

“pursuant to the doctrine of *respondeat superior* and as employer on the job site . . . Smith is liable for any and all acts of negligence of the defendant Carroll. Alternatively, plaintiff avers that Pope employed for the construction and pursuant to the doctrine of *respondeat superior* and as employer on this job site the defendant Pope is liable for the negligence of the defendant Carroll, and their [sic] own negligence.”

It is further alleged that on August 12, 1994 the plaintiff’s decedent was electrocuted on a construction site at Pope’s and was engaged in construction work within the meaning of the Tennessee Occupational Safety and Health Act, TENN. CODE ANN. § 50-3-101, *et. seq.* The decedent was using a power tool furnished by Carroll, supplied with power through an extension cord plugged into an outlet which was not grounded, while standing on a metal ladder provided by Pope. The connection between the extension cord and power tool partially separated and the exposed prongs came into contact with the metal ladder. The decedent touched the frame work of the greenhouse and was electrocuted.

The plaintiff alleges that the defendants failed to provide the decedent a safe place to work and provided unsafe electrical service, since there was no ground fault interceptor protection, in violation of the National Electric Code which requires that all 125 volt receptacle outlets shall have ground fault circuit interrupter protection for personnel, and that portable ladders shall have non-conductive side rails.

The plaintiff further alleges “that the defendants have failed to secure payments of workers’ compensation as required by the Tennessee Workers’ Compensation Law and that accordingly the defendants may not assert various defenses as provided by TENN. CODE ANN. § 50-6-111.”

Pope filed a motion for summary judgment alleging only that there was no genuine issue of material fact, and that it was entitled to judgment as a matter of law, supported by the affidavit of James Michael Pope, its President. He testified that he contracted Smith, manufacturer of greenhouses, and orally agreed to purchase a number of greenhouses to be supplied, delivered and installed by Smith, who in turn agreed to subcontract the installation to a construction firm it had used on other occasions.

Pope testified that he learned the identity of the construction firm, Carroll, when the job began in July 1994. He further testified that although Carroll had a number of aluminum ladders, he had no objection to one of his being used, and offered no objections to the use of the electrical outlets in Pope's warehouses to operate equipment. He admitted that one outlet used by the decedent had no ground fault circuit interruption protection, and testified that Pope's exercised no control over the erection of the greenhouses.

The motion was overruled and Pope filed its answer, denying all allegations of negligence or liability based on *respondeat superior*. By a separate paragraph, Pope

“ . . . would show that it has, and did have at the time of this project, workers' compensation coverage for its own employees, but that this coverage would not inure to the benefit of plaintiff, and that it would not be required to have such coverage.”

The defendant Smith admitted that it contracted with Pope to sell it a greenhouse, but denied that it subcontracted with Carroll as alleged. It alleged that it merely advised Pope that Carroll constructed greenhouses and was competent to do so.

The defendant Carroll alleged that it constructed the greenhouses for Pope, but that the decedent was an independent contractor on the particular job.

Carroll alleged that Pope had workers' compensation coverage and had made demand upon it to pay a portion of the premiums therefor, and averred:

“ . . . that in the event Pope received a workers' compensation policy that said policy inured to the benefit of the plaintiff and would be the plaintiff's exclusive remedy ”

By particular paragraph, Carroll

“ . . . denies that it is liable to the plaintiff and further avers that the plaintiff's exclusive remedy at law is the workers' compensation insurance coverage and benefits provided by Pope's Plant Farm, Inc.”

The Evidence

_____Pope purchased a number of greenhouses from Smith, who recommended Carroll as a reliable installer.

Smith delivered the greenhouses to Pope in Blount County, and Carroll began then the installation. Smith took no part in the installation.

While there was some evidence that Carroll, a corporation, was an independent contractor, there was also evidence that it was a sub-contractor, and also some evidence that its employees were employees of Pope, since Pope paid them directly, and controlled the performance of their work to a substantial extent.

Carroll borrowed a ladder from Pope, and received permission to utilize the electrical outlets in the warehouse to operate power hand tools. One of these outlets had no ground-fault interceptor protection. The decedent was standing on a ladder using a power tool connected by an extension cord to an electrical outlet when the connection between the tool and the cord separated, exposing the bare prongs which somehow came into contact with the ladder. The decedent touched the grounded greenhouse frame and received a shock which killed him.

On all construction sites, the Tennessee Occupational Safety and Health Act requires electrical outlets to be equipped with a ground fault interrupter switch.

The Judgment

_____The case was submitted to a jury which returned a special verdict awarding damages of \$475,000 and apportioned fault as follows:

The decedent	5%
Pope	80%
Carroll	15%

Smith was dismissed from the case upon motion for a directed verdict, and no further pleadings were filed against this defendant. Carroll filed no motion for a new trial, and hence no notice of appeal.

The Issues

We rephrase the first two issues as:

1. Whether Pope pleaded the bar of the workers' compensation law as an affirmative defense.
2. Whether Pope was entitled to introduce evidence that TOSHA issued no citations for its alleged negligence resulting in the death of the plaintiff's decedent.

Analysis

This is a wrongful death action wherein Pope's, *inter alia*, is essentially alleged

to have been the employer [principal contractor] of the decedent, and that “it failed to secure payments of workers’ compensation as required by law, thus entitling the plaintiff to proceed at common law.”

Pope filed its answer denying liability for the death of the decedent under any theory, and that “. . . it has and did have at the time of this project, workers’ compensation coverage for its own employees, but that this coverage would not inure to the benefit of plaintiff, and that it was not required to have such coverage.”

One of the major issues at trial was whether the decedent was an employee of Pope’s or whether Pope was the principal contractor and thus liable under TENN. CODE ANN. § 50-6-113.

The jury was instructed to determine if “Pope is vicariously liable for the death of the decedent.” The jury responded that Pope was vicariously liable for the negligence of Carroll. In this connection we note that there is evidence that Pope was the *direct* employer of the decedent, e.g., Pope paid his wages, controlled the manner of his work, and made demand, according to Carroll, that Carroll pay a portion of the workers’ compensation premiums attributed to the employment of the decedent.

The accuracy of the instructions is not presented for review.

The relationship of master-servant was found to exist between Pope and the decedent, thus directly implicating the workers’ compensation law if Pope, the master-employer, affirmatively pleaded the exclusive remedy thereby afforded.

Pope raised the issue directly in its motion for a new trial, alleging that the:

“complaint, the answer of Pope and Carroll and the extensive argument over the availability of certain statutory defenses under workers’ compensation during trial itself show that the applicability and availability of workers’ compensation was at issue in this matter . . . the jury’s decision, based on that proof and arguments, shows this to be an action governed by the Tennessee Workers’ Compensation Statutes and, accordingly, plaintiff’s sole and exclusive remedy is under that statutory scheme.”

We readily agree that, properly pleaded and proved, workers’ compensation was the exclusive remedy available to the plaintiff. TENN. CODE ANN. § 50-6-108, *et.*

seq. so provide in the clearest language. There is evidence that Pope was a statutory employer of the decedent, and hence would ordinarily be immune from tort liability. TENN. CODE ANN. § 50-6-113. *Mathis v. Bowater, Inc.*, 985 F.2d 277 (6th Cir. 1993); *Liberty Mut. Ins. Co. v. Stevenson*, 368 S.W.2d 760 (Tenn. 1963); *Clayton v. Pizza Hut, Inc.*, 673 S.W.2d 144 (Tenn. 1984).

The appellees argue that since Pope pleaded that the decedent was not its employee, and that its workers' compensation coverage "would not inure to the benefit of the plaintiff," that it waived the defense of exclusive remedy, RULE 12, TENN. R. CIV. PRO., and cannot, for the first time, raise the defense in a new trial motion.

During the charge conference, hereafter discussed, counsel for the plaintiff stated to the Court "We think as a matter of law under the proof introduced in this case that Pope was the *principal contractor*." This statement implicates TENN. CODE ANN. § 50-6-113 which provides that a principal contractor shall be liable for compensation to any employee injured while in the employ of any subcontractor *Brown v. Canterbury Corp.*, 844 S.W.2d 124 (Tenn. 1992).

If Pope did not affirmatively and specifically plead the Act as a defense, may we look to the entire record to determine if it may fairly be construed as raising the issue of whether Pope was immune from tort liability, i.e., whether workers' compensation was the exclusive remedy for the plaintiff?

It is worth repeating that counsel for the plaintiff argued - and the trial court agreed - that Pope was the *principal contractor*; apparently, it was thought that this concession, or argument, was a predicate for the plaintiff's theory that Pope was "vicariously liable" for the death of the decedent, which was adopted by the jury as a special verdict. But if Pope was the principal contractor, it was, *ipso facto*, liable for workers' compensation benefits, as we have seen, to the plaintiff, had the Act been pleaded and proved. See, *Mathis v. Bowater, Inc.*, 985 S.W.2d 277 (6th Cir. 1995); *Brown, supra*.

The issue of whether Pope was immune from tort liability arose from time to time during the trial, usually in the context that the pleadings alluded to the fact. On

one occasion, during a colloquy with counsel, as the trial wound down and the issue of fault apportionment emerged, counsel for the plaintiff broached the subject of workers' compensation coverage and assured the Court there was none.

Counsel for Pope stood mute. At any rate, he offered no rebuttal to the statement by counsel for the plaintiff, and the Court said "under these circumstances the Court is compelled to find that there is no workers' compensation coverage."¹

This ruling was apparently made on the basis of the statement by the plaintiff's counsel to the exclusion of counsel for Pope, as we have seen. Superimposed is the curious fact that on the day prior to trial the plaintiff, by motion *in limine*, asked the Court to exclude any testimony regarding workers' compensation insurance. This motion was granted, apparently without argument. It was apparently predicated on the fact that Pope had not affirmatively pleaded the defense of the Act.

The pleadings are not artful, and were never amended after it became clear that the issue of tort immunity remained relevant and viable. RULE 8.03, TENN. R. CIV. PRO., requires a party to set forth affirmatively facts in plain terms constituting an affirmative defense, and 8.06 requires that all pleadings shall be construed as to do substantial justice.

Pope argues that the complaint, its answer, Carroll's answer, the extensive comments ". . . show that the applicability and availability of workers' compensation was at issue in this matter," and that the plaintiff should have a judgment "for the statutorily prescribed workers' compensation exclusive remedy."

The Act must be affirmatively pleaded. *Hammitt v. Vogue, Inc.*, 165 S.W.2d 577 (Tenn. 1942); *Pikeville Fuel Co. v. Marsh*, 232 S.W.2d 789 (Tenn. Ct. App. 1948), and the burden is on the defendant to prove the applicability of the Act.

The plaintiff initially raised the issue of workers' compensation by alleging that the defendants "*failed to secure payments of workers' compensation as required by the Tennessee Workers' Compensation Law . . .*"

¹Statement of counsel is not evidence. But Pope had, from the first, adamantly insisted that the decedent had no coverage and that Pope had no liability in the case. Superimposed is the fact that Pope had not affirmatively pleaded the Act as a defense to the tort action.

In its motion for summary judgment Pope merely alleged the language of the Rule, that there is no genuine issue as to any material fact, entitling it to judgment as a matter of law. Supporting documents do not reference workers' compensation.

Pope then filed its answer, as we have seen, and alleged that it has, and did have at the time of the accident, workers' compensation coverage for its own employees, "but that this coverage would not inure to the benefit of plaintiff . . . "

Pope obviously did not plead the affirmative defense available to it.

The only rational view of the quoted answer is that Pope was not liable to the plaintiff for workers' compensation benefits since the decedent was not an employee and otherwise was owed no duty by Pope.

At the conclusion of all the evidence, the Court conferred with counsel about jury instructions. The plaintiff insisted that no percentage of fault should be apportioned to the decedent because of the "failure of the defendants to have workers' compensation insurance coverage." Counsel for the plaintiff stated:

"Clearly, both of these employers [Pope and Carroll] had more than five employees. Clearly, they were required to have workers' compensation coverage and did not."

Further,

". . . TENN. CODE ANN. § 50-6-113 talks [sic] about a principal or intermediate contractor or subcontractor shall be liable for compensation to any employee while injured . . . and, of course, as your Honor knows, a principal can rely upon the defense of workers' compensation insurance coverage to avoid liability . . . "

This argument is curious since the Court, upon the plaintiff's motion, excluded proof of workers' compensation insurance, while the defendant is taken to task because it failed to "have insurance coverage." To all of which counsel for Pope responded:

". . . there's a big question about whether my client is subject to the workers' compensation laws here . . . we submit that . . . Pope was under no requirement whatsoever to provide workers' compensation for the employer or the workers of this construction company. Pope has workers' compensation for their own people, they've always had it. They're not supposed to have to have [sic] it in this case . . . But its a dispute here, a factual dispute, as to whether Pope was required to provide workers' comp, whether the workers' comp laws apply to Pope in this case."

Counsel for Pope continued:

“ . . . the jury’s got to determine whether or not OSHA applies to Pope, whether or not workers’ comp applies to Pope. You’ve determined that workers’ comp. applies to Pope if you don’t allow Mr. Douglas’ name on that verdict form. It has to be on there because by not allowing it on there, you have said yes, it applies, and no, Pope, you don’t have that defense of comparative fault.”

We have examined the charge, and workers’ compensation is not mentioned.

No special request was tendered, and no objection was made to the charge.

Pope filed a motion for a new trial, complaining (1) of the refusal of the trial judge to allow evidence that the Tennessee Department of Labor had never cited Pope for an OSHA violation, (2) of the dismissal of Smith by motion for directed verdict, (3) of the submission to the jury the issue of Pope’s vicarious liability, (4) the admission of hearsay testimony, (5) the failure to grant Pope’s motion for a directed verdict.

Coupled with the motion for a new trial was a motion for judgment NOV, which we reproduce *in haec verba*:

“II. FOR JUDGMENT NOTWITHSTANDING THE VERDICT DUE TO THE EXCLUSIVE REMEDY PROVISIONS OF TENNESSEE WORKERS’ COMPENSATION STATUTES:

Alternatively, Pope’s is entitled to a Judgment Notwithstanding the Verdict either dismissing plaintiff’s tort action against it for lack of jurisdiction or entering a judgment notwithstanding the verdict and finding this to be a workers [sic] compensation matter, for which jurisdiction as a civil tort case does not lie, and giving plaintiff judgment instead for the statutorily prescribed workers compensation exclusive remedy for wrongful death with no dependents. The Plaintiff’s Complaint, the Answer of Pope’s and of E&C and the extensive argument over the availability of certain statutory defenses under workers compensation during trial itself show that the applicability and availability of workers compensation was at issue in this matter. Plaintiff’s and E&C’s presentation of evidence and able arguments to this Court and to the jury demonstrate without reservation the plaintiff’s position that Pope’s was a “statutory employer” of the decedent, subject to the workers compensation statutes. The jury’s decision, based on that proof and arguments, shows this to be an action governed by the Tennessee Worker’s Compensation statutes, and accordingly, plaintiff’s sole and exclusive remedy is under that statutory scheme.”

In its motion for judgment NOV, Pope squarely presented the issue it now relies on, and we reluctantly hold that the defense was never properly pleaded. We agree that the complaint, the answer of Pope, the answer of Carroll and the arguments raised the tort immunity issue to an extent, but Pope never pleaded the Act as an affirmative defense; neither did it offer evidence, or make an offer of proof,

that its workers' compensation liability was involved, as required by TENN. CODE ANN. § 50-6-405 *et. seq.*

We are frank to say that aspects of the case are troubling, especially the *motion in limine* to exclude evidence of workers' compensation coverage. But Pope did not plead in the alternative, made no offer of proof, and made no motion to amend. The motion for summary judgment did not raise the issue, and we hold that Pope waived the defense of the Act. *Hammett, supra; Pikeville Fuel, supra*, and all of the cases available to us hold that the defendant must raise the exclusive workers' compensation remedy as an affirmative defense or waive it. *Kaley v. Catalina Yachts*, 187 Cal. App. 3rd 1187 (1986); *DeRosa v. Albert F. Ambling Co.*, 404 N.E. 2d 564 (Ill. 1980); *Turner Const. Co. v. Hebner*, 419 A.2d 488 (Pa. 1980); *Ammons v. Hood*, 341 S.E.2d 816 (S.C. App. 1986); *Murray v. City of N.Y.* 372 N.E.2d 560 (N. Y. 1977); *Gordon v. NKC Hosp., Inc.*, 887 S.W.2d 360 (Ky. 1994) (after a judgment was rendered in favor of plaintiff, defendant sought to raise the exclusive remedy of workers' compensation as a defense. The Court held that the defense must have been plead and proven at trial.)

We will briefly respond to the third issue which complains of the refusal of the trial judge to allow Pope to present evidence that the Tennessee Department of Labor took no punitive action against it for any OSHA violation. The matter was chiefly discretionary, *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439 (Tenn. 1992), and it involved proof of the negative, largely irrelevant.² See, *Williams v. Brown*, 860 S.W.2d 854 (Tenn. 1993).

The judgment is affirmed at the costs of the appellant and the case is remanded.

William H. Inman, Senior Judge

CONCUR:

²None of the grounds of the motion for a new trial was presented as an issue for review.

Don T. McMurray, Judge

Charles D. Susano, Jr., Judge