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NO. COA11-225
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

DEBORAH LYNN JACKSON,
ADMINISTRATRIX OF THE ESTATE OF
THE LATE JOEL EDWARD TRIPP,
Plaintiff,

v.

Columbus County
No. 09 CVS 1005

ES&J ENTERPRISES, INC., TOWN OF
LAKE WACCAMAW, LARRY CARLISLE,
ESTHER FAYE CARLISLE and SANDRA
CARROLL WILLIAMS,
Defendants.

Appeal by plaintiff from order entered 2 December 2010 by
Judge Douglas B. Sasser in Columbus County Superior Court.
Heard in the Court of Appeals 1 September 2011.

*Brent Adams & Associates, by Brenton D. Adams, for
plaintiff-appellant.*

*McAngus, Goudelock & Courie, PLLC, by John T. Jeffries and
Jennifer M. Arno, for defendants-appellees.*

GEER, Judge.

The issue raised in this appeal is whether plaintiff
Deborah Lynn Jackson, in response to defendants' motion for
summary judgment, presented sufficient evidence to trigger the

exceptions to the exclusivity provisions of the North Carolina Workers' Compensation Act set out in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), and *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). With respect to plaintiff's *Woodson* claim, we hold that plaintiff failed to forecast sufficient evidence to allow a jury to find that defendant ES&J Enterprises, Inc. ("ES&J") intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to plaintiff's decedent. We also hold that plaintiff did not present sufficient evidence that the death of her decedent was caused by the willful, wanton, and reckless negligence of a co-employee as required under *Pleasant*. The trial court, therefore, properly entered summary judgment for defendants.

Facts

Plaintiff's decedent, Joel Edward Tripp, was employed by defendant ES&J as a pipe layer. ES&J is owned by defendant Esther Faye Carlisle, who is ES&J's sole stockholder. Her daughter, defendant Sandra Carroll Williams, serves as vice president of the company and runs its day-to-day operations.

On 2 August 2007, Mr. Tripp was helping lay 42-inch pipe in the Town of Lake Waccamaw, North Carolina. He climbed into the bottom of a 12-foot-deep, 10-foot-wide trench to check the depth

and grade. He determined that with one more pass of the trackhoe, the trench would be sufficiently deep.

The trackhoe operator, when lowering his bucket to remove dirt from the trench, could not see into the trench. In addition, the bucket of the trackhoe being used was 6 feet wide, which left only two feet clearance on either side of the bucket when it was in the trench. Because of the danger to the pipe layer if he remained in the trench while the trackhoe was operating, the ES&J employee safety manual specified that "[n]o one is permitted in an excavation while equipment is working or parked next to the edge."

ES&J's supervisors interpreted this rule as allowing pipe layers to go inside the already-laid pipe in the trench when a trackhoe bucket was moving in a trench, rather than leaving the trench completely. The supervisors believed that the installed pipe, covered with dirt, would provide safety for the pipe layer while the trackhoe was digging dirt out of the trench. This procedure was not insisted upon by ES&J management, but rather was developed in the field as a result of experience. A ladder was, however, always provided in case of emergency.

On 2 August 2007, Mr. Tripp motioned to the trackhoe operator to make one more pass. Pursuant to the ES&J policy, Mr. Tripp was then supposed to go inside the already-laid 42-

inch pipe. As the bucket of the trackhoe was lowered into the trench, the operator heard Mr. Tripp "holler." The bucket of the trackhoe had pinned Mr. Tripp against the 42-inch pipe. Mr. Tripp died later the same day as a result of his injuries.

Following Mr. Tripp's death, OSHA conducted an investigation. Only one OSHA citation was issued related to the fatality, and it was for violating a general duty to have a safe workplace. Another citation issued as a result of this investigation dealt with the placement of the trench box too high from the bottom of the trench, although OSHA determined this concern was not a factor in the fatality. After the initial citations were issued, ES&J appealed the findings. The appeal resulted in the citations being modified through an Informal Settlement Agreement. This agreement did not require ES&J to modify their practices and install large pipe differently in the future.

On 25 June 2009, plaintiff filed a wrongful death action in superior court against defendants Town of Lake Waccamaw, ES&J, and Larry Carlisle, Ester Faye Carlisle's husband. Plaintiff filed an amended complaint on 31 July 2009 adding Esther Faye Carlisle and Sandra Carroll Williams as defendants. Apparently, on 1 November 2010, plaintiff filed a voluntary dismissal without prejudice of her claims against Larry Carlisle and the

Town of Lake Waccamaw. The trial court subsequently granted defendants' motion for summary judgment on 2 December 2010. Plaintiff timely appealed to this Court.

Discussion

Summary judgment is appropriate "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 any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). "A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to the non-moving party." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007).

As a general matter, the North Carolina Workers' Compensation Act provides the exclusive remedy for injured employees in North Carolina. The Act represents a compromise that assures employees, on the one hand, of receiving certain benefits without any need of proving negligence or defending against claims of contributory negligence. *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003). On the other hand, the employer benefits because "the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead

limited exclusively to those remedies set forth in the Act." *Id.*

Our Supreme Court has, however, recognized two exceptions to the exclusivity provisions of the Workers' Compensation Act. In *Woodson*, the Court held:

[W]hen 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

329 N.C. at 340-41, 407 S.E.2d at 228. In *Pleasant*, the Court held that "the North Carolina Workers' Compensation Act does not insulate a co-employee from the effects of his willful, wanton and reckless negligence"; the injured worker may maintain a common law tort action against the co-employee. 312 N.C. at 717, 325 S.E.2d at 250. Plaintiff contends that she forecast sufficient evidence to assert claims under both *Woodson* and *Pleasant*.

We address first the *Woodson* claim. Although plaintiff asserts on appeal that the Supreme Court has "never overruled or modified" *Woodson*, the Court has, in fact, since restricted *Woodson*'s applicability. The Court held:

The *Woodson* exception 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, 357 N.C. at 557, 597 S.E.2d at 668.

In *Whitaker*, the plaintiff's decedent, a maintenance employee assigned to a garbage truck, was killed by a crushing injury. *Id.* at 553-54, 597 S.E.2d at 666. As a dumpster was being raised for emptying into the truck, the latching mechanism on the truck -- which the supervisor for two months had known was broken -- gave way, allowing the dumpster to swing free and pin the decedent against the truck. *Id.* at 554, 597 S.E.2d at 666. The OSHA investigator found five "'serious'" violations as a result of the accident. *Id.* The trial court granted summary judgment to defendants on plaintiff's *Woodson* claim.

On appeal, the Supreme Court, in addressing the sufficiency of the evidence presented by the plaintiff in that case, first described the actions of the *Woodson* employer's president in connection with a trench collapse that resulted in a fatality:

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. at 557-58, 597 S.E.2d at 668 (internal citation omitted).

The *Whitaker* Court then contrasted the evidence presented in its case to that of *Woodson*:

In the present case, there is no similar evidence that defendants were manifestly indifferent to the health and safety of their employees. The Town has a long history of garbage collection, yet there is no evidence of record that the Town had been previously cited for multiple, significant violations of safety regulations, as in *Woodson*. On the day of the accident, none of the Town's supervisors were on-site to monitor or oversee the workers' activities. Decedent was not expressly instructed to proceed into an obviously hazardous situation as in *Woodson*. There is no evidence that defendants knew that the latching mechanism on the truck was substantially certain to fail or that if such failure did occur, serious injury or death would be substantially certain to follow. As discussed in *Woodson*, simply having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death.

In *Woodson*, evidence was presented from which a jury could reasonably conclude that the defendant-employer's president recognized the immediate hazards of his operation and consciously elected to forgo critical safety precautions. Here, there is

no such evidence. Moreover, in *Woodson*, the employee worked in a deep, narrow trench in which it was impossible for him to escape or avoid injury once the soil around him began to cave in. Here, however, decedent was not so helpless.

Id. at 558, 597 S.E.2d at 668-69 (internal citation omitted).

The *Whitaker* Court then concluded: "In sum, the forecast of evidence in the present case fails to establish that defendants intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to decedent. The facts of this case involve defective equipment and human error that amount to an accident rather than intentional misconduct." *Id.*, 597 S.E.2d at 669. Consequently, the Court determined that plaintiffs failed to raise a genuine issue of material fact as to defendants' liability under the *Woodson* exception to the exclusivity provisions of the Workers' Compensation Act. *Id.*

We find the evidence in this case comparable to the evidence the *Whitaker* Court found insufficient to survive summary judgment. While plaintiff has argued generally about requiring an employee to remain in a trench while a trackhoe bucket is removing dirt in that trench, the alleged misconduct in this case was having the employee go inside an already-installed pipe instead of leaving the trench while equipment was operating in the trench. Plaintiff does not cite to any

evidence in the record -- and we have found none -- to support the claim in her brief that the evidence was conflicting as to whether it was standard practice at ES&J for employees to go into the existing pipe as opposed to simply remaining in the trench. Indeed, plaintiff's own expert witness identified the alleged misconduct as "requiring the late Joel Tripp to work inside the trench box and . . . expect[ing] Joel Tripp to go inside the 42" pipe when the bucket of the excavator is lowered into the trench box"

The question for this Court is, therefore, whether, under *Woodson* and *Whitaker*, plaintiff forecast sufficient evidence that defendant intentionally engaged in misconduct knowing that it was substantially certain to cause serious injury or death to Mr. Tripp when defendant ES&J required its workers to remain in the trench but go inside the already-laid pipe as the bucket of the excavator was lowered into the trench.

Here, like the plaintiff in *Whitaker*, plaintiff presented no evidence that defendants "were manifestly indifferent to the health and safety of their employees," *id.* at 558, 597 S.E.2d at 668, when adopting the practice of having employees go inside a pipe for protection. ES&J had no previous OSHA citations regarding this practice. Nor has plaintiff presented evidence of multiple, significant safety violations of any kind, even

though ES&J has been in the business of laying pipe for many years.

Plaintiff, however, asserts that the OSHA inspector assigned to investigate the fatality, Paul Vogel, found that the practice was inherently dangerous and could cause serious injury or death. However, the OSHA report repeatedly indicates that the danger was to employees "within the confines of the trench box" -- it does not state that the same danger existed if the employee went into the already-installed pipe past the end of the trench box, where the pipe was covered with dirt. In fact, Mr. Vogel testified that if an employee followed ES&J's practice, the employee would be protected in the concrete pipe with overhead and lateral protection. According to Mr. Vogel, had Mr. Tripp been in the pipe consistent with standard ES&J operating procedure, he would not have been hurt.

Additionally, the OSHA report states in the "Employer Knowledge" section that ES&J "believed this [practice] to be safe." Plaintiff has, in fact, presented no evidence that suggested that the supervisors or anyone else at defendant ES&J knew that going into the pipe was dangerous at all -- to say nothing of being substantially certain to result in serious injury or death.

While, in contrast to *Whitaker*, two ES&J supervisors were in fact present at the site, those supervisors -- one of whom had 20 and the other 40 years of experience -- testified that they believed entering the already-laid pipe was standard industry practice and that they had never had an employee injured while following that practice. Another employee with over 30 years of experience had also never seen an injury when entering the pipe. Further, the record contains no evidence that ES&J had ever had anyone injured as a result of this practice.

Plaintiff attempts to show knowledge of the danger by pointing to the testimony of Larry Carlisle, who worked as an estimator for ES&J and was married to defendant Esther Faye Carlisle.¹ Mr. Carlisle testified:

A You got a backhoe that's got a bucket on it and the bucket weighs more than your car, just the bucket. And you're going down and you got a man that's running that machine, and he's got to be so good, as good as your attorney or surgeon is with his knife. That bucket when he stretched it out to do that work, which is typical putting in sewer, all of them puts it in the same. If that operator would have moved just like -- if he'd have moved his hand just like that, that boy would have been cut half in two.

¹Mr. Carlisle does not have any ownership interest in the company and has never been an officer or director.

Q It's a very dangerous situation?

A It's a very high-risk job.

Mr. Carlisle was thus acknowledging that the bucket operator -- and perhaps the pipe layer in the trench -- has a very high-risk job. Mr. Carlisle's testimony, upon which plaintiff relies, does not indicate that the practice of having the employee go into the already-installed pipe was high risk.

Plaintiff mistakes the issue when she asserts that an employer cannot avoid liability simply because it has been lucky that no one has been injured in the past or because OSHA has not cited the employer in the past. As *Whitaker* points out, the lack of injuries and OSHA citations goes to whether the employer had knowledge that a practice was substantially certain to result in serious injury or death. See *id.* (noting lack of citations and holding that "knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a substantial certainty of injury or death"). See also *Rose v. Isenhour Brick & Tile Co.*, 344 N.C. 153, 159, 472 S.E.2d 774, 778 (1996) (holding that lack of OSHA citations and injuries for six years was sufficient to demonstrate lack of knowledge and that grant of summary judgment to employer was appropriate); *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 584, 668 S.E.2d 114, 118 (2008) (holding that "[a]llthough

plaintiff presented evidence relating to the results of investigations following the accident, including expert testimony regarding the likelihood of an accident, there is no evidence that [defendant] knew, prior to decedent's death, that a carbon monoxide leak was substantially certain to occur"); *Jones v. Willamette Indus., Inc.*, 120 N.C. App. 591, 594-95, 463 S.E.2d 294, 297 (1995) (finding no *Woodson* claim where employer had not been cited for safety violations and the specific procedure had been used for some time).

Plaintiff also points to the affidavit of her expert witness, C. William Brewer. Much of Mr. Brewer's affidavit seems to focus on his belief that the risk of serious injury or death is higher for incidents involving crushing events than it is for trench cave-ins, the event in *Woodson*. This portion of the affidavit does not address the specific misconduct alleged in this case. As *Whitaker*, a crushing event case, establishes, we must look at the knowledge of the employer regarding the hazards of the specific alleged misconduct.

As for the practice of requiring employees to seek protection in already-installed pipe, Mr. Brewer's affidavit states that he knows of no other company that engages in the practice. He conducted a telephone survey of unidentified companies apparently in the southeast that confirmed his

understanding that this practice was not engaged in by anyone else. However, apart from explaining that there were safer alternatives to the practice used by defendants, Mr. Brewer provides no evidence that it was generally known that the practice employed by ES&J was substantially certain to result in serious injury or death.

Even though Mr. Brewer's evidence regarding industry practices rebuts ES&J's evidence that this practice was industry standard, this issue of fact is not sufficient to defeat summary judgment because it does not address ES&J's knowledge that serious injury or death was substantially certain. This Court has previously held that evidence of a violation of industry standards, without more, is not sufficient to establish a *Woodson* claim. See *Powell v. S & G Prestress Co.*, 114 N.C. App. 319, 323-24, 442 S.E.2d 143, 144-46 (1994) (holding that summary judgment was properly granted despite expert affidavit that employer's operations were inconsistent with industry standards, evidence that employer had been cited by OSHA twice in 10 years for unsafe operations, and evidence that employer could have taken steps that would have made the workplace safer), *overruled in part on other grounds by Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995).

Mr. Brewer also stated in his affidavit: "[I]t is a violation of OSHA standards to have a load of any description lifted above a worker in such circumstances." While it is not clear precisely what Mr. Brewer meant by this statement (which is not explained further in the affidavit), even if Mr. Brewer was stating that ES&J's practice of going into the pipe was an OSHA violation, that evidence would not be sufficient to defeat summary judgment. See *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 236, 240, 424 S.E.2d 391, 393, 395 (1993) (holding that evidence that employer had acted "in violation of OSHA requirements and industry standards" did not rise "to the higher level of negligence as defined in *Woodson* of substantial certainty of injury").

Finally, plaintiff points to the fact that Mr. Brewer concludes that the conduct "had an exceedingly high probability of causing serious injury or death" and "was substantially certain to result in serious injury or death." We note that "[a] *Woodson* claim cannot be made out or saved from summary judgment simply because a nonlegal expert states that *Woodson's* test has been met." *Jones*, 120 N.C. App at 595, 463 S.E.2d at 297 (discussing how plaintiff presented affidavits from two experts who stated that there was substantial certainty of death or serious injury under the conditions in place).

Plaintiff has not cited any case suggesting that her forecast of evidence is sufficient to meet the requirements of *Woodson* and that the trial court, given this record, erred in granting summary judgment. On the other hand, we find the evidence in this case materially indistinguishable from that in *Whitaker*, which plaintiff does not cite or discuss.² We are, therefore, compelled to conclude based on *Whitaker* and the authority cited above that the trial court properly granted summary judgment on plaintiff's *Woodson* claim.

Plaintiff next contends that the individual defendants -- Esther Faye Carlisle and Sandra Carroll Williams -- willfully, wantonly, and recklessly required employees to violate safety rules and regulations when they required employees to work in the trench in close proximity to a moving trackhoe bucket. Plaintiff argues that she should, therefore, be allowed to assert a claim against the individual defendants under *Pleasant*.

We first address plaintiff's claims against Ms. Carlisle. In *Woodson*, the Supreme Court held regarding the claims against the individual defendant:

Since the evidentiary forecast shows that Morris Rowland was at all material times the president and sole shareholder of Rowland Utility, and was acting in furtherance of corporate business, we conclude that any individual liability on

²Oddly enough, neither do defendants.

his part must be based on the same standard as that applied to the corporation. . . . His liability, like that of the corporation, must be determined under the substantial certainty standard.

329 N.C. at 347-48, 407 S.E.2d at 232. Similarly, Ms. Carlisle is the owner and sole shareholder of defendant ES&J, and any actions Ms. Carlisle took were in furtherance of ES&J's business. Consequently, under *Woodson*, any claim against Ms. Carlisle must be determined under the substantial certainty standard. Since we have concluded that summary judgment was properly entered under *Woodson* in favor of the company for plaintiff's failure to meet that standard, summary judgment was also properly entered in favor of Ms. Carlisle.

Turning to Ms. Carroll Williams, *Pleasant* holds that "the Workers' Compensation Act does not shield a co-employee from liability for injury caused by [her] willful, wanton and reckless negligence." 312 N.C. at 717, 325 S.E.2d at 249. Plaintiff has, however, presented no evidence that Mr. Tripp's death was caused by any willful, wanton, and reckless act of Ms. Carroll Williams.

Ms. Carroll Williams served as vice president of ES&J and ran its day-to-day operations. It is undisputed, however, that she was not on site at the time of the accident, and plaintiff has cited no evidence that Ms. Carroll Williams was the one who

required employees to move inside a pipe rather than leave the trench while the trackhoe bucket was operating in the trench. Therefore, the trial court also properly entered summary judgment for Ms. Carroll Williams.

Affirmed.

Judges STROUD and THIGPEN concur.

Report per Rule 30(e).