

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2005-SC-000242-DGE
(2002-CA-001399)

DEBBIE ELLEN REHM, INDIVIDUALLY
AND AS EXECUTRIX OF THE ESTATE
OF JAMES DAVID REHM, ET AL.

APPELLANTS

v.

JEFFERSON CIRCUIT COURT
NO. 01-CI-001344

NAVISTAR INTERNATIONAL
CORPORATION, ET AL.

APPELLEES

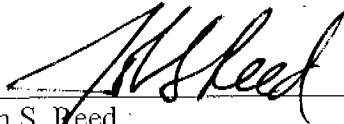
**BRIEF OF KENTUCKY CHAMBER OF COMMERCE, ASSOCIATED INDUSTRIES
OF KENTUCKY, GREATER LOUISVILLE, INC., AND COALITION FOR
LITIGATION JUSTICE, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

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SUMMARY OF THE ARGUMENT

The “up the ladder” doctrine deserves a broad reading, not a hostile one. The doctrine was clearly intended to encompass any circumstance under which it would be reasonable to include an “employer” within the framework of workers’ compensation. Under KRS § 342.610(2), any work that is a “regular” or “recurrent” part of the contracting employer’s business activities -- part of the business, occupation or trade -- is properly considered to be subject to up the ladder liability and associated immunity. That is the case here. The Court should address the issues in this case in a manner consistent with these principles.

ARGUMENT

I. The Workers’ Compensation System Provides The Proper Vehicle For Addressing Asbestos Injury In The Workplace

The United States Supreme Court has observed that this country is in the midst of an “asbestos-litigation crisis,” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997), as a result of an “elephantine mass” of claims. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). The crisis has not abated. Asbestos claims continue to be filed.¹

The filing of asbestos claims is evident in two dimensions. It is evident *vertically*. The number of plaintiffs continues to increase; many new cases involve plaintiffs who have not suffered any impairment. More important for present purposes, however, the proliferation of asbestos claims is also evident *horizontally*, with each claimant now

¹ See generally Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001); Stephen J. Carroll *et al.*, *Asbestos Litigation* (RAND Inst. for Civil Justice, 2005).

filing claims against an ever-widening universe of peripheral defendants, many of which have no connection to the plaintiff's alleged disease.²

The "traditional" asbestos defendant was involved in asbestos production or production of asbestos insulation, and plaintiffs often alleged significant exposure to a defendant's products. The basis for the suit was generally products liability. As reflected in case law that developed over the course of much of the last century, society has chosen to place upon the manufacturer and seller of products a duty to assure the safety of products that it makes and sells.

However, the range of defendants in asbestos cases has expanded beyond those responsible for asbestos products, producing exponential growth in the dimensions of asbestos litigation and compounding the burden on the courts. The dockets reflect that we are moving far beyond the era in which manufacturers and producers of friable asbestos products, raw asbestos or asbestos insulation, are the defendants. Plaintiffs who have heretofore pursued claims against traditional products liability defendants are now pursuing additional sources of recoveries.³ There are now more than 8,500 asbestos defendants,⁴ up from only 300 in 1982.⁵

2 Plaintiff's attorney Richard Scruggs has characterized the trend of asbestos litigation as an "endless search for a solvent bystander." *Medical Monitoring and Asbestos Litigation - A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002).

3 See generally Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14 ("the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.").

4 See Deborah R. Hensler, *California Asbestos Litigation - The Big Picture*, Columns - Asbestos, Aug. 2004, at 5.

5 James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* 5 (RAND Inst. for Civil Justice, 1984).

Because every peripheral defendant who can be named in an asbestos case provides a potential additional source of some recovery, there is certainly no *disincentive* for a plaintiff to sue as many defendants as can be named under any plausible theory, although the consequences for defendants are dramatic. The sheer number of claims makes it difficult for the courts to address the specifics of any one of them.

Among the current defendants in asbestos cases are business premises owners subjected to suit on the theory that workers hired to perform services in their facilities allegedly have come into contact with asbestos while performing those services. The notion that a plaintiff can sue a series of defendants -- each owner of a factory in which he or she worked, for example -- for workplace injuries and thus obtain *seriatim* settlements against each of them, has sparked a marked increase in such claims. Allowing such claims adds not only size and complexity, but irrationality and inequality, to the asbestos landscape. One can hardly justify the different treatment of two identically injured plaintiffs -- one who happened to work at 12 factories (and is able to extract, for example, \$500 settlements from each of those 12 companies if such claims are allowed to proceed), and another who worked at 3 factories (and can only extract \$500 settlements from those 3 companies) to supplement their workers' compensation recovery.

This attempt to expand the range of asbestos defendants in connection with workplace asbestos exposure runs headlong into established legal principles historically barring such claims. Long ago, this country established an alternative, comprehensive mechanism to provide compensation for workplace injury. That mechanism is a more

fair, efficient, and effective tool for providing compensation to injured workers than is civil litigation.

Workers' compensation was designed to remove workplace injury from the often-arbitrary inequalities produced by litigation in a common law based, highly adversarial tort system, by eliminating common law defenses, reducing legal fees, and expediting claims. Under the tort system, even assuming identical injuries, some employees could obtain large judgments, while some obtained none at all; some could collect on their judgments, others could not. Moreover, the litigation process is costly for everyone -- both employees and employers -- with vast sums spent on adversarial warfare. Workers' compensation eliminates all that by substituting a statutorily-established recovery for workplace injury. It is designed to eliminate common law actions for personal injury growing out of industrial operations. *See Union Underwear Co., Inc. v. Scarce*, 896 S.W.2d 7, 8 (Ky. 1995). It is an exclusive mechanism, designed to provide a unitary recovery through a single proceeding. Thus, while it might be tactically advantageous in the tort litigation system for claimants (and their lawyers) to file innumerable claims against different defendants, hoping to extract settlements from each, that notion is antithetical to a founding tenet of workers' compensation, which was designed to provide an exclusive and unitary remedy for workplace injury.

In sum, within the workplace, there emerged a consensus for replacing the inequalities, inefficiencies, and costs of tort litigation with a structure seen as fair both to employers and to employees. Workers' compensation was thus designed to provide a substitute for -- not a supplement to -- the tort system in the field of workplace injury.

The exclusivity of the remedy reflects a basic *quid pro quo*. See *Washington Metro. Transit Author. v. Johnson*, 467 U.S. 925, 931 (1984). The employer is relieved of the cost of having to defend itself in tort suits and, in exchange, the employer assumes a broader range of potential liability without fault.

The use of workers' compensation for workplace injury works effectively for all participants only because it is a balanced, closed system. An employee cannot claim benefits from one employer and pursue a tort suit against another. To allow an employer, at its whim, to decline benefits to a particular employee, because that employer believes that it can fare better in the tort system, would undermine the premise of the system. Likewise, to allow an employee to collect workers' compensation benefits, yet also retain the right to maintain a tort suit against an employer operating within the system, would undermine its basic premise.

Indeed, in Kentucky, workers' compensation ensures that even if a "direct employer" fails to provide the requisite protection for its employees, responsibility runs "up the ladder" to the next higher contractor-employer. See *Matthews v. G&B Trucking, Inc.*, 987 S.W.2d 328, 330 (Ky. App. 1998) (citing *Tom Ballard Co. v. Blevins*, 614 S.W.2d 247, 249 (Ky. App. 1980)). By participating -- by assuming up the ladder responsibility, and by contributing to workers' compensation costs for any subcontractor it hires -- an employer frees itself from the tort system. Having imposed the costs of workers' compensation on employers, to then expose them to the risks and costs of the tort system would be to force employers to pay twice for the same liability.

To be sure, workers injured on the job can, in certain limited circumstances, supplement their workers' compensation recovery with *certain* types of tort suits. For example, where the legal requirements can be met, courts permit an employee who has collected workers' compensation to maintain a product liability suit against the manufacturer of a dangerous product that caused the injury. But the reason such a suit can be maintained without undermining workers' compensation is because the *product manufacturer* defendant is not part of the workers' compensation mechanism *vis a vis* the employee. The product manufacturer simply cannot be made directly or indirectly responsible under the workers' compensation system.

But the same cannot be said in connection with the cases now before the Court. Defendants in these cases fully participate in the workers' compensation system.

A key issue in this case is whether certain statutory language, "regular or recurrent," should receive broad or narrow treatment. This issue is critical because the interpretation of the statutory language determines the scope of workers' compensation as the exclusive remedy for workplace injuries.

Specifically, plaintiffs have advocated a cramped definition of "regular" or "recurrent" under KRS § 342.610(2) that would eliminate the workers' compensation defense in many cases where it should apply. Their approach reflects a hostility to including up the ladder contractors within the workers' compensation system, all under the guise of the assertion that a contractor's protection from tort suits should be strictly construed. But such hostility is fundamentally misdirected. The provisions of the workers' compensation law which address the basic scope of workers' compensation

should be *broadly* construed to include within it all who may reasonably be asked to participate. Given the broad purposes of workers' compensation, and the desire to ensure the fullest coverage under that program for both employees and employers, the real question is simply whether it is appropriate to include the particular employer within the scope of the workers' compensation system as someone who may be held potentially responsible for providing compensation to individuals at that work site. Because the defendants here are all properly placed within the compensation framework, the exclusivity provisions of the workers' compensation law necessarily bar any effort to subject them to civil litigation.

Under plaintiffs' approach, *some* employees would be remitted to their workers' compensation remedies for workplace injuries, whereas others would be afforded an opportunity to circumvent the bar. The introduction of such inequalities in the treatment of similarly situated employees would fundamentally undermine the fairness of workers' compensation as conceived by the General Assembly. :

II. There Are Important Reasons For The Court To Protect Workers' Compensation By Ensuring That Workers Are Treated Equally

The approach of the plaintiffs here relies upon the assumption that workers' compensation was designed primarily to benefit employees and that it now needs fixing -- or, at least, liberalization -- because, according to the plaintiffs, the current workers' compensation regime under-compensates workers injured on the job. As a characterization of historic fact, that notion embodies a half-truth. The workers' compensation approach reflected an historically fair balance: Common law doctrines made it difficult for employees to recover against employers in the tort system; workers'

compensation provided a swift and fair substitute; in exchange for surrendering certain defenses, employers were freed from both the expense of the tort system and the risks of tort system damages. *See generally Washington Metro. Transit Author.*, 467 U.S. 925 (1984).

Plaintiffs suggest, however, that things have changed and that the balance has shifted. Modern tort doctrines -- and the economics of modern tort litigation -- supposedly make it much easier to recover in the tort system. Moreover, the dimensions of the recoveries now available in the tort system -- whether through a single jury verdict or through *seriatim* settlements from numerous defendants -- would (in plaintiffs' view) dwarf anything that the General Assembly could have imagined in creating workers' compensation. Therefore, plaintiffs say, what seemed like a fair trade-off as conceived by the General Assembly, no longer looks like such a good deal. According to the plaintiffs, faced with this modern imbalance, the courts should take the initiative and chip away at the basic structure of workers' compensation around the margins, allowing workplace tort suits to proceed whenever some basis for the tort suit can be found.

That approach is fundamentally wrong. The General Assembly established a comprehensive structure for workplace compensation. It established that structure as an exclusive alternative to the tort system. If the structure needs fixing, then it is for the General Assembly to remodel it. Indeed, if compensation levels are now too low (relative to what may be available in the tort system), the remedy is not judicial deconstruction of the system itself. Just as the courts should not change the compensation available under workers' compensation, they should not revise it to

compensate for any perceived inadequacy of the available compensation. The responsibility lies in a different branch of government. Of course, in dealing with the suggestion that workers' compensation provides recoveries that are too low, and thus unfair, the General Assembly may believe, and take into account, that it is the tort system itself that is unfair.

Indeed, the General Assembly is best situated to implement such reforms. As reflected in this case, the plaintiffs' restrictive approach would have the effect of fortuitously allowing *some* workers access to the tort system to supplement their workers' compensation recoveries, while leaving many others, similarly situated, with only the compensation the General Assembly intended. Such inequality between similarly-situated employees undermines workers' compensation -- and only serves to underscore that if people believe that it needs fixing, they must bring their complaints to the General Assembly, which is in a position to weigh the equities and institute any necessary reforms.

**III. There Are Important Reasons For The Court To Reaffirm
The Legislatively-Established Mechanism For Providing
Compensation To Injured Workers**

Under the legislatively-designed *quid pro quo*, workers receive compensation and, in return, they relinquish their right to recover for workplace injuries in tort. Employers surrender certain defenses and, in return, they are protected from tort suits and tort liability. *See Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 453 (N.D. 1994) (“[workers’ compensation] in effect represents a legislatively created ‘settlement’ of claims between injured workers and their employers. Both sides have forfeited certain

common-law rights to implement the social purposes of the act.”). The system furthers the interests of both employers and workers by providing compensation far more swiftly, equitably, and reliably than the tort system, and generally with significantly lower transaction costs. *See King v. Shelby Rural Elec. Coop. Corp.*, 502 S.W.2d 659, 663 (Ky. 1973). Moreover, it promotes justice and furthers broad societal objectives: It relieves the burden on the court system. It promotes the equal treatment of similarly injured individuals.

The restrictive approach advocated by the plaintiffs here would undermine workers’ compensation in important ways. We highlight a few of them.

1. *The possibility that an employee’s direct employer would be unwilling or unable to provide compensation was considered a significant problem under workers’ compensation laws as originally conceived.* Workers’ compensation was aimed at guaranteeing recovery to the injured worker. Thus, employer responsibility was to run “up the ladder” to require higher level contractors to likewise guarantee payment to injured workers. The beneficial purpose of up the ladder responsibility mandates a broad reading of the statutory provisions. That broad purpose is reflected in the words used: responsibility runs up the ladder whenever the hiring was for work that is “of a kind” that is a “regular” or “recurrent” part “of the [employer’s] trade, business, occupation, or profession.” KRS § 342.610(2). To reach any employer who might reasonably be asked to bear responsibility, the law includes work in connection with professional or business activities. The law was designed to exclude only those infrequent hirings -- conceivably non-business hirings -- where it would be unfair to include the contractor as a potentially

responsible party. Because the “up the ladder” approach is designed to guarantee employees compensation for injuries, a broad reading of the statute is appropriate. That we are here focusing on the flip side of that guarantee -- the tort suit bar that mirrors the statutory responsibility to ensure payment to injured workers -- does not change the broad intent, and consequently the broad protective reading that the General Assembly necessarily intended for this provision.

2. The employers here already bear the cost of workers’ compensation.

Workers’ compensation premiums are necessarily factored into the price of the underlying contracts. *See, e.g., Privette v. Superior Court of Santa Clara County*, 854 P.2d 721, 728 (Cal. 1993) (premises owner “is indirectly paying for the cost of [workers’ compensation] coverage, which the contractor presumably has calculated into the contract price.”); *Zueck v. Oppenheimer Gateway Props.*, 809 S.W.2d 384, 390 (Mo. 1991) (“cost of the workmen’s compensation insurance will be included by the contractor in his contract price for the work, and so will in any case ultimately be borne by the defendant who hires him.”). Requiring premises owners also to bear the costs of tort liability for the same occupational injury is inconsistent with the societal *quid pro quo* underlying workers’ compensation and is unfair because it makes premises owners pay twice -- or more than twice, considering the guarantee of payment at issue here -- for the

same workplace injury.⁶ Indeed, it would be particularly unfair where, as here, defendants have done nothing more than hire an independent contractor and rely upon that contractor's expertise to perform the work and to supervise, control, and protect its own employees.

3. *Workers' compensation is designed to ensure fair and equal treatment among and between injured workers.* There is no reason why some persons injured in the workplace should enjoy enormous recoveries achieved through the vagaries of the tort system, while others do not. Uniformity and consistency should guide compensation systems. Yet the plaintiffs' approach would necessarily create inequality. For example, under plaintiffs' approach, some employees of defendants' contractors would be able to collect from workers' compensation, and then again from defendants in the tort system. At the same time, a direct employee of the defendants, injured in an identical way at the same workplace, would be limited to a workers' compensation recovery.

The inequalities created by the tort system are manifest even among employees permitted to pursue tort suits. Employees who perform a type of work that the court views as "recurrent or regular" for one contractor would be barred from the tort system, whereas another employee, performing precisely the same work for a different employer, could both collect workers' compensation and pursue a tort remedy if the court viewed

6 Other courts have made the same observation. See *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445, 450 (N.D. 1994); *Dillard v. Strecker*, 877 P.2d 371, 385 (Kan. 1994); *Wagner v. Cont'l. Cas. Co.*, 421 N.W.2d 835, 843-44 (Wis. 1988); *Peone v. Regulus Stud Mill, Inc.*, 744 P.2d 102, 106 (Idaho 1987); *Jones v. Chevron USA*, 718 P.2d 890, 899 (Wyo. 1986); *Johns v. New York Blower Co.*, 442 N.E.2d 382, 388 (Ind. Ct. App. 1982); *Tauscher v. Puget Sound Power & Light Co.*, 635 P.2d 426, 430 (Wash. 1981); *Vagle v. Pickands Mather & Co.*, 611 F.2d 1212, 1218 (8th Cir. 1979); *Eutsler v. United States*, 376 F.2d 634, 636 (10th Cir. 1967).

that work as non-recurrent and irregular for a different employer. Moreover, some workers, who work in many "premises," would fortuitously be able to file suit against, and command settlements from, dozens of contractors; others, injured in the same way, might only be able to bring suit against one, or none.

4. *Workers' compensation was also intended to promote workplace safety.*

Because employers cannot (under workers' compensation) avoid liability for worker injuries (as they could, given the theories of recovery and defenses available at common law), employers have every incentive to ensure a safe workplace. Plaintiffs' approach to the issues would have the ironic effect of undermining workplace safety. Stripping the business employer of immunity if it subcontracts certain work will create disincentives to subcontracting. Instead, to preserve immunity, the employer will opt to use its own employees wherever possible -- while potentially sacrificing the special expertise available by hiring a subcontractor. As the Court explained in *Ralston Purina Co. v. Farley*, 759 S.W.2d 588, 591 (Ky. 1988):

If the employment of an independent contractor with expertise in a particular field results in the imposition of liability upon the owner, the temptation will exist for the owner to accomplish the work with his own employees, even though they may lack the particular skills needed; because, in such case, workers' compensation would be the only remedy of the employee.⁷

⁷ See also *Tauscher*, 635 P.2d at 431; *Zueck*, 809 S.W.2d at 387-88; *Dillard*, 877 P.2d at 385; *Wagner*, 421 N.W.2d at 842.

Specialized employees, available through a contractor, are likely to come equipped with greater knowledge and training for specialized tasks. With additional skill and experience comes the ability to avoid injuring oneself and others. By having the work performed by less skilled employees, rather than contracted out, premises owners may be making the worksite less safe, particularly for their own employees.

5. *There is simply no need to create tort liability.* Where the injured worker is eligible to receive workers' compensation benefits, tort liability is not *necessary* to ensure that the injured worker is adequately compensated. *See, e.g., Privette*, 854 P.2d at 723 (tort recovery from landowner "advances no societal interest that is not already served by the worker's compensation system"); *Ray v. Schneider*, 548 A.2d 461, 465-66 (Conn. App. Ct. 1988); *Zueck*, 809 S.W.2d at 387-89; *Wagner*, 421 N.W.2d at 842-44. To the contrary, the General Assembly has made a judgment regarding an appropriate level of compensation for an occupational injury where that compensation is provided swiftly and on a no-fault basis. Because such compensation is provided promptly through workers' compensation, the "need" to provide compensation cannot justify imposing upon employers, such as those in this case, the substantial additional costs of being forced to participate in a tort-based system. *See Privette*, 854 P.2d at 729-30.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,



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