IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1259

Filed: 2 August 2016

Bladen County, No. 14 CVS 438

JANICE JOHNSON, Plaintiff,

v.

JONATHAN GOODEN, R.N., and TAMMY TODD, R.N., Defendants.

Appeal by plaintiff from order entered 14 May 2015 by Judge James Gregory Bell in Bladen County Superior Court. Heard in the Court of Appeals 29 March 2016.

Mark Hayes for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Colleen N. Shea and Kara O. Gansmann, and Young Moore and Henderson, P.A., by Angela Farag Craddock and Joseph W. Williford, for defendant-appellees.

McCULLOUGH, Judge.

Janice Johnson appeals from an order dismissing her medical malpractice and common law negligence claims against Jonathan Gooden and Tammy Todd with prejudice for lack of subject matter jurisdiction. Based on the reasons stated herein, we affirm the order of the trial court.

I. Background

On 3 July 2014, Janice Johnson ("plaintiff") filed a complaint in superior court against Jonathan Gooden ("defendant Gooden") and Tammy Todd ("defendant Todd")

(collectively referred to as "defendants"), alleging medical malpractice and common law negligence. Plaintiff's complaint alleged as follows: Defendants are registered nurses, practicing nursing at the Smithfield Packing Medical Clinic in Bladen County ("medical clinic"). Plaintiff alleged that the medical clinic was a medical provider within the meaning of N.C. Gen. Stat. § 90-21.11. On 26 June 2013, plaintiff was employed with Smithfield Packing Company, Incorporated ("Smithfield Packing") and while at work, was hit by a pallet jack on the back of her left ankle. Plaintiff received a deep laceration on the back of her left ankle, near her Achilles tendon. Immediately following her injury, plaintiff presented herself to the medical clinic. She was treated by defendant Gooden. Defendant Gooden "packed the torn tissue and Achilles tendon back in the area of the wound and placed steristrips to hold the laceration together[.]" Plaintiff returned to work to finish her shift.

On or about 27 June 2013, plaintiff returned to the medical clinic and was seen by a nurse. Plaintiff alleges that she had continued swelling, bleeding, and pain at the site of the wound. Plaintiff again returned to work to finish her shift. On or about 28 June 2013, plaintiff returned to the medical clinic and was attended to by defendant Todd. Plaintiff had continued swelling, bleeding, and severe bruising and edema around the area of the wound. A telephone order for an X-ray of her left foot was ordered. Plaintiff presented herself to Bladen County Hospital where an X-ray was taken. On or about 29 June 2013, plaintiff returned to work at Smithfield

Packing and returned to the medical clinic. Plaintiff alleged that she had continued bleeding, severe edema, and swelling at the wound site. Thereafter, she returned to work.

Plaintiff never saw a medical doctor at the medical clinic and was never referred to one during each of her four visits. On or about 5 July 2013, plaintiff presented herself to Bladen County Hospital due to continued bleeding, severe edema, swelling, and pain at the site of her left ankle injury. She was transferred to Cape Fear Valley Medical Center with a diagnosis of complete Achilles tendon tear and septic ankle. Plaintiff continues to treat with various medical providers to fight infection and to heal her left ankle. Plaintiff alleged that defendants were negligent in their care and treatment of plaintiff and that as a result of their negligence, plaintiff was damaged in an amount in excess of $10,000.00.

On 15 September 2014, defendants each filed an answer. Defendants also moved to dismiss plaintiff's action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) and failure to state a claim for relief pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 11 February 2015, plaintiff filed a "Motion to Amend Complaint." Plaintiff moved to amend her original complaint by adding the following allegations: Defendants were registered nurses practicing nursing and subject to the provisions of the Nursing Practice Act. Defendants received compensation from Smithfield

Packing. Smithfield Packing is not a healthcare provider as defined by N.C. Gen. Stat. § 90-21.11 and was not engaged in the profession of practicing medicine or nursing. Smithfield Packing had no authority to supervise defendants in the scope of their performance and professional duties of providing medical treatment to plaintiff. Smithfield Packing contracted with Doctor Marcelo Romano Perez-Montes ("Dr. Perez-Montes"), an independent contractor, to provide medical services and supervise the medical services provided by defendants. Dr. Perez-Montes was a licensed physician who supervised defendants at all relevant times. The medical services plaintiff received on or about 26 June 2013 were under the supervision of Dr. Perez-Montes and not Smithfield Packing. The Nursing Practice Act which governs nursing in North Carolina does not allow a registered nurse to prescribe a medical treatment regimen or make a medical diagnosis except under the supervision of a licensed physician. Dr. Perez-Montes was the licensed physician that defendants were under a duty to report to and receive orders from regarding treatment of plaintiff. Although Dr. Perez-Montes was defendants' supervisor, defendants did not report plaintiff's initial injury to Dr. Perez-Montes to obtain a medical diagnosis and appropriate treatment. Defendants violated the Nursing Practicing Act by providing a medical treatment regimen to plaintiff without notifying and obtaining authority from Dr. Perez-Montes. Defendants are agents of Dr. Perez-Montes and liable for violations under the standard of care as a healthcare provider.

The trial court granted plaintiff's motion to amend her complaint by an order entered 14 May 2015.

Following a hearing held on 27 April 2015, the trial court entered an order on 14 May 2015 granting defendants' motions to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure and dismissing plaintiff's claims with prejudice.

Plaintiff appeals.

II. Discussion

Plaintiff's sole argument on appeal is that the trial court erred by granting defendants' motion to dismiss based on Rule 12(b)(1) for lack of subject matter jurisdiction. Specifically, plaintiff contends that the North Carolina Workers' Compensation Act does not give the Industrial Commission exclusive jurisdiction over her claim. We disagree.

"Our review of an order granting a Rule 12(b)(1) motion to dismiss is *de novo*." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). "[W]e view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). "Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a

court except as provided by that law." *Clements v. Clements*, 219 N.C. App. 581, 586, 725 S.E.2d 373, 377 (2012) (citation omitted).

It is well-settled that through the Workers' Compensation Act (the "Act"), "North Carolina has set up a comprehensive system to provide for employees who suffer work-related illness or injury. The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Johnson v. First Union Corp.*, 131 N.C. App. 142, 144, 504 S.E.2d 808, 809-10 (1998) (citation and internal quotation marks omitted).

> The purpose of the [A]ct is to provide compensation for an employee in this [S]tate who has suffered an injury by accident which arose out of and in the course of his employment, the compensation to be paid by the employer, in accordance with the provisions of the [A]ct, without regard to whether the accident and resulting injury was caused by the negligence of the employer, as theretofore defined by the law of this [S]tate. The right of the employee to compensation, and the liability of the employer therefor, are founded upon mutual concessions, as provided in the [A]ct, by which each surrenders rights and waives remedies which he theretofore had under the law of this [S]tate. . . . As administered by the North Carolina Industrial Commission, in accordance with its provisions, the [A]ct has proven satisfactory to the public and to both employers and employees in this [S]tate with respect to matters covered by its provisions.

Lee v. American Enka Corp., 212 N.C. 455, 461-62, 193 S.E. 809, 812 (1937) (internal citations omitted).

The provisions of the Act with which we are primarily concerned are N.C. Gen. Stat. §§ 97-9 and 97-10.1. N.C. Gen. Stat. § 97-9 provides:

> Every employer subject to the compensation provisions of this Article shall secure the payment of compensation to his employees in the manner hereinafter provided; and while such security remains in force, he or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified.

N.C. Gen. Stat. § 97-9 (2015). N.C. Gen. Stat. § 97-10.1, commonly referred to as an "exclusivity provision," provides:

> 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 (2015). "By its plain language, N.C.G.S. § 97-9 extends exclusivity protection beyond the employer to those conducting [the employer's] business. We have noted that this phrase should be liberally construed[.]" *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 635, 652 S.E.2d 231, 234-35 (2007) (citations and internal quotation marks omitted).

In *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), our Supreme Court held that the Act has been interpreted "as foreclosing a worker who is injured in the course of his employment from suing a co-employee whose negligence caused

the injury." *Id.* at 713, 325 S.E.2d at 247 (citations omitted). However, the Court concluded that the Act "does not insulate a co-employee from the effects of his willful, wanton and reckless negligence. An injured worker in such situations may receive benefits under the Act and also maintain a common law action against the co-employee." *Id.* at 717, 325 S.E.2d at 250. "The concept of willful, reckless and wanton negligence inhabits a twilight zone which exists somewhere between ordinary negligence and intentional injury." *Id.* at 714, 325 S.E.2d at 247. "Wanton" and "reckless" conduct is defined "as an act manifesting a reckless disregard for the rights and safety of others." *Id.* at 714, 325 S.E.2d at 248. "Willful negligence" is defined as "the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed." *Id.* (citations omitted).

In the present case, viewing plaintiff's allegations as true and in the light most favorable to plaintiff, the evidence tended at most to support a finding of ordinary negligence by plaintiff's co-employees. Defendants are both registered nurses, employed by Smithfield Packing at the medical clinic and conducting their employer's business. Plaintiff was also employed by Smithfield Packing and suffered an injury during the course and scope of her employment. Plaintiff alleges that defendants were negligent in providing medical treatment to plaintiff. There was no evidence to support a finding that defendants' conduct constituted willful, wanton, or reckless

negligence. Accordingly, plaintiff is barred from bringing this action against defendants and is limited to recovery under the Act. *See Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 241, 362 S.E.2d 559, 562 (1987) (where the evidence supports only a finding of ordinary negligence on the part of the defendants, the Workers' Compensation Act provides the "sole remedy for an employee who has been injured by the ordinary negligence of a co-employee").

Plaintiff contends that her workers' compensation award does not preclude her from filing a malpractice claim against a third-party physician who treated a compensable injury and, by malpractice, caused a subsequent injury. Plaintiff relies on the holding in *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E.2d 548 (1966), for her argument.

In *Bryant*, the North Carolina Supreme Court held that:

> We do not have before us the question of the right of an injured employee to bring suit against a physician who is employed, full time, by the plaintiff's employer to treat and care for those sustaining injuries in the employer's business. Where, as here, the physician is carrying on an independent practice of medicine or surgery, we agree with the Supreme Court of Appeals of Virginia that he is not "conducting the business" of an industrial corporation merely because the manager of the plant sends to him, for examination and treatment, those who, from time to time, sustain injuries in the plant. Thus, we hold that, under these circumstances, G.S. § 97-9 does not deprive the employee of his common law right to sue a physician or surgeon who, in the course of such examination or treatment, is negligent and thereby aggravates the original injury.

Id. at 551, 148 S.E.2d at 553.

We do not find the holding in *Bryant* to be controlling in the present case as the circumstances surrounding plaintiff's claim are distinguishable. In *Bryant*, the plaintiff was injured at work and the defendant physician examined the plaintiff at the request of the plaintiff's employer. The defendant was paid by the employer's insurance carrier. The plaintiff then instituted a negligence action in superior court against the defendant physician who was carrying on an independent practice of medicine. Here, plaintiff instituted an action against defendant Gooden and defendant Todd. It is undisputed that defendants were both full-time employees of Smithfield Packing when they treated plaintiff. Plaintiff was also employed by Smithfield Packing when she was injured and treated by defendants. In its holding, the *Bryant* Court specifically distinguished its own facts from the exact circumstances found in our present case. Based on the foregoing, we reject plaintiff's contention.

Next, plaintiff argues that for purposes of her claim, defendants were sued in their capacity as agents of a third-party supervising physician, Dr. Marcelo Romano Perez-Montes, and not in the capacity as her co-employees. Plaintiff maintains that under the doctrine of *respondeat superior*, as described in *Taylor v. Denton*, 251 N.C. 689, 111 S.E.2d 864 (1960), she has the option to sue either the third-party physician or defendants in superior court. As such, she again contends that her complaint is akin to the action in *Bryant*. Plaintiff's arguments are without merit.

In *Taylor*, the North Carolina Supreme Court provided that "a person injured by the tort of a servant may bring suit against either the master or servant[.]" *Id.* at 691, 111 S.E.2d at 865. Plaintiff amended her original complaint to include allegations that Smithfield Packing had no authority to supervise defendants in the scope of their performance and professional duties of providing medical treatment. Rather, plaintiff alleged that defendants were supervised by Dr. Perez-Montes, an independent contractor hired by Smithfield Packing to provide professional medical services and to supervise the medical services provided by defendants. Plaintiff further alleged that defendants were under the direct control and supervision of Dr. Perez-Montes and that defendants breached their duties pursuant to the Nursing Practice Act by failing to notify Dr. Perez-Montes of plaintiff's injury in order to obtain the appropriate medical diagnosis and treatment.

Even assuming *arguendo* that plaintiff is correct in her allegations that defendants were under the supervision of Dr. Perez-Montes, this does not change the fact that defendants were conducting the employer's business as defined by the Act. Our Courts have held that "[o]ne must be deemed to be conducting his employer's business, within the meaning of this statute, whenever he, himself, is acting within the course of his employment, as that term is used in the [Act]." *Hamby*, 361 N.C. at 635, 652 S.E.2d at 234-35 (citation omitted). The phrase "those conducting the [employer's] business" is to be liberally construed. *Id.* "Whether one employed to

perform specified work for another is to be regarded . . . as an employee within the meaning of the Act is determined by the application of ordinary common law tests." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383-84, 364 S.E.2d 433, 437 (1988) (citations omitted). Here, Smithfield Packing employed defendants full-time, set their work schedule, paid their salaries, and supplied their equipment. Defendants did not have the right to hire individuals to assist them. All of these factors demonstrate that defendants had an employer-employee relationship with Smithfield Packing and consequently were co-employees of plaintiff. *See Youngblood*, 321 N.C. at 386, 364 S.E.2d at 439 (stating that "the four principal factors generally recognized as demonstrating the right to control details of the work [include]: (1) method of payment; (2) the furnishing of equipment; (3) direct evidence of exercise of control; and (4) the right to fire"). The fact that defendants were registered nurses and may have been under the supervision of Dr. Perez-Montes does not invalidate their status as co-employees of plaintiff.

Based on the foregoing, we hold that the Act provides the sole remedy for plaintiff's claims. Accordingly, we affirm the order of the trial court, dismissing plaintiff's claim for lack of subject matter jurisdiction.

III. Conclusion

The 14 May 2015 order of the trial court, dismissing plaintiff's claim for lack of subject matter jurisdiction, is affirmed.

AFFIRMED.

Judges Bryant and Stephens concur.

Report per Rule 30(e).