NOT DESIGNATED FOR PUBLICATION

ROY HALL	*	**NO. 2000-CA-0816**
VERSUS	*	**COURT OF APPEAL**
DR. SALVADOR SIMEONE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-7253, DIVISION "G"
Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Terri F. Love)

Lester J. Waldmann
Brian C. Beckwith
LESTER J. WALDMANN, APLC
301 Huey P. Long Avenue
Gretna, Louisina 70053
COUNSEL FOR PLAINTIFF/APPELLANT

Monique M. Garsaud
HULSE & WANEK
1010 Common Street, Suite 2800
New Orleans, Louisiana 70112
COUNSEL FOR DEFENDANT/APPELLEE

REVERSED AND REMANDED

Plaintiff, Roy Hall, appeals the district court's judgment dismissing his action upon the granting of a motion for summary judgment filed by defendant, Dr. Salvador Simeone. For the reasons that follow, we reverse.

On May 27, 1997, plaintiff was allegedly injured when he slipped and fell from the roof of a house that was owned by the defendant, a retired physician, as rental property. The defendant's son, Sam Simeone, who managed his father's rental property, had hired an individual named Joey Mills to paint the house, which was unoccupied at the time. Mr. Hall apparently was hired by Mr. Mills to pressure wash the house in connection with the painting job.

Mr. Hall filed a petition in negligence against Dr. Simeone alleging that while he was working on defendant's property, he fell from the roof because of an unanchored shingle and rotted wood that gave way. Dr. Simeone responded by filing an exception of no right of action, asserting that he was the statutory employer of Mr. Hall under La. R.S. 23:1061 and as such, plaintiff's exclusive remedy was to file a claim for worker's

compensation. Subsequently, the defendant "restyled" the exception as a motion for summary judgment, and submitted as support the deposition of Sam Simeone. After hearing, the trial court granted the exception/ motion without written reasons, and dismissed plaintiff's petition with prejudice.

On appeal, plaintiff argues that the exception of no right of action is an improper procedural vehicle by which to raise the statutory employer defense to a tort claim. Alternatively, plaintiff contends that the summary judgment should not have been granted because defendant failed to meet his initial burden of proving that he was the statutory employer of plaintiff under the law that existed at the time of the accident.

Generally, the plea of statutory employment under the provisions of R.S. 23:1061 is an affirmative defense, which must be set forth in defendant's answer; however, it may also be raised in a motion for summary judgment, in which situation the courts have deemed the answer as being amended to conform to the allegation of the statutory employer defense asserted by defendant in the motion. *Peterson v. BE & K Inc. of Alabama*, 94-0005, p.3 (La. App. 1 Cir. 3/3/95), 652 So. 2d 617, 621n.2 (Citations omitted). Therefore, Dr. Simeone's claim was properly raised in his motion

for summary judgment.

Plaintiff's first argument is that defendant's exception of no right of action was an improper procedural vehicle by which to assert the affirmative defense of tort immunity due to statutory employment. The exception of no right of action questions whether the plaintiff is the proper person to sue for his injuries. It raises the issue of whether the plaintiff belongs to the particular class to which the law grants a remedy for the particular harm alleged by the plaintiff. *Trowbridge v. Fascio*, 98-1311, p.2 (La. App. 4 Cir. 9/9/98), 718 So. 2d 1025, 1027 (Citations omitted). The Third Circuit has held that the exception of no right of action could not be used to address the question of whether the named defendant in a worker's compensation action was the plaintiff's employer; the court stated that issues such as this must be resolved by trial or motion for summary judgment. *Buller v. Falcon Rice Mill, Inc.*, 95-644, p.5 (La. App. 3 Cir.11/2/95), 664 So. 2d 509, 511. However, the *Buller* case did not involve the assertion of the statutory employment defense, but the assertion that the named defendant, Falcon Rice Mill, no longer existed because it had legally changed its corporate name to Egan Rice Drier, Inc.

In the instant case, we need not determine whether the statutory employer defense may be raised by means of an exception of no right of action, as the defendant expressly converted his exception into a motion for summary judgment prior to its submission. We will therefore presume that the trial judge considered and decided it as such.

Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. Pro. art. 966 (B). The burden of proof remains with the mover, unless the mover is not the party who will bear the burden of proof on that particular issue at trial, in which case the mover is only required to point out to the court an absence of factual support for one or more of the elements essential to the adverse party's claim. La. Code Civ. Pro. art. 966 (C) (2).

In the instant case, Dr. Simeone bore the burden of establishing his statutory employer status, as it is an affirmative defense that he would have to prove at trial. The only evidence submitted by Dr. Simeone in support of his motion was the deposition testimony of his son, Sam Simeone, who

served as manager of the rental property. Sam Simeone stated that his father is a seventy-five year old retired physician whose heart condition prevents him from undergoing the rigors of a deposition. Dr. Simeone purchased the one story, double residence on Bienville Street in 1978 as rental property. He owns no other rental property. Sam Simeone receives ten percent of the rental income in exchange for managing the property. On the advice of his insurance agent, Dr. Simeone has had worker's compensation insurance on the property since 1996. Both sides of the house were vacant in 1997 when Sam Simeone hired Joey Mills to paint the exterior. Joey Mills gave Sam Simeone a written estimate, to which Sam verbally agreed. Sam understood that Joey Mills did not carry worker's compensation insurance. When the paint job was finished, Sam paid Joey Mills, who at that time reported no problems with the job. Neither Sam Simeone nor his father knew anything about the plaintiff, Roy Hall, until Dr. Simeone was served with the instant lawsuit. Sam Simeone stated that after reading the petition, he telephoned Joey Mills, who said he had hired Roy Hall to pressure wash the house, but claimed he, Mills, did not know Hall had been injured at the house. Sam Simeone did nothing further to investigate the alleged accident.

Plaintiff did not submit evidence in the district court to dispute any of the facts presented by Sam Simeone's deposition. Rather, plaintiff argued in the trial court, and again argues on appeal, that the facts presented are not sufficient for defendant to meet his burden of establishing the existence of a statutory employment relationship between him and plaintiff as a matter of law. We agree.

At the time the alleged accident occurred, May 27, 1997, the controlling law with regard to what constitutes a statutory employment relationship under R.S. 23:1061 was the Louisiana Supreme Court's decision in *Kirkland v. Riverwood International USA, Inc.*, 95-1830 (La. 9/16/96), 681 So. 2d 329. Prior to its amendment effective June 17, 1997, which expressly does not apply to causes of action arising prior to that date, R.S. 23:1061 provided, in pertinent part:

> A. Where any person, in this Section referred to as "principal," undertakes to execute any work, which is a part of his trade, business, or occupation…and contracts with any person, in this Section referred to as "contractor," for the execution … of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work…any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him….

See Acts 1989 No. 454.

In *Kirkland*, the Court held that the appropriate standard under the above quoted statute for determining whether contract work is part of the alleged principal's trade, business, or occupation, such that the principal will be considered a statutory employer, requires the consideration of "all pertinent factors under the totality of the circumstances." *Id.* at p.14, 681 So. 2d at 336. The Court stated:

> Among those factors to be considered in determining whether a statutory employment relationship exists are the following:
>
> > (1) The nature of the business of the alleged principal;
> >
> > (2) Whether the work was specialized or non-specialized;
> >
> > (3) Whether the contract work was routine, customary, ordinary, or usual;
> >
> > (4) Whether the alleged principal customarily used his own employees to perform the work, or whether he contracted out all or most of such work;
> >
> > (5) Whether the alleged principal had the equipment and personnel capable of performing the contract work;
> >
> > (6) Whether those in similar businesses normally contract out this type of work or whether they have their own employees perform the work;
> >
> > (7) Whether the direct employer of the claimant was an independent business enterprise who insured his own workers and included that cost in the contract; and

> (8) Whether the principal was engaged in the contract work at the time of the incident.

Id. at pp.14-15, 681 So. 2d at 336-337.

In the instant case, facts that may be elicited from the deposition of Sam Simeone include that the nature of his father's business was renting residential property and that the work being performed by the contractor was painting. The information Sam Simeone received from Joey Mills is clearly hearsay and should not serve as the basis for summary judgment absent any direct evidence. Defendant, therefore, presented no evidence at all relating to at least six of the eight factors named by the *Kirkland* Court as requiring consideration. Although unchallenged, the facts to which Mr. Simeone testified are simply not sufficient to show that Dr. Simeone was the statutory employer of the plaintiff according to the legal standard enunciated in *Kirkland*. Under the circumstances, we agree with the plaintiff that defendant failed meet his burden of affirmatively establishing, as a matter of law, the existence of a statutory employment relationship between him and Roy Hall. Therefore, we find that the trial court erred in granting summary judgment.

Accordingly, for the reasons stated, we reverse the judgment of the trial court and remand the matter for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED