IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-188

Filed: 5 January 2016

Robeson County, No. 13 CVS 944

GENEVA T. BULLARD, Administratrix of the Estate of VONNIE LEE BULLARD, Plaintiff,

v.

PEAK STEEL, L.L.C., Defendant.

Appeal by Plaintiff from an order entered 29 September 2014 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 10 September 2015.

Kennedy, Kennedy, Kennedy, and Kennedy, LLP, by Harold L. Kennedy, III, and Harvey L. Kennedy, for Plaintiff-Appellant.

Ragsdale Liggett, PLLC, by Mary W. Webb and Amie C. Sivon, and Musselwhite, Musselwhite, Branch, and Gratham, by Stephen C. McIntyre and James W. Musselwhite, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Geneva T. Bullard ("Plaintiff"), in her capacity as Administratrix of Vonnie Lee Bullard's ("Bullard") estate, appeals from a 29 September 2014 order dismissing her complaint against Peak Steel, L.L.C. ("Defendant"), for lack of subject matter jurisdiction. We affirm the trial court's order.

I. Factual and Procedural History

Bullard's employer Tradesmen International, Inc., ("Tradesmen"), is a temporary employment agency. In 2004, Tradesmen entered into an agreement ("Agreement") to provide skilled laborers to Defendant. Tradesmen assigned Bullard to Defendant, to work erecting steel at a Wake County construction site. The Tradesmen-Defendant Agreement required Tradesmen to provide employees and to pay wages and benefits. Tradesmen agreed to provide employees with the "quality and knowledge" that Defendant required. If not, Defendant could send the unsatisfactory worker back to Tradesmen. Additionally, Defendant was responsible for supervising and terminating Tradesmen employees, as well as providing general liability insurance coverage for Tradesmen and its workers. The appellate briefs indicate Defendant provided workers' compensation insurance as well.

On 27 May 2011, a 700 pound arc of tubular steel fell and struck Bullard at Defendant's construction site. The accident badly injured Bullard, requiring him to undergo multiple surgeries before he died from his injuries on 12 June 2011.

The day of the accident, Defendant was installing structural steel on an unfinished building. The tube steel "was [supposed] to rest on steel pads or saddles that were welded to two vertical steel column[s]." Unfortunately, workers welded the center section of the steel, but not the ends resting on the steel pads. When two workers loosened bolts from the steel beam, it came loose and struck a mechanical

lift, and "fell approximately 12 to 15 feet to the ground, where it collided with the concrete slab of the building, rebounded, and then struck [Bullard] on his upper back, neck and head."

Prior to the 27 May 2011 accident, the North Carolina Department of Labor's Division of Occupational Safety and Health Administration ("OSHA") cited Defendant for two "non-serious" and three "serious" violations. On 19 May 2010, Defendant received a non-serious citation for not maintaining a written communication program for employees handling hazardous chemicals. On 15 March 2010, Defendant received two serious violations for not providing a proper guard on a drill press and not securely anchoring the drill press to the floor. Lastly, on 8 February 2011, Defendant received a non-serious citation for leaving a battery in a production area, and a serious citation for having electrical equipment near hazards.

On 5 April 2013, Plaintiff, acting on behalf of Bullard's estate, filed a complaint in Robeson County Superior Court against Defendant, raising negligence and wrongful death claims, as well as a *Woodson* claim. On 18 July 2013, Defendant filed an answer and made a Rule 12(b)(1) motion to dismiss Plaintiff's complaint for lack of subject matter jurisdiction, and a Rule 12(b)(6) motion to dismiss for failure to state a claim for which relief can be granted. Plaintiff filed an amended complaint on 25 September 2013, and Defendant filed an answer to the amended complaint on 31 October 2013 and renewed its motions to dismiss. On 13 January 2014, pursuant to

Rule 36, Plaintiff moved to strike statements in Defendant's responses to the first request for admissions, and moved to deem the first request for admissions as admitted. On 16 May 2014, Plaintiff filed a motion to strike the affidavit of Defendant's CEO, David Lewis Woodruff, under Rules 26(e) and 37. The trial court set the motions for hearing on 19 May 2014. At the hearing, Defendant asked to argue the 12(b)(1) motion first, while preserving, but not abandoning, its 12(b)(6) motion. The trial court allowed Defendant to argue the 12(b)(1) motion first, and neither party argued the 12(b)(6) motion. The court took the motions under advisement, and on 11 September 2014, the court granted Plaintiff's motion to strike Defendant's statements and deemed Plaintiff's first request for admissions admitted. On 29 September 2014, the court denied Plaintiff's motion to strike Defendant's CEO's affidavit.

On 29 September 2014, the court granted Defendant's 12(b)(1) motion and dismissed Plaintiff's complaint for lack of subject matter jurisdiction, making the following conclusions of law:

> 1. Mr. Bullard was an employee of Tradesmen and Defendant Peak Steel, L.L.C.
> 2. Tradesmen and Defendant Peak Steel, L.L.C. are subject to the Workers' Compensation Act.
> 3. The Industrial Commission has exclusive jurisdiction over Plaintiff's claims against Defendant Peak Steel, L.L.C.

The trial court did not cite to Defendant's 12(b)(6) motion, but inherent in the order, the court granted the 12(b)(6) motion for failure to state a *Woodson* claim, finding:

"The Plaintiff has alleged a *Woodson* Claim, but has not presented evidence that Defendant Peak Steel, L.L.C. committed intentional conduct amounting to an intentional tort, nor conduct amounting to any intentional disregard for the safety of Mr. Bullard that was substantially certain to cause injury to Mr. Bullard." Since the court found the *Woodson* pleading to be insufficient, the *Woodson* claim could not remain in Robeson County Superior Court apart from the Workers' Compensation claims, which the court dismissed for lack of subject matter jurisdiction. With no claims remaining before the court, Plaintiff filed her written notice of appeal on 28 October 2014.

On appeal, Plaintiff contends the trial court erred in dismissing her complaint for two reasons: (1) the court had subject matter jurisdiction over the claims because Bullard was not a special employee of Defendant; and (2) Plaintiff submitted sufficient evidence to support her *Woodson* claim, giving the court jurisdiction to hear it as an exception to the exclusive jurisdiction of the North Carolina Industrial Commission ("Industrial Commission"). We disagree and affirm the trial court's order.

II. Appellate Jurisdiction

Plaintiff's appeal is interlocutory. "It is well settled that an order denying a motion to dismiss made pursuant to the exclusivity provision of the [Workers' Compensation] Act and either Rule 12(b)(6) or Rule 12(b)(1) is interlocutory." *Estate*

of Vaughn v. Pike Elec., LLC, ___ N.C. App. ___, ___, 751 S.E.2d 227, 231 (2013) (citations omitted). Generally, a party does not have an immediate right to appeal from an interlocutory order. *Davis v. Davis*, 360 N.C. 518, 524, 631 S.E.2d 114, 119 (2006). However, a party may immediately appeal an interlocutory order when the order affects a substantial right *Id.* *See also* N.C. Gen. Stat. § 1-277 (2013).

In the case of a Workers' Compensation claim, our Supreme Court has determined that "the denial of a motion to dismiss under Rule 12(b)(1) and the exclusivity provision of the [Workers' Compensation] Act affects a substantial right . . . ." *Estate of Vaughn*, ___ N.C. App. at ___, 751 S.E.2d at 231 (citing *Burton v. Phx. Fabricators & Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242, 242 (2008)). Additionally, an order denying a 12(b)(6) motion "is immediately appealable as affecting a substantial right to the extent that [the] motion[] [was] asserted pursuant to the exclusivity provision of the [Workers' Compensation] Act." *Estate of Vaughn*, ___ N.C. App. at ___, 751 S.E.2d at 232. Thus, to the extent that Defendant's 12(b)(1) and 12(b)(6) motions "involve the trial court's jurisdiction over this matter . . . ." we review Plaintiff's appeal on the merits. *Id.*

In her notice of appeal, Plaintiff repeats the trial court's omission by not citing to Defendant's Rule 12(b)(6) motion, and only refers to "the Order granting Defendant's Motion to Dismiss under Rule 12(b)(1) . . . ." However, on appeal, Plaintiff contends she properly pled her *Woodson* claim and presented sufficient

evidence to survive the Rule 12(b)(6) motion, thus allowing the claim to proceed before the trial court as an exception to the exclusive jurisdiction of the Industrial Commission. Accordingly, we review the merits of Plaintiff's appeal because the order dismissing Plaintiff's claims implicates the trial court's subject matter jurisdiction to hear the claims.

III. Standard of Review

"The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*." *Estate of Vaughn*, ___ N.C. App. at ___, 751 S.E.2d at 232–33 (internal quotation marks and citation omitted). In conducting this *de novo* review, a court "may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). "[A] motion to dismiss is properly granted when it appears that the law does not recognize the plaintiff's cause of action or provide a remedy for the alleged [cause of action]." *Brown v. Friday Servs.*, 119 N.C. App. 753, 755, 460 S.E.2d 356, 358 (1995) (citation omitted). Therefore, "the question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Id.* (citing *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 355 S.E.2d 838 (1987)). However, this Court is not required

"to accept mere conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true." *Estate of Vaughn*, ___ N.C. App. at ___, 751 S.E.2d at 233 (citing *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (citation omitted).

IV. Analysis

A. Subject Matter Jurisdiction

The North Carolina General Assembly has expressed a clear intent to adjudicate claims for work related injuries under Chapter 97 of the North Carolina General Statutes, the Workers' Compensation Act ("the Act"). *Reece v. Forga*, 138 N.C. App. 703, 705, 531 S.E.2d 881, 883 (2000). Generally, when an employer-employee relationship exists, as the Act defines, the employee may pursue a Workers' Compensation claim subject to the exclusive jurisdiction of the Industrial Commission. N.C. Gen. Stat. § 97-10 (2013). The limits of this jurisdiction are defined by the Act's "exclusivity provision" which excludes all "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." *Id.* This provision protects the interests of the employee, while limiting the employer's liability. *See Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 118, 266 S.E.2d 848, 849 (1980). Therefore, a common law claim brought in a court of equity outside the

Industrial Commission will fail for lack of subject matter jurisdiction. *Reece*, 138 N.C. App. at 705, 531 S.E.2d at 883.

However, the exclusivity provision is not without limitation. The Act will not relieve an employer from civil liability when he "[commits an intentional tort or] 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). In such a case, the "employee, or the personal representative of the estate . . . may pursue a civil action against the employer" in a court outside the Industrial Commission, and the exclusivity provision will not bar the action from proceeding for lack of subject matter jurisdiction. *Id.* at 341, 407 S.E.2d at 228. These unique claims are known as *Woodson* claims, and they are allowed to proceed simultaneously to a separate Workers' Compensation claim before the Industrial Commission, although the plaintiff is entitled to only one recovery between the two claims. *Id.* at 348, 407 S.E.2d at 233.

A second limitation of the exclusivity provision is defined by the employer-employee relationship, because the provision only applies to "employees" and "employers." N.C. Gen. Stat. §§ 97-2(1), 97-3 (2013). Employees are defined as "every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." N.C. Gen. Stat. § 97-2 (2013). In

addition to this statutory definition, our Court has developed a doctrine that includes other workers known as "special employees" or "borrowed servants," which are treated the same as workers that meet the Act's statutory "employee" definition. *Collins v. James Paul Edwards, Inc.*, 21 N.C. App. 455, 459, 204 S.E.2d 873, 876, *cert. denied*, 285 N.C. 589, 206 S.E.2d 862 (1974). Therefore, special employees are subject to the jurisdictional limitations of the Act's exclusivity provision just like "employees."

The special employee doctrine establishes, "a general employee of one [employer] can also be the special employee of another [employer] while doing the latter's work and under his control." *Brown*, 119 N.C. App. at 759, 460 S.E.2d at 360. To determine whether a worker is a special employee courts use the three-part *Collins* test, which states the following:

> 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. (quoting *Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876) (emphasis added).

The *Collins* test is conjunctive and the Court must answer "yes" to every question for the worker to qualify as a special employee. *Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876. With these three questions answered in the affirmative, an

employer-employee relationship can be established, which subjects the worker to the exclusivity provision of the Act and gives the Industrial Commission exclusive jurisdiction over the worker's claims, notwithstanding any standalone *Woodson* claims. *Id.*

Therefore, Plaintiff's appeal turns on whether Bullard is a special employee under the *Collins* test. If Bullard qualifies as a special employee, then Plaintiff's negligence and wrongful death claims are restricted to the exclusive jurisdiction of the Industrial Commission.

i. Prong One: Express or Implied Contract

To satisfy the first prong of the *Collins* test, an express or an implied contract must exist between the employer and employee. *Shelton v. Steelcase, Inc.*, 197 N.C. App. 404, 411, 677 S.E.2d 485, 491 (2009). When an employee works for a temporary employment agency, their agency contracts with other employers who are in need of labor. If that employee accepts an assignment to work for the outside employer, this Court will often find an implied contract between the employee and the outside employer. *Id.* at 412, 677 S.E.2d at 492; *see also Brown*, 119 N.C. App. at 760, 460 S.E.2d at 360. However, when there is contrary language in the contract between the agency and the employer, we will not readily find an implied employer-employee contract. We have reviewed such contractual language in *Shelton* and *Gregory*, and reviewed a contract that was silent on the matter in *Brown*.

In *Shelton*, the plaintiff worked for a cleaning company, Drew, L.L.C. ("Drew"), that contracted with other businesses in need of cleaning services. *Shelton*, 197 N.C. App. at 407, 677 S.E.2d at 489. Drew, contracted with defendant Steelcase, Inc. ("Steelcase"), to provide a cleaning crew for one of Steelcase's projects. *Id*. The Drew-Steelcase contract expressly stated that Drew's employees "will be employees of [Drew]." *Id*. at 412, 677 S.E.2d at 492. Also, Drew paid the plaintiff's salary, withheld her taxes, paid her workers' compensation insurance, and paid her benefits. *Id*. Although the plaintiff had her own office at Steelcase and worked there full time, we placed great import on the express language of the Drew-Steelcase contract, which retained the plaintiff and other Drew employees as "employees of [Drew]." *Id*. With such clear language, we held there was no implied employer-employee contract, thus failing to satisfy the first prong of the *Collins* test. Consequently, we held the plaintiff's special employee status was a question of fact for the jury, and we affirmed the trial court's decision to present the issue to the jury by denying Steelcase's motion for JNOV. *Id*. at 415, 677 S.E.2d at 494.

In *Gregory*, a young man, Travis Kidd ("Kidd"), worked for a temporary employment agency, WorkForce Staffing, Inc. ("WorkForce"). *Gregory*, 224 N.C. App. at 581, 736 S.E.2d at 578. WorkForce contracted with Cleveland County, North Carolina ("County"), to supply workers for the County's landfill. *Id*. at 581, 736 S.E.2d at 578–79. While working at the landfill, Kidd tragically fell into a trash

compactor and was crushed to death. *Id.* at 582, 736 S.E.2d at 579. Kidd's mother brought a wrongful death claim against the County in Cleveland County Superior Court, and it was dismissed for lack of subject matter jurisdiction. *Id.* Reviewing the dismissal, we again focused on the express language of the WorkForce-County contract, which stated "temporary employees are not employees of the County." *Id.* at 586, 736 S.E.2d at 581. Based on the contract's language, we held that the first prong of the *Collins* test was not satisfied, and there was no implied contract between Kidd and the County. *Id.* at 587, 736 S.E.2d at 582. With no express or implied employer-employee contract, Kidd's mother could pursue her claim in Cleveland County Superior Court with proper subject matter jurisdiction, since Kidd was not a special employee subject to the exclusivity provision of the Act. *Id.*

Contrasting the express contractual language in *Shelton* and *Gregory*, we reviewed a contract that was silent on special employee retention in *Brown*, 119 N.C. App. 753, 460 S.E.2d 356. The decedent-worker in *Brown* was employed by a temporary employment agency, Friday Services, Inc. ("Friday Services"). *Id.* at 755, 460 S.E.2d at 358. Friday Services contracted with a roofing company, Kassem, Inc. ("Kassem"), to supply workers for Kassem's roofing work at a construction site. *Id.* Unlike *Shelton* and *Gregory*, the agency, Friday Services, did not retain its temporary employees in the contract with the outside employer, Kassem. Without this contractual language, the decedent-worker accepted an assignment to work for

Kassem, and worked under Kassem's direction and supervision. *Id.* at 760, 460 S.E.2d at 360. By doing so, the decedent-worker established an implied contract with Kassem, which subjected his estate's claim to the exclusivity provision, and gave the Industrial Commission exclusive jurisdiction over the claim. *Id.* at 760, 460 S.E.2d at 360–61.

On appeal, Defendant contends it had an implied contract with Bullard. We agree. Unlike *Shelton*, the Tradesmen-Defendant Agreement does not expressly retain the temporary employees as Tradesmen's employees. Unlike *Gregory*, the Tradesmen-Defendant Agreement does not disclaim Tradesmen's temporary employees by stating they "are not employees" of Defendant. Rather, the Tradesmen-Defendant Agreement is silent on the issue, much like the contract in *Brown*. In addition to this silence, the Agreement suggests that Tradesmen's temporary employees are special employees of Defendant, stating, "Tradesmen agrees to assign employees to Client [Defendant] on a permanent basis and assume exclusive responsibility for the payment of wages to its employees so assigned." While Bullard did not personally contract with Defendant, he did accept an assignment to work for Defendant pursuant to the Tradesmen-Defendant Agreement. Given the silence in the Tradesmen-Defendant Agreement, and Bullard's acceptance to work for Defendant, an implied contract exists between Bullard and Defendant. Therefore, the first prong of the *Collins* test is satisfied.

ii. Prong Two: Type of Work

The second prong of the *Collins* test requires the type of work being done by the special employee to be "essentially that of the special employer." *Collins*, 21 N.C. App. at 459, 204 S.E.2d at 876. This principle is best illustrated in *Brown*.

In *Brown*, a building owner hired a roofing company to replace the roof on a building. *Brown*, 119 N.C. App. at 760, 460 S.E.2d at 361. The roofing company, Kassem, staffed its labor needs by contracting with decedent-worker's temporary employment agency. *Id*. The decedent-worker accepted the assignment to work for Kassem, and fell throw a skylight when he was working on the roof. *Id*. at 754, 460 S.E.2d 358. We held the decedent-worker met the "type of work" requirement for special employee status since he was injured while performing roofing work for Kassem. *Id*. at 760, 460 S.E.2d at 361.

The instant case is analogous to *Brown*. Bullard as a temporary agency employee, agreed to work for Defendant and carry out Defendant's steel working obligations at a construction site. Bullard was working for Defendant at the construction site when a piece of tube steel fell and fatally injured him. Therefore, the second prong of the *Collins* test is satisfied with regard to Bullard's special employee status.

iii. Prong Three: Control Over Work

Our Court "has stressed that '[t]he third prong, control over *the detail* of the work, may be the most significant [prong of the *Collins* test]." *Shelton*, 197 N.C. App. at 412, 677 S.E.2d at 492 (citing *Anderson v. Demolition Dynamics, Inc.*, 136 N.C. App. 603, 609, 525 S.E.2d 471, 474 (2000)) (emphasis in original). The "crucial test" in determining whether a worker is a special employee under the defendant-employer's control, is whether "'the work to be done . . . [and] the manner of performing it'" are controlled by the defendant-employer. *Shelton*, 197 N.C. App. at 412, 677 S.E.2d at 492–93 (citing *Moody v. Kersey*, 270 N.C. App. 614, 621, 155 S.E.2d 215, 220–21 (1967)) (emphasis in original).

Under the Tradesmen-Defendant Agreement, Tradesmen guaranteed that the temporary workers sent to Defendant's construction site would be "of the quality and have the knowledge . . . [Defendant] requested. If, in [Defendant's] opinion, this is not the case, then [Defendant] has the option of sending the worker back to Tradesmen within the first four hours of the first day at no charge to [Defendant]." The Agreement went on to state, "[Defendant] is solely responsible for directing, supervising and controlling Tradesmen employees as well as their work." This language clearly states that Defendant controlled the required skill set Bullard needed to possess, the detail of Bullard's work, and the manner Bullard performed the work. Defendant's control was so absolute that it could have returned Bullard to

Tradesmen swiftly, with autonomy. Therefore, the third prong of the *Collins* test is satisfied.

With all three prongs of the *Collins* test met, we hold that Bullard is a special employee of Defendant. Therefore, the Act's exclusivity provision applies to the "rights and remedies of [Bullard], his dependents, next of kin, or representative as against [Defendant] at common law or otherwise on account of such injury or death." N.C. Gen. Stat. § 97-10 (2013). As such, we hold that the trial court correctly dismissed Plaintiff's claims for lack of subject matter jurisdiction.

B. *Woodson* Claim

Plaintiff contends she properly pled and evidenced her *Woodson* claim, and the trial court erred in granting Defendant's motion to dismiss for lack of subject matter jurisdiction. In the seminal case for *Woodson* claims, our Supreme Court established the following:

> [When] an 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, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act.

Woodson, 329 N.C. at 340–41, 407 S.E.2d at 228.

Our Supreme Court reasoned that *Woodson* claims could proceed as standalone claims outside the Act because the legislature did not intend to relieve an employer

of civil liability when it "[commits an intentional tort or] 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 . . . ." *Id.* The Court elaborated on *Woodson* in a later case, holding:

> The Woodson exception [to the Act's exclusivity provision] represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct. Such circumstances exist where there is uncontroverted evidence of the employer's intentional misconduct and where such misconduct is substantially certain to lead to the employee's serious injury or death.

Whitaker v. Town of Scotland Neck, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003). This holding set the standard for pleading *Woodson* claims, requiring plaintiffs to forecast "uncontroverted evidence of the employer's intentional misconduct . . . where such misconduct is substantially certain to lead to the employee's serious injury or death." *Id.*

Our Supreme Court found what it considered to be uncontroverted evidence of intentional employer misconduct in the facts of *Woodson*. *See Whitaker*, 357 N.C. at 557–58, 597 S.E.2d at 668 (citation omitted).

> In *Woodson*, the defendant-employer's president was on the job site and observed first-hand the obvious hazards of the deep trench in which he directed the decedent-employee to work. Knowing that safety regulations and common trade practice mandated the use of precautionary shoring, the defendant-employer's president nonetheless disregarded all safety measures and intentionally placed his employee into a hazardous situation in which experts

> concluded that only one outcome was substantially certain to follow: an injurious, if not fatal, cave-in of the trench.

Id. (citations omitted).

In *Woodson*, the unsafe trench collapsed as predicted, and the decedent-worker died while his fellow employees tried to dig him out of the trench. *Woodson*, 329 N.C. at 336, 407 S.E.2d at 225. The evidence in *Woodson* included expert testimony regarding soil analysis, trench construction and safety, and repeated OSHA violations by the defendant-employer that led to the decedent-worker's death. Our Supreme Court held, "[f]rom this evidence, a reasonable juror could determine that upon placing a man in this trench serious injury or death as a result of a cave-in was a substantial certainty rather than an unforeseeable event, mere possibility, or even substantial probability." *Id*. at 345, 407 S.E.2d at 231.

In the present case, Plaintiff alleged that Defendant "knew that its conduct was substantially certain to cause serious injury or death to [Bullard], and its intentional conduct was a proximate cause of his death." To support this claim, Plaintiff cited to Defendant's OSHA violations in her complaint. At the motion to dismiss hearing, Plaintiff provided no additional support for her *Woodson* claim.

There is no evidence in Plaintiff's complaint to suggest these OSHA violations caused Bullard's death. The varying serious and non-serious citations contemplate improper written communications programs, drill presses, electrical equipment, and batteries, not tube steel falling from an elevated work zone. Reviewing the complaint,

taking all of the evidence as true in the light most favorable to Plaintiff, we cannot identify any pleadings or facts that forecast uncontroverted evidence of Defendant's intentional misconduct. Therefore, we cannot hold Defendant's OSHA violations were substantially certain to lead to Bullard's injuries or death. *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668. Accordingly, Plaintiff's *Woodson* claim does not state a claim upon which relief can be granted, and it cannot proceed outside the exclusive jurisdiction the Worker's Compensation Act. We therefore hold the trial court properly granted Defendant's motion to dismiss for lack of subject matter jurisdiction.

V. Conclusion

For the foregoing reasons we affirm the trial court.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).