of the Kentucky Constitution.

Accordingly, Rehm respectfully requests the Court to reverse the Trial Court's grant of summary judgment in favor of all sixteen (16) Property Owners and remand this case for a jury determination as to all factual issues.

Respectfully submitted,

SALES, TILLMAN & WALLBAUM
CATLETT & SATTERLEY

Kenneth L. Sales
Joseph D. Satterley
Paul J. Kelley
1900 Waterfront Plaza
325 W. Main Street
Louisville, KY 40202
(502) 589-5600

JAMES REHM - SERVICE LIST

Clerk, Kentucky Court of Appeals
360 Democrat Drive
Frankfort, KY 40601

Hon Thomas B. Wine
Jefferson Circuit Court, Div. 8
700 West Jefferson Street
Louisville, KY 40202

James J. Montgomery
Montgomery, Rennie & Jonson
36 East Seventh Street, Suite 2100
Cincinnati, OH 45202-4413
513-241-4722
513-241-8775 Fax
Counsel for Navistar International Corporation (Int'l Truck & Engine Corp.)

Scott T. Dickens
Tachau, Maddox, Hovious & Dickens, PLC
National City Tower
101 South Fifth St., Suite 2700
Louisville, KY 40202-3116
502-588-2005
502-588-2020 Fax
Counsel for General Electric Company

Byron N. Miller
Thompson, Miller & Simpson
600 W. Main Street
Suite 500
Louisville, KY 40202
502-585-9900
502-585-9993 Fax
Counsel for Ford Motor Company

Rosemary D. Welsh
Vorys, Sater, Seymour and Pease
Suite 2100, Atrium Two
221 East Fourth Street
P.O. Box 0236
Cincinnati, OH 45201-0236
513-723-4487
513-852-8449 Fax
Counsel for B.F. Goodrich

Rebecca Schupbach
Wyatt, Tarrant & Combs
500 W. Jefferson, Suite 2800
Louisville, KY 40202
Counsel for Brown-Forman Corp. and Colgate-Palmolive Co.

Walter M. Jones
Angela C. McCorkle
Cynthia Blevins Doll
Wyatt, Tarrant & Combs
500 W. Jefferson Street, Suite 2800
Louisville, KY 40202
502-585-3321
502-581-8123 Fax
Counsel for E.I. Du Pont; Rohm & Haas

Edward H. Stopher
Scott A. Davidson
Boehl, Stopher & Graves
2300 Aegon Center
400 West Market Street
Louisville, KY 40202
502-589-5980
502-561-9400 Fax
and
Sheryl G. Snyder
Frost Brown Todd, LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202
Counsel for LG&E and Kentucky Utilities

Richard H.C. Clay
David T. Schaefer
Woodward, Hobson & Fulton
National City Tower
101 South Fifth Street, Suite 2500
Louisville, KY 40202
502-585-3321
502-581-8123 Fax
Counsel for Philip Morris; Lorillard

Wendell S. Roberts
Donald Yates
Gray, Woods & Cooper
510 16th Street
P.O. Box 70
Ashland, KY 41105-0070
606-329-2121
606-324-0751 Fax
Counsel for Allied Chemical Corp.

J. Mark Grundy
Greenbaum, Doll & McDonald
3500 National City Tower
101 South Fifth Street
Louisville, KY 40202
502-589-4200
502-587-3695 Fax
Counsel for American Standard

John B. Moore
Phillips, Parker, Orberson & Moore
716 West Main Street, Suite 300
Louisville, KY 40202
502-583-9900
502-587-1927 Fax
Counsel for Reynolds Metals Co.

John D. Epps
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200
Counsel for Reynolds Metal Company