NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 0921

FELICIA DAVIS

VERSUS

JOHN HOOGACKER, WENDY HOOGACKER,
JOHN HOOGACKER AND WENDY HOOGACKER AS
NATURAL TUTORS OF THEIR MINOR CHILDREN,
TRAVIS AND TREVOR HOOGACKER AND
UNITED PROPERTY & CASUALTY INSURANCE COMPANY

Judgment Rendered: DEC 21 2018

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Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2017-10656

Honorable Raymond Childress, Judge

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Plaintiff – Felicia Davis

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Attorneys for Appellees
Defendants – John Hoogacker,
Wendy Hoogacker, and Family
Security Insurance Company, Inc.

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

WELCH, J.

The plaintiff, Felicia Davis, appeals a judgment of the trial court, which sustained a peremptory exception raising the objection of no right of action and dismissed her claim for damages against the defendants, John and Wendy Hoogacker, individually and on behalf of their minor children (collectively "the Hoogackers"), and their insurer, Family Security Insurance Company, Inc.,[1] with prejudice. For reasons that follow, we vacate the judgment of the trial court and remand this matter with instructions.

FACTUAL AND PROCEDURAL HISTORY

On February 10, 2017, the plaintiff filed a petition seeking damages from the Hoogackers and their insurer. In the petition, the plaintiff alleged that on or about October 5, 2016, while she was working for Assure Health Care Providers, Inc. ("Assure Health Care") as a Personal Care Attendant for the Hoogackers, she "stepped onto a step ladder decorating a tree when [one of the minor children] hit the ladder[,] knocking [her] to land hard on her feet[,] jarring her back all the way to her neck." The plaintiff alleged that the incident was reported on the same day to Wendy Hoogacker and the owner of Assure Health Care. The plaintiff claimed that as a result of the incident, she has undergone medical treatment and has suffered restrictions and limitations on her activities and ability to work. More specifically, the plaintiff claimed that she has suffered with her lower back, neck, both arms, left leg, feet, numbness, and pins and needles. The plaintiff further claimed that a workers' compensation claim was made against Assure Health Care,[2] but that the Hoogackers were liable to her for the negligence and action of

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[1] The plaintiff named United Property & Casualty Insurance Company as the Hoogackers' insurer in her first supplemental and amended petition; however, the record reflects that the Hoogackers' insurer is Family Security Insurance Company, Inc.

[2] The plaintiff alleged that although a workers' compensation claim was made against Assure Health Care, she was informed that Assure Health Care did not have workers' compensation insurance. Nevertheless, the record reflects that the plaintiff's workers' compensation claim

their children and the damages she sustained, including loss of income and loss of earning capacity; loss of enjoyment of life; and psychological, emotional, and physical pain and suffering.

In response to the plaintiff's petition, the Hoogackers filed a peremptory exception raising the objection of no right of action,[3] and their insurer subsequently joined them in that objection. In the objection of no right of action, the Hoogackers claimed that the plaintiff was their "shared" or "borrowed" employee; and thus, the recovery of workers' compensation benefits was her exclusive remedy for her alleged injuries. See La. R.S. 23:1031(C) and 23:1032. Therefore, the Hoogackers sought the dismissal of the plaintiff's tort claims against them.

Following an evidentiary hearing on the objection of no right of action, which consisted solely of the testimony of John Hoogacker, the trial court sustained the objection on the basis that the plaintiff was a borrowed employee of the Hoogackers. A judgment in accordance with the trial court's ruling, which dismissed all of the plaintiff's claims in this matter, with prejudice, was signed on May 10, 2018. From this judgment, the plaintiff has appealed, challenging the trial court's ruling on the objection of no right of action.

LAW AND DISCUSSION

Generally, an action can only be brought by a person having a real and actual interest that he asserts. La. C.C.P. art. 681. The peremptory exception raising the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. See La. C.C.P. art. 927(A)(6). Simply

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against Assure Health Care was settled for the total sum of $15,000.00. In addition, Assure Health Care filed a petition of intervention, claiming that it was subrogated to the rights of the plaintiff in this matter and was entitled to reimbursement out of the proceeds of any judgment or settlement in favor of the plaintiff and against the Hoogackers for the full amount of the workers' compensation settlement, plus legal interest and costs.

[3] The record reflects that the Hoogackers also raised the objection of *res judicata* in its peremptory exception and that the Hoogackers initially filed a special motion to strike under La. C.C.P. art. 971, a peremptory exception raising the objection of prescription, and a dilatory exception raising the objection of vagueness. However, the record does not contain the trial court's ruling on these three objections or the motion to strike.

stated, the objection of no right of action tests whether this particular plaintiff, as a matter of law, has an interest in the claim sued on. **Louisiana State Bar Association v. Carr and Associates, Inc.**, 2008-2114 (La. App. 1st Cir. 5/8/09), 15 So.3d 158, 165, writ denied, 2009-1627 (La. 10/30/09), 21 So.3d 292. The exception does not raise the question of the plaintiff's ability to prevail on the merits *nor the question of whether the defendant may have a valid defense.* **Falcon v. Town of Berwick**, 2003-1861 (La. App. 1st Cir. 6/25/04), 885 So.2d 1222, 1224. Thus, the exception of no right of action *cannot be used to raise an affirmative defense.* **Leone v. Ware**, 2017-0638 (La. App. 3rd Cir. 5/2/18), 246 So.3d 833, 836-837, quoting **Beslin v. Anadarko Petroleum Corp.**, 2011-1523 (La. App. 3rd Cir. 4/4/12), 87 So.3d 334, 338. See also **Madisonville State Bank v. Glick**, 2005-1372 (La. App. 3rd Cir. 5/3/06), 930 So.2d 263, 265.

The party raising a peremptory exception bears the burden of proof. **Falcon**, 885 So.2d at 1224. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. *Id.* Evidence supporting or controverting an objection of no right of action is admissible for the purpose of showing that the plaintiff does not possess the right he claims or that the right does not exist. **Robertson v. Sun Life Financial**, 2009-2275 (La. App. 1st Cir. 6/11/10), 40 So.3d 507, 511; **Thomas v. Ardenwood Properties**, 2010-0026 (La. App. 1st Cir. 6/11/10), 43 So.3d 213, 218, writ denied, 2010-1629 (La. 10/8/10), 46 So.3d 1271, quoting **Falcon**, 885 So.2d at 1224.

Accordingly, in this case, the Hoogackers, as the exceptors, had the burden of showing that the plaintiff did not have an interest in the subject matter of this suit or the legal capacity to proceed with this suit. Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed *de novo* on appeal. **Torbert Land Co., L.L.C. v. Montgomery**, 2009-1955 (La. App. 1st Cir.

7/9/10), 42 So.3d 1132, 1135, writ denied, 2010-2009 (La. 12/17/10), 51 So.3d 16. The court begins its analysis on an exception of no right of action "with an examination of the pleadings." **Howard v. Administrators of Tulane Education Fund**, 2007-2224 (La. 7/1/08), 986 So.2d 47, 60.

Herein, as previously set forth, the plaintiff alleged in her petition that she was injured by the negligence of one of the Hoogackers' minor children while she was working for Assure Health Care as a personal care attendant for the Hoogackers, that she had filed a workers' compensation claim against her employer for her injuries, and that the Hoogackers were liable to her for her damages due to the negligence and actions of their children. See La. C.C. 2315, 2326, 2317, and 2318. The Hoogackers contend that the plaintiff was their "borrowed employee," that the plaintiff's exclusive remedy for her injuries is the recovery of workers' compensation benefits, and that the plaintiff does not have a right of action against them in tort.

Under the Louisiana Workers' Compensation Act, an employer is liable for compensation benefits to an employee who is injured as a result of an accident arising out of and in the course of employment. La. R.S. 23:1031(A). Generally, the rights and remedies under the Louisiana Workers' Compensation Act, La. R.S. 23:1021-1470, provide an employee's exclusive remedy against the employer for such injury. La. R.S. 23:1032. The exclusive remedy protections set forth in La. R.S. 23:1032 applies to both a "general" or "immediate" employer/employee relationship, as well as to a "special" or "borrowing" employer/employee relationship. See La. R.S. 23:1031(C).

An employer's immunity from tort suits under the exclusive remedy provision of La. R.S. 23:1032 is an affirmative defense. **Brown v. Adair**, 2002-2028 (La. 4/9/03), 846 So.2d 687, 690; see also **Walls v. American Optical Corp.**, 98-0455 (La. 9/8/99), 740 So.2d 1262, 1267-1268; **Shephard v. AIX**

Energy, Inc., 51,965 (La. App. 2nd Cir. 5/23/18), 249 So.3d 194, 217. Thus, it is a substantive defense which, if proven, *defeats an otherwise viable claim.* **Brown**, 846 So.2d at 690; see also **Walls**, 740 So.2d at 1267-1268. Likewise, tort immunity under the borrowed employer/employee doctrine is an affirmative defense within the context of a tort action. **Billeaud v. Poledore**, 603 So.2d 754, 755 (La. App. 1st Cir.), writ denied, 608 So.2d 176 (La. 1992). An affirmative defense must be specially pled in the answer and proved at trial by the one asserting the defense. La. C.C.P. art. 1005; **Walls**, 740 So.2d at 1267-1268. Since the exclusive remedy of the workers' compensation act is an affirmative defense, which must be proven, it is not properly raised by peremptory exception raising the objection of no right of action. See **Shephard**, 249 So.3d at 217; see also **Leone**, 246 So.3d at 836-837; **Beslin**, 87 So.3d at 338; **Madisonville State Bank**, 930 So.2d at 265.

As previously noted, the Hoogackers' peremptory exception raising the objection of no right of action was premised on their contention that the plaintiff was their borrowed employee and that her exclusive remedy for damages was the recovery of workers' compensation benefits. However, because tort immunity for any "borrowed" employer/employee relationship that might exist between the Hoogackers and the plaintiff is an affirmative defense, it may not be raised through the objection of no right of action. For this reason, we must conclude that the trial court erred in sustaining the Hoogackers' objection of no right of action on the basis of a borrowed employer/employee relationship between the plaintiff and the Hoogackers and in dismissing the plaintiff's claims against the Hoogackers and their insurer.

Furthermore, we find the evidence offered by the Hoogackers insufficient to meet their burden of showing that the plaintiff did not have an interest in the subject matter of this suit or the legal capacity to proceed with this suit. As

previously noted, in support of the objection of no right of action, the Hoogackers relied on the testimony of John Hoogacker, as well as the affidavits of John Hoogacker and Wendy Hoogacker, which focused on the relevant factors to be considered by a court in determining whether a borrowed employer/employee relationship exists. See **Barrios v. Lambar, Inc.** 2006-0324 (La. App. 1st Cir. 12/28/06), 951 So.2d 323, 327 (noting that while there is no fixed test to determine whether a borrowed employer/employee relationship exists, the factors to be considered in determining the existence of such a relationship include: right of control; selection of employees; payment of wages; power of dismissal; relinquishment of control by the general employer; which employer's work was being performed at the time in question; the existence of an agreement, either implied or explicit, between the borrowing and lending employer; furnishing of instructions and place for the performance of the work; the length of employment; and the employee's acquiescence in a new work situation). While this evidence is certainly relevant to the Hoogackers' defense of tort immunity based on the exclusive remedy provision of the workers' compensation act, this evidence fails to establish that the plaintiff herein does not have an interest in the subject matter of this suit or the legal capacity to proceed with this suit. Rather, the very nature of this affirmative defense (tort immunity under the exclusive remedy of workers' compensation act), is that it is a substantive defense which, if proven, *defeats an otherwise viable claim*. See **Brown**, 846 So.2d at 690 and **Walls**, 740 So.2d at 1267-1268. Therefore, based on the record before us, we find that the plaintiff has a right of action against the Hoogackers and their insurer.

Lastly, we note that La. C.C.P. art. 1005 provides, in pertinent part, that "[i]f a party has mistakenly designated an affirmative defense as a peremptory exception ... and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation." Herein, the

defendants raised or designated an affirmative defense by peremptory exception, and for this reason, we have determined that the trial court erred in sustaining the peremptory exception of no right of action and in dismissing the plaintiff's claims. Therefore, we vacate the May 10, 2018 judgment of the trial court and remand this matter to the trial court with instructions that, pursuant to La. C.C.P. art. 1005, the peremptory exception raising the objection of no right of action filed by the Hoogackers (and adopted by their insurer) be treated as a pleading raising the affirmative defense of tort immunity based on the exclusive remedy provision of the workers' compensation act, *i.e.*, La. R.S. 23:1032.[4]

CONCLUSION

For all of the above and foregoing reasons, the May 10, 2018 judgment of the trial court sustaining the peremptory exception raising the objection of no right of action and dismissing the claims of the plaintiff, Felicia Davis, against the defendants, John Hoogacker and Wendy Hoogacker, individually and on behalf of their minor children, and their insurer, Family Security Insurance Company, Inc., with prejudice, is vacated and this matter is remanded with instructions.

All costs of this appeal are assessed to the defendants/appellees, John Hoogacker and Wendy Hoogacker, individually and on behalf of their minor children, and their insurer, Family Security Insurance Company, Inc.

VACATED; REMANDED WITH INSTRUCTIONS.

[4] By our ruling in this matter, we make no determination as to the validity or merits of this affirmative defense by the Hoogackers and their insurer.