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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1113

Filed 2 July 2024

Robeson County, No. 22 CVS 3228

SHIVISHIE WILSON, Plaintiff,

v.

BUTTERBALL, LLC; C&D SECURITY MANAGEMENT INC. d/b/a “ALLIED UNIVERSAL SECURITY SERVICES”; C&D ENTERPRISES INC d/b/a “ALLIED UNIVERSAL SECURITY SERVICES”; UNIVERSAL PROTECTION SERVICE, LLC d/b/a “ALLIED UNIVERSAL SECURITY SERVICES, LLC”; SECURADYNE SYSTEMS INTERMEDIATE LLC d/b/a “ALLIED UNIVERSAL TECHNOLOGY SERVICES”; SOS SECURITY LLC d/b/a “ALLIED UNIVERSAL RISK ADVISORY AND CONSULTING SERVICES”; ALLIED UNIVERSAL COMPLIANCE AND INVESTIGATIONS, INC.; ALLIED UNIVERSAL EXECUTIVE PROTECTION AND INTELLIGENCE SERVICES, INC.; UNIVERSAL PROTECTION SERVICE, LLC; ALLIED TOPCO LLC; ALLIED UNIVERSAL MANAGER LLC; ESTATE OF NEKEIA WHITTINGTON; ESTATE OF SHERONDA SHAW; CHARANESSA WILSON; TIQUASHIA MCNEIL; TYQUAN MCDONALD; and ANGELA OXENDINE, Defendants.

Appeal by defendant Butterball, LLC from order entered 25 April 2023 by Judge Tiffany P. Powers in Robeson County Superior Court. Heard in the Court of Appeals 17 April 2024.

Howard, Stallings, From, Atkins, Angell, and Davis PA, by Robert H. Jessup and Lee A. Rodio, for plaintiff-appellee.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by Theresa M. Sprain, for defendant-appellant.

THOMPSON, Judge.

Butterball, LLC (defendant) appeals from the trial court's order denying its Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss. Defendant contends that the North Carolina Industrial Commission (Industrial Commission) has exclusive jurisdiction over Shivishie Wilson's (plaintiff) complaint, and that plaintiff has not stated a claim for which relief could be granted under the *Woodson* exception to the exclusivity provision of the Workers' Compensation Act (Act). For the reasons discussed below, we affirm the trial court's order denying defendant's Rule 12(b)(1) motion to dismiss.

I. Factual Background and Procedural History

Plaintiff began working for defendant in April of 2018. "Over the course of nearly two years, [p]laintiff remained in good standing as an employee and was promoted to the position of line leader [o]n a turkey bacon processing line[.]" Plaintiff and defendant Nekeia Whittington, who was also employed by defendant, worked on processing lines that were adjacent to each other. Throughout the course of plaintiff's employment with defendant, Whittington harassed plaintiff by cursing and physically threatening plaintiff. Plaintiff reported Whittington's actions to defendant's human resources (HR) department on several occasions, requesting intervention by defendant, to no avail.

On 9 October 2019, "Whittington approached [p]laintiff and told her that

Whittington's family members were going to come to the parking lot, near[] [] [defendant's facility], to beat [p]laintiff after she got off work." Plaintiff reported this threat to Lisa Smith (Smith), defendant's HR representative, but was told to go back to work—on the processing line that was adjacent to Whittington—without any intervention by defendant.

On 15 January 2020, Whittington attempted to fight plaintiff in the restroom. However, in an attempt to avert the altercation, plaintiff stated, "you may not need your job, but I need mine[,]” and in response, Whittington knocked plaintiff down and left the restroom. Plaintiff immediately reported the interaction to Smith, reminded Smith of Whittington's prior conduct and remarks toward plaintiff, and informed Smith that plaintiff was in imminent danger; however, Smith told plaintiff to go back to work and defendant took no further action. When plaintiff returned to her processing line, Whittington had dumped all of the turkey bacon from plaintiff's processing line onto the floor, and while plaintiff cleaned up the mess, Whittington stated, "wait until this afternoon, I've got something coming for you." Plaintiff and Whittington's shift ended at 4 p.m., and after being "off duty from work for some time," plaintiff went to her car in a nearby parking lot. As plaintiff got into her car, three vehicles parked behind plaintiff such that plaintiff was unable to escape. Whittington approached plaintiff's vehicle, pulled plaintiff out of the vehicle by her

hair, and began violently assaulting plaintiff.¹ Subsequently, Whittington's sister, Sheronda Shaw, and defendants Tiquashia McNeil, Tyquan McDonald, Charanessa Wilson, and Angela Oxendine² joined in and severely beat plaintiff. The violent assault on plaintiff did not stop until plaintiff was unconscious.

Plaintiff sustained several brain injuries as a result of the assault, which required her to undergo extensive brain surgery at Duke University Hospital, and left her with permanent, lifelong disabilities that will prevent her from accomplishing normal activities of daily living.

On 7 December 2022, plaintiff filed a complaint against defendant. Within the complaint, plaintiff raised several causes of action, but relevant to this appeal are the first and second claims for relief. Plaintiff's first claim for relief was "[n]egligence, [g]ross [n]egligence, and [p]remises [l]iability against [d]efendants Butterball and Allied Security[.]" Plaintiff's second claim for relief was "[i]n the [a]lternative, *Woodson* [c]laim [a]gainst [d]efendant Butterball[.]"

On 16 February 2023, defendant filed a Rule 12(b)(1) motion to dismiss and a Rule 12(b)(6) motion to dismiss. On 25 April 2023, Judge Tiffany P. Powers denied defendant's Rule 12 motions to dismiss.

¹ Plaintiff alleges that this incident was being recorded by bystanders, and that "camera footage shows a security officer with [d]efendant Allied Security standing mere feet away from the attack" watching as plaintiff was beaten "within an inch of her life" without taking any action to intervene or assist plaintiff before, during, or after the assault.

² Whittington's daughter, Tiquashia McNeil, Whittington's son, Tyquan McDonald, a coworker of defendant and plaintiff, Charanessa Wilson, and Angela Oxendine were named as defendants in the underlying cause of action, but are not parties to this appeal.

Defendant filed a notice of appeal regarding the trial court's denial of its Rule 12 motions on 31 May 2023.

II. Discussion

A. Appellate Jurisdiction

A trial court's order denying a defendant's Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss is not a final order; instead, it is interlocutory. *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 570, 887 S.E.2d 448, 452 (2023). Although there is generally "no right of immediate appeal from interlocutory orders and judgments[.]" one may immediately appeal an interlocutory order and/or judgment "if it affects a substantial right." *Id.* at 571, 887 S.E.2d at 452 (citations omitted). Denial of a Rule 12(b)(1) motion to dismiss based on the exclusivity provision of the Act affects a substantial right and is, therefore, immediately appealable. *Id.*

In the present case, defendant filed a Rule 12(b)(1) motion to dismiss contending that the trial court lacked subject matter jurisdiction over this action due to the exclusivity provision of the Act. Additionally, defendant filed a Rule 12(b)(6) motion to dismiss contending that plaintiff failed to allege a claim to which the *Woodson*³ exception to the exclusivity provision would apply. The trial court denied defendant's motions. Therefore, defendant's motions to dismiss based on the exclusivity provision of the Act are properly before us on appeal.

³ See *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

B. Standard of Review

“A Rule 12(b)(1) motion to dismiss represents a challenge to the trial court’s subject matter jurisdiction over a plaintiff’s claims.” *Id.* at 572, 887 S.E.2d at 452. Subject matter jurisdiction is the trial court’s authority to hear the kind of action in question. *Id.* “The trial court need not confine its evaluation of a Rule 12(b)(1) motion to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.” *Id.* at 572, 887 S.E.2d at 452–53 (internal quotation marks and citation omitted). This Court reviews a trial court’s order on a Rule 12(b)(1) motion to dismiss de novo. *Id.* at 572, 887 S.E.2d at 453.

C. Workers’ Compensation Act

At the outset, we must first determine whether defendant is subject to and has complied with the provisions of the Act.

“The Superior Court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute.” *Morse v. Curtis*, 276 N.C. 371, 374–75, 172 S.E.2d 495, 498 (1970). “By statute the Superior Court is divested of original jurisdiction of all actions *which come within* the provisions of the [] Act.” *Id.* at 375, 172 S.E.2d at 498 (emphasis added). “Where an employee and their employer are subject to and have complied with the provisions of the Act, the rights and remedies granted to the employee under the Act exclude all other rights and remedies of the employee.” *Marlow*, 288 N.C. App. at 572, 887 S.E.2d at 453.

Here, there is no dispute between the parties about whether defendant was subject to the Act at the time of plaintiff's injury. Undeniably, in defendant's brief, defendant subjected itself to the Act through its contention that the exclusivity provision of the Act bars plaintiff's claim from being within the jurisdiction of the trial court. Moreover, defendant carried workers' compensation insurance and there is nothing in the record to indicate that defendant was not in compliance with the Act. Thus, we find that defendant was subject to the Act at the time of plaintiff's injury.

D. Jurisdiction Pursuant to the Act

Next, we turn to the cause of action to determine if it comes within the provisions of the Act such that the Industrial Commission has exclusive jurisdiction over this matter. Defendant contends that the trial court erred in denying its Rule 12(b)(1) motion to dismiss because "plaintiff's claims were barred by the exclusivity provision" of the Act. We do not agree.

"The Industrial Commission is not a court of general jurisdiction[,] but instead "it is a quasi-judicial administrative board created to administer the [] Act and has no authority beyond that conferred upon it by statute." *Salvie v. Med. Ctr. Pharm. of Concord, Inc.*, 235 N.C. App. 489, 491, 762 S.E.2d 273, 275 (2014). "The [] Act specifically relates to the rights and liabilities of employee and employer by reason of injuries and disabilities arising out of and in the course of the employment relation." *Id.* (internal quotation marks and citation omitted). And this Court has indicated

that, “[w]here that relation does not exist[,] the Act has no application.” *Id.* at 491, 762 S.E.2d at 275–76. Thus, the Industrial Commission only has exclusive jurisdiction over injuries that “arise out of and in the course of the employment,” not *any* workplace injury.

In determining whether the plaintiff’s injury—giving rise to her cause of action—arose out of and in the course of employment such that it comes with the provisions of the Act, we must apply the “applicability test.” *See Marlow*, 288 N.C. App. at 572, 887 S.E.2d at 453 (establishing the test). Under the applicability test, “[a]n action comes within the provisions of the Act if: (1) the injury was caused by an accident; (2) the injury was sustained in the course of the employment; and (3) the injury arose out of the employment.” *Id.*

While plaintiff’s primary cause of action is based on a theory of negligence, the injury giving rise to this cause of action was the assault that was committed against her. And “[b]ecause these claims arise upon defendant[’s] motions to dismiss, we treat plaintiff[’s] factual allegations . . . as true.” *Stone v. N.C. Dep’t. of Labor*, 347 N.C. 473, 477, 495 S.E.2d 711, 713 (1998). So, for the purposes of this appeal, this Court will treat the factual allegations found in plaintiff’s complaint as true.

a. Was the injury caused by an accident?

The Act is found in Chapter 97 of the North Carolina General Statutes. N.C. Gen. Stat. § 97 (2023). For the purposes of the Act, injury “shall mean only injury by accident arising out of and in the course of the employment” N.C. Gen. Stat. §

97-2(6). “Injuries resulting from an assault are caused by ‘accident’ within the meaning of the Act when, from the employee’s perspective, the assault was unexpected and was without design on her part.” *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780 (1989) (emphasis omitted).

In the instant case, “treat[ing] plaintiff[s] factual allegations . . . as true[.]” *Stone*, 347 N.C. at 477, 495 S.E.2d at 713, we conclude that plaintiff’s injuries do not constitute an accident because, from plaintiff’s perspective, the assault committed against her was not unexpected. Indeed, following the altercation in the restroom, Whittington told plaintiff to “wait until this afternoon, I’ve got something coming for you.” Moreover, in plaintiff’s complaint she qualifies the assault as “inevitable” and that “it was substantially certain that such an attack was imminent[.]” Therefore, plaintiff’s injury was not an accident for the purposes of the Act because the assault was not unexpected. As such, the first prong of the applicability test is not satisfied.

b. *Did the injury arise out of and in the course of employment?*

“[W]hile the ‘arising out of’ and ‘in the course of’ elements are distinct tests, they are interrelated and cannot be applied entirely independently.” *Culpepper*, 93 N.C. App. at 247–48, 377 S.E.2d at 781. “The words ‘arising out of the employment’ refer to the origin or cause of the accidental injury.” *Id.* at 248, 377 S.E.2d at 781 (ellipsis and citation omitted). “[I]n the course of the employment[.]” for the purposes of the Act, refers “to the time, place and circumstances under which an accidental injury occurs[.]” *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E.2d 350, 353 (1972).

Furthermore, “an intentional assault in the [workplace] by a fellow employee or third party is an accident that occurs in the course of employment, but does not arise out of the employment unless a job-related motivation or some other causal relation between the job and the assault exists.” *Wake Cnty. Hosp. Sys., Inc. v. Safety Nat. Cas. Corp.*, 127 N.C. App. 33, 39, 487 S.E.2d 789, 792 (1997).

Here, plaintiff concedes that her injuries were not sustained during the course of employment. Certainly, plaintiff indicated that the assault did not occur until after her shift had ended. In her complaint, plaintiff stated that she and Whittington “clocked out at or around 4:00 p.m.” and that “[a]fter officially being off duty from work for some time, [p]laintiff got in her car in [a] nearby parking lot[,]” and that was when Whittington and two other vehicles blocked plaintiff in and began assaulting plaintiff. Looking at the “time, place and circumstances[,]” *Robbins*, 281 N.C. at 238, 188 S.E.2d at 353, in which plaintiff’s injury arose, plaintiff’s injury occurred after she had completed her work day, in a parking lot located near defendant’s facility, and was not related to her employment with defendant. Therefore, plaintiff did not sustain her injury in the course of her employment with defendant.

Moreover, plaintiff’s injuries did not arise out of her employment with defendant. “[A]n injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment.” *Id.* at 239, 188 S.E.2d 350, 354 (1972) (internal

quotation marks and citation omitted). And our Supreme Court has indicated that, “intentional tortious acts are rarely considered to be within the scope of an employee’s employment.” *Medlin v. Bass*, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990) (internal brackets and citation omitted). Here, Whittington’s assault on plaintiff was not related to the performance of the services required of Whittington as an employee of defendant, *Robbins*, 281 N.C. at 239, 188 S.E.2d at 354, because Whittington worked on a turkey bacon processing line and there is no causal relation between meat processing and an intentional assault. Additionally, it is assumed that Whittington assaulted plaintiff to accomplish some “undisclosed, personal motive,” *Medlin*, 327 N.C. at 594, 398 S.E.2d at 464, as there is no indication that the assault was committed “in furtherance of [defendant’s] business and for the purpose of accomplishing the duties of the employment.” *Phelps v. Vassey*, 113 N.C. App. 132, 135, 437 S.E.2d 692, 695 (1993). Furthermore, defendant acknowledged that plaintiff’s injury did not arise out of or in the course of employment when it denied plaintiff’s workers’ compensation claim on 5 February 2020. Found in this “Denial of Workers’ Compensation Claim,” defendant stated that plaintiff’s claim was denied because the assault committed against plaintiff occurred in a parking lot and “was not in the course and scope of employment[.]” Thus, plaintiff’s “injuries and disabilities” did not “aris[e] out of and in the course of [her] employment relation” with defendant. *Salvie*, 235 N.C. App. at 491, 762 S.E.2d at 275. And as such, the last two prongs of the *Marlow* applicability test are not satisfied.

Accordingly, we conclude that the Industrial Commission does not have exclusive jurisdiction over plaintiff's first claim for relief because (1) plaintiff's injuries do not constitute an accident for the purposes of the Act; (2) plaintiff's injuries were not sustained in the course of employment; and (3) plaintiff's injuries did not arise out of her employment with defendant. *See Marlow*, 288 N.C. App. at 572, 887 S.E.2d at 453. Thus, the trial court did not err in denying defendant's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because plaintiff's first claim for relief falls squarely within the superior court's general jurisdiction.

Finally, we decline to review defendant's Rule 12(b)(6) motion to dismiss plaintiff's alternative *Woodson* claim. The exclusivity provision of the Act, found at N.C. Gen. Stat. § 97-10.1, generally bars an employee "from suing the employer for potentially larger damages in civil negligence actions" by limiting the employee to the exclusive remedies set forth in the Act. *Blow v. DSM Pharm., Inc.*, 197 N.C. App. 586, 588, 678 S.E.2d 245, 248 (2009). However, the *Woodson* exception to the exclusivity provision allows a plaintiff to bring a civil action based on an intentional tort in specific cases. *Id.* at 589, 678 S.E.2d at 248. As we established in our discussion above, the exclusivity provision is inapplicable to plaintiff's injuries, and therefore her alternative *Woodson* claim is moot.

III. Conclusion

To conclude, plaintiff's cause of action against defendant Butterball does not come within the provisions of the Act. Plaintiff's injury was not an accident, she did

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not sustain her injury in the course of employment, and her injury did not arise out of her employment with defendant. Based on these reasons, we hold that the trial court did not err in denying defendant's Rule 12(b)(1) motion to dismiss.

AFFIRMED.

Judges MURPHY and ARROWOOD concur.

Report per Rule 30(e).