NO. COA03-427

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2004

ADRIANA NOYOLA,

Plaintiff,

v. Guilford County
No. 01 CVS 6366

HYTROL CONVEYOR COMPANY, INC., SHAMROCK CORPORATION, JOHN DOE MAINTENANCE COMPANY, and JOHN DOE INSTALLATION COMPANY,

Defendants.

Appeal by plaintiff from order entered 26 September 2002 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 14 January 2004.

*Gray, Newell, Johnson & Blackmon L.L.P., by Mark V.L. Gray, and Moshera H. Mohamed, for plaintiff-appellant.*

*Ragsdale Liggett P.L.L.C., by George R. Ragsdale and Sarah E. Winslow, for defendant-appellee Shamrock Corporation.*

*Poyner & Spruill, by Douglas M. Martin, for defendant-appellee Hytrol Conveyor Company, Inc.*

ELMORE, Judge.

Adriana Noyola (plaintiff) appeals from an order entered 26 September 2002 granting defendant Shamrock Corporation's (Shamrock) motion to dismiss plaintiff's claims against Shamrock for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. For the reasons stated herein,

we conclude that the North Carolina Industrial Commission has exclusive jurisdiction over plaintiff's claims against Shamrock, and we affirm the trial court's order.

The litigation underlying this appeal arose from a 29 October 1999 incident in which plaintiff's hair was caught in a conveyor belt while plaintiff was working at defendant Shamrock's place of business, resulting in severe injury to plaintiff's scalp. On 19 April 2001, plaintiff filed a complaint in Guilford County Superior Court alleging claims for negligence, breach of warranty, strict liability, and punitive damages against Shamrock and defendant Hytrol Conveyor Company, Inc. (Hytrol).[1] On 22 June 2001, Shamrock filed its answer and motions to dismiss. On 26 August 2002, Shamrock filed an "Amended 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction," seeking dismissal of plaintiff's claims against it on the grounds that such claims "are preempted by the provisions of the Workers' Compensation Act, Chapter 97 of the North Carolina General Statutes." Attached to Shamrock's motion was the affidavit of Pamela D. Medlin, President of Key Resources,

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[1]The order from which plaintiff appeals did not dismiss her claims against defendant Hytrol; consequently, Hytrol is not a party to the present appeal. Shamrock states in its brief that "it is Shamrock's [u]nderstanding that Plaintiff and Hytrol have agreed that the trial court could declare Plaintiff's claim against Hytrol inactive, pending resolution of [the present appeal]," and that Shamrock "has no objection" to this Court hearing the present appeal, despite the fact that plaintiff's claims against Hytrol remain pending. We note that on 24 June 2003 Shamrock filed a motion with this Court seeking dismissal of the present appeal, which motion was denied by order entered 30 January 2004, and that Shamrock's motion to dismiss appeal contained neither allegation nor argument that the present appeal is interlocutory.

Inc. (Key), the temporary employment service which supplied plaintiff to Shamrock as a temporary worker.

Shamrock's motion to dismiss was heard on 4 September 2002, and on 26 September 2002, the trial court entered an order granting Shamrock's motion to dismiss for lack of subject matter jurisdiction. The order included the following findings of fact:

> 1. [Shamrock] is engaged in the business of selling wrapping paper to organizations for fundraisers. Its sales are seasonal. As a result, Shamrock obtains labor from temporary services, including Key Resources ("Key").
>
> 2. Shamrock hired Plaintiff through Key. By agreement with Shamrock, Key used part of Shamrock's payments to it to procure workers' compensation insurance for Plaintiff.
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> 3. Plaintiff's job was to fill gift wrap orders as directed by Shamrock. At all times, Shamrock controlled the details of Plaintiff's work, including, but not limited to, Plaintiff's work schedule and the quality and production standards Plaintiff was required to observe. Shamrock had the right to terminate Plaintiff at will. It supplied all tools, equipment, and materials which Plaintiff used on the job.
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> 4. On October 29, 1999, Plaintiff was performing Shamrock's work when her hair became caught in a conveyor belt.
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> 5. Plaintiff filed a workers' compensation claim and collected benefits for her on-the-job injuries.
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> 6. Plaintiff instituted this civil action on April 19, 2001.
>
> 7. Plaintiff has not alleged a *Woodson* claim, and there is no evidence to support one.

Based on these findings of fact, the trial court entered the following conclusions of law:

> 8. Plaintiff was an employee of both Shamrock and Key Resources.

> 9. Shamrock is subject to the Workers' Compensation Act and has complied with its provisions regarding the procurement of workers' compensation insurance.
>
> 10. The Industrial Commission has exclusive jurisdiction over Plaintiff's claims against Shamrock.

The trial court proceeded to grant Shamrock's motion to dismiss plaintiff's claims against it for lack of subject matter jurisdiction, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). From this order, plaintiff appeals.

Plaintiff contends that allowing Shamrock's motion to dismiss was error because the trial court's findings of fact and conclusions of law are not supported by the evidence. We find no merit in plaintiff's contentions.

"The appellate court reviews *de novo* an order of the trial court allowing a motion to dismiss for lack of subject matter jurisdiction, but the trial court's findings of fact are binding on appeal if supported by competent evidence." *Cooke v. Faulkner*, 137 N.C. App. 755, 757, 529 S.E.2d 512, 513-14 (2000); *accord, Department of Transporation v. Blue*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).[2] Moreover, "[w]hen reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule

[2]Plaintiff incorrectly cites *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433 (1988), and *Hicks v. Guilford County*, 267 N.C. 364, 148 S.E.2d 240 (1966), for the general proposition that findings of jurisdictional fact, such as those involving the existence of an employer-employee relationship, are not binding on appeal, even when supported by competent evidence. However, because *Youngblood* and *Hicks* involved findings made by the Industrial Commission, rather than a trial court, we conclude that those cases are inapposite to the present appeal.

12(b)(1), a trial court may consider and weigh matters outside the pleadings." *Blue*, 147 N.C. App. at 603, 556 S.E.2d at 617.

Our review of the record indicates that each of the trial court's findings, including those which support its conclusions that an employer-employee relationship existed between Shamrock and plaintiff, are supported by competent record evidence. Taking the pertinent findings in order, finding of fact (FOF) number 1 is supported by the deposition testimony of Shamrock's assistant human resources director, William A. Coleman, who testified that Shamrock routinely obtained labor from temporary employment services, including Key. FOF number 2 is supported by the affidavit of Medlin, Key's president, who stated therein that Key sent plaintiff to Shamrock as a temporary worker in the fall of 1999, and that Key used a portion of Shamrock's payment to it to procure workers' compensation insurance covering plaintiff. FOF number 3 is supported by Medlin's affidavit, which stated that Shamrock "controlled the details of plaintiff's work," by "determin[ing] the beginning and ending times of plaintiff's shifts, as well as her . . . breaks;" setting the "quality and production standards which plaintiff was required to observe;" "suppl[ying] the conveyor belt, boxes, wrapping paper, and all other tools, equipment, and materials which plaintiff used to perform her duties at Shamrock;" and retaining "the right to terminate plaintiff and other temporary workers at will." FOF number 4 is supported by plaintiff's complaint and her deposition testimony. Finally, FOF number 5 is supported by Medlins's affidavit, wherein she averred that

"[p]laintiff has filed a workers' compensation claim and has received workers' compensation payments from Key Risk Management Services, through Key Resources."

Having concluded that the trial court's findings of fact are supported by competent evidence, we must now determine whether the findings in turn support the trial court's conclusions of law. The trial court concluded that plaintiff was an employee of both Shamrock and Key and that Shamrock has complied with the provisions of the Workers' Compensation Act (Act) regarding procurement of workers' compensation insurance, and that consequently, the Industrial Commission has exclusive jurisdiction over plaintiff's claims against Shamrock.

In what is commonly referred to as its "exclusivity provision," the Act provides as follows:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2003). In construing this provision, our appellate courts have stated as follows:

> [W]here the employer and employee are subject to and have complied with the Act, the rights granted an injured employee under the Act are the exclusive remedy in the event of the employee's injury by accident in connection with the employment. Under such circumstances, the injured employee may not elect to maintain a suit for recovery of damages for his injuries, but must proceed

> under the Act. Such cases are within the exclusive jurisdiction of the Industrial Commission; the superior court has been divested of jurisdiction by statute.

*Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 882-83, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000) (internal citations omitted). The only exception to the foregoing is a so-called "*Woodson* claim," under which an employee covered under the Act may maintain a civil action against his employer for a work-related injury where the employer "intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct[.]" *Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991).[3]

Section 97-2(2) of our General Statutes provides that, for purposes of the Workers' Compensation Act, "[t]he term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written . . . ." The Act makes no distinction between temporary and permanent employees, and as this Court has previously stated,

> "numerous other jurisdictions have considered whether a temporary employee is an employee of both the temporary agency and the temporary employer. The majority of these jurisdictions have also held that a temporary employee is an employee of both the temporary agency and the temporary employer, making workers' compensation the employee's exclusive remedy."

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[3]Our review of the record in the present case indicates the trial court correctly found that "[p]laintiff has not alleged a *Woodson* claim, and there is no evidence to support one."

*Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 760, 460 S.E.2d 356, 361, *disc. review denied*, 342 N.C. 191, 463 S.E.2d 234 (1995).

In *Brown*, a different panel of this Court, citing the "'special employment' or 'borrowed servant' doctrine which holds that under certain circumstances a person can be an employee of two different employers at the same time," held that all claims asserted by the decedent's estate against the company to which the decedent had been assigned to work by a temporary employment agency at the time of his fatal work-related accident were barred by the Act's exclusivity provision. *Id.* at 759-60, 460 S.E.2d at 360-61. The *Brown* Court set forth the test for determining the liability of special employers in loaned employee cases as follows:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has a right to control the details of the work. When all three of the conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

*Id.* at 759, 460 S.E.2d at 360 (citations omitted). The *Brown* Court further stated that joint employer status provides an injured employee with two *potential* sources of recovery rather than two recoveries, and that where, as here, the employee obtains any recovery under the statutory mechanism of workers' compensation, the employee is thereafter barred from maintaining a civil action against either of his employers. *Id.*

In the present case, we conclude, as in *Brown*, that the trial court's findings support its conclusions that, as a "special employee" of Shamrock, plaintiff's claims against Shamrock come under the exclusive jurisdiction of the Industrial Commission. First, an implied contract of hire existed between plaintiff and Shamrock since plaintiff accepted the work assignment from Key and performed the work under Shamrock's direction and supervision, as the trial court found in FOF numbers 1-4. Furthermore, an express contract existed between Key and Shamrock whereby Key provided plaintiff's labor to Shamrock, as the trial court found in FOF number 2. Second, plaintiff was performing work for Shamrock when she was injured, as the trial court found in FOF number 4. Finally, Shamrock controlled the details of plaintiff's work, as the trial court found in FOF number 3. As in *Brown*, we conclude that at the time she was injured, plaintiff was performing work as a loaned servant on behalf of Shamrock. Accordingly, all plaintiff's claims against Shamrock are barred by the exclusivity provisions of the Workers' Compensation Act. *Brown*, at 759-760, 460 S.E.2d at 360-61.

Affirmed.

Judges TIMMONS-GOODSON and CALABRIA concur.

Report per Rule 30(e).