2013 IL App (1st) 121902-U

THIRD DIVISION
June 26, 2013

No. 1-12-1902

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

MOISES FLORES GARCIA, Individually and as Next Best Friend and Brother and Special Administrator of the ESTATE OF JULIO FLORES GARCIA, deceased, Plaintiff-Appellant v. RECYCLING SERVICE, INC., an Illinois Corporation d/b/a RECYCLING SERVICES and/or d/b/a FIBER OPTIONS, INC., and LEONEL PATINO, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 10 L 7305 Honorable Kathy Flanagan, Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

Held: The circuit court did not err in granting summary judgment in favor of defendant where the Illinois Workers' Compensation Act prohibits common law actions premised on negligence or wilful and wanton conduct against borrowing employers.

¶ 1 Plaintiff-appellant Moises Flores Garcia, individually and as next best friend and brother and special administrator of the estate of Julio Flores Garcia, filed a wrongful death and survival action against defendants-appellees Recycling Service, Inc. (RSI) and Leonel Patino, based on negligence and/or wilful and wanton conduct. The complaint alleged decedent was killed while cleaning a paper bailer at a plant operated by RSI, where he worked. Defendant moved for summary judgment on the basis that the Illinois Workers' Compensation Act (805 ILCS 305/1 (West 2010)) (the Act) provides an exclusive remedy for plaintiff's injuries and bars plaintiff's common law claims, which was granted. On appeal, plaintiff contends that the circuit court erred in granting summary judgment because: (1) defendants' actions were wilful and wanton and so fall outside the scope of the exclusivity provisions of the Act; (2) defendant RSI was not a borrowing employer within the meaning of the Act and was thus not protected by the Act's exclusive remedy provisions; and (3) defendant RSI agreed to indemnify decedent's employer for accidents arising out of defendant's failure to comply with safety standards. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiff's decedent was killed on March 20, 2009, when he was inside a paper baler at RSI that was activated by defendant Patino. At the time of his death, plaintiff's decedent was working as a paper sorter at RSI, where he had been placed nearly three years earlier by the temporary staffing agency Remedial Environmental Manpower (REM). The relationship between REM and RSI was governed by a Client Services Agreement (Agreement). That Agreement, dated January 1, 2009, described that REM would provide, or "loan," temporary

employees to perform work at RSI, the "borrowing employer." The temporary employees were paid by REM, but the Agreement specified that RSI had the exclusive right to direct and control the manner in which the temporary employees performed their work. Michael Finn, president of RSI, testified that RSI would in fact interview the workers REM provided before "hiring" them. Upon their "hire," they would undergo the same orientation and training as an employee hired directly by RSI. The dismissal of an REM employee from RSI's plant was at RSI's sole discretion, though REM bore the responsibility of informing that employee.

¶ 4 On the date of his hire, decedent signed a form acknowledging that he was an employee of REM, although he would report to a client and perform work at a client's business. The form also made him aware that he would receive instructions from the client that he would be required to follow. All REM employees who were placed at RSI agreed that RSI did in fact instruct them on their daily tasks and supervise their performance. They further testified that RSI provided their training and the tools they needed to work.

¶ 5 Under a separate provision of the Agreement, RSI agreed that it would not ask REM employees to operate machinery, with the exception of office equipment, without seeking prior authorization from REM. If temporary employees did operate machinery without such authorization, then RSI agreed to indemnify and hold harmless REM from and against all claims for damages and injuries.

¶ 6 Brian Reynolds, manager at REM, testified that it was his understanding that decedent's duties at RSI were limited to paper sorting. But after the accident, Reynolds learned that decedent was also performing janitorial tasks, such as cleaning balers and other machines. Finn

admitted that decedent and other paper sorters did perform general maintenance, but would not have been asked to clean balers.

¶ 7 Antonio Cisneros, the employee and production manager at RSI, confirmed that only supervisors were authorized to go inside the paper baler, which is a machine that compresses paper into bales. Patino, the lead supervisor at RSI at the time of the accident, testified that he was responsible for cleaning the baler before the end of his shift at 3:00 p.m. This entailed physically entering the baler through an access door in order to remove scraps of paper that were stuck inside the machine. Patino took several safety measures prior to entering the baler, including turning off the electricity and using a lock to ensure that the electricity could not be turned back on. He would often have REM employees stand outside the machine to pick up the scraps that he would dislodge.

¶ 8 Patino denied asking other workers to enter the baler; however, a paper sorter from REM, Noe Chavez, testified that Patino told him it was his job to clean inside the machine. Chavez testified he used to clean inside the baler daily, while decedent cleaned the top of the machine. Chavez denied receiving any safety training on the machine and testified that he never received a lock. Indeed, he stated that the baler was not always locked out when he cleaned inside it. Several forklift operators placed at RSI by REM likewise testified that they cleaned the baler on occasion, but they did not enter the machine. Rather, they leaned inside the machine with air blowers to dislodge paper scraps. The forklift operators all testified that they did receive safety training on the cleaning of the baler, were provided with locks, and only cleaned the machine when it was locked. None of them saw anyone other than Patino physically enter the baler,

although one forklift operator had previously seen decedent leaning inside the baler with an air blower.

¶ 9 Patino testified to the circumstances leading up to decedent's accident. He stated that at approximately 2:00 p.m. on March 20, decedent asked him if they were ready to clean the machine, and Patino told him to wait. Patino switched the baler to "manual" mode, which stopped the machine from making bales automatically, and then walked away from the machine to take a phone call from Cisneros, who was out of the office. When he returned to the baler a few minutes later, he pushed the ram forward, cut off the electricity and locked the machine. Someone then rushed to him and informed him an accident had occurred. When Patino investigated, he saw the machine's access door was open, and decedent, who had been inside the machine, had been killed when the ram was pushed forward. Patino testified that he did not know or suspect that decedent was in the machine when he pushed the ram forward. He had not asked decedent to enter the machine.

¶ 10 Patino went on to testify that there was a sign on the access door which read, in both Spanish and English: "WARNING – Open door only when machine is shut off and main switch is padlocked." This was in addition to a safety interlock on the door that prevented the baler from operating when the door was open. At the time of the accident, however, the safety interlock on the door was broken. Patino, Cisneros, and Finn were all aware that the lock was broken. In addition, there was some testimony that the lock had been broken up to three months prior to the accident. Patino testified that RSI's safety procedures dictated that if a machine was broken, it was not supposed to be used, but the baler remained operational. The case

supplementary report filed by Chicago police concluded that if the safety interlock had been operational, the accident could have been avoided.

¶ 11 Plaintiff filed a wrongful death and survival action against defendants based on negligence and wilful and wanton conduct. Specifically, plaintiff alleged in part that defendants negligently or wilfully and wantonly exposed decedent to an unreasonable risk of harm by: (1) operating the baler without first checking to make sure no one was inside the machine; (2) operating the baler knowing the access door safety interlock was broken; (3) failing to enforce safety procedures; and (4) failing to properly train workers on safety procedures. Defendants moved for summary judgment on the basis that decedent was a borrowed employee of RSI, and as such, the exclusivity provisions of the Illinois Worker's Compensation Act barred plaintiff from pursuing a common law cause of action against them. The circuit court granted the motion and denied plaintiff's motion to reconsider. Plaintiff timely filed this appeal.

¶ 12 ANALYSIS

¶ 13 Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *State Farm Mutual Automobile Insurance Co. v. Coe*, 367 Ill. App. 3d 604, 607 (2006). In making this determination, the record materials must be viewed in the light most favorable to the non-movant. *Federal Insurance Co. v. Lexington Insurance Co.*, 406 Ill. App. 3d 895, 897 (2011). We review *de novo* an order granting summary judgment. *Hall v. Henn*, 208 Ill. 2d 325, 328 (2003).

¶ 14 At issue in this case is whether plaintiff's common law causes of action are barred by

section 5(a) of the Illinois Workers' Compensation Act, which reads:

> "No common law or statutory right to recover damages from the employer *** for injury or death sustained by an employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act *** [or] the legal representatives of his estate." 820 ILCS 305/5(a) (West 2010).

¶ 15

This section is often analyzed in conjunction with section 11 of the Act, which provides:

> "The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer *** who has elected to provide and pay compensation for accidental injuries sustained by any employee arising out of and in the course of the employment according to the provisions of this Act." 820 ILCS 305/11 (West 2010).

Simply stated, these sections of the Act require "exclusive resort" to the worker's compensation remedy for injuries arising out of the course of employment. *Esposito v. Dior Builders*, 274 Ill. App. 3d 338, 345 (1995). The exclusive remedy provisions have been termed a *quid pro quo* " 'in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.' " *Meerbrey v. Marshall Field and Co., Inc.*, 139 Ill. 2d 455, 462 (1990) (quoting 2A A. Larson, Law of Workmen's Compensation § 65.11 (1988)). In order to circumvent this bar on common law actions imposed by the Act, a plaintiff must allege and

prove the injury (1) was not accidental; (2) did not arise out of employment; (3) was not incurred during the course of employment; or (4) was noncompensable under the Act. *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 237 (1980). Initially, plaintiff maintains there is an issue of fact as to whether decedent's injury was accidental.

¶ 16 An accidental injury within the meaning of the Act is one that "is traceable to a definite time, place and cause and occurs in the course of employment unexpectedly and without affirmative act or design of the employee." *Jablonski v. Multack*, 63 Ill. App. 3d 908, 910 (1978) (citing *International Harvester Co. v. Industrial Commission*, 56 Ill. 2d 84, 89 (1973)). Injuries that an employer intentionally inflicts on an employee, or which are commanded by the employer, are not accidental and thus do not fall within the ambit of the Act's protection. *Meerbrey*, 139 Ill. 2d at 463. Wilful and wanton misconduct, on the other hand, *is* "accidental" within the meaning of the Act. *Lannom v. Kosco*, 158 Ill. 2d 535, 541 (1994).

¶ 17 As plaintiff's complaint is premised on willful and wanton misconduct by defendants, his claim that decedent's injury was not accidental must fail. See *id.* Plaintiff attempts to avoid this inevitable conclusion by conflating wilful and wanton conduct with intentional conduct. To be sure, wilful and wanton conduct does include conduct that was performed intentionally, but it also encompasses reckless conduct. *Ziarko v. Soo Line R.R. Co.*, 161 Ill. 2d 267, 274 (1994). Our supreme court has described the distinction as follows:

> "Generally, '[t]ort intent means *** a desire to cause consequences or at least [a] substantially certain belief that the consequences will result. [Citations.]' [Citations.]

> *In contrast*, this court has offered the following definition of willful and wanton acts: 'A willful or wanton injury must have been intentional *or* the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care.' " *Id.* at 272-73 (citing *Scheiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)) (emphasis added).

In the case *sub judice*, plaintiff does not allege defendants intentionally caused decedent's death, in the sense that they desired or were substantially certain that his death would result from their acts or omissions. Rather, plaintiff argues that defendants consciously disregarded the safety of their employees and workers by permitting a baler with a malfunctioning access door to remain operational and allowing untrained employees to clean that baler. This is not intentional conduct as it has been defined in tort. See *Ziarko*, 161 Ill. 2d at 272.

¶ 18 We reached the same conclusion in *Mier v. Staley*, 28 Ill. App. 3d 373 (1975), a case comparable to the one at bar. There, the plaintiff-employee was injured when she fell off a manlift in the defendant's factory. *Mier*, 28 Ill. App. 3d at 376. She alleged negligence and wilful and wanton misconduct against the defendants-employers, who had directed office personnel such as herself to work in the factory during a strike despite knowing the machinery was dangerous to inexperienced persons. *Id.* The circuit court dismissed her complaint as barred by section 5(a) of the Act and we affirmed. *Id.* Specifically, we held that injuries caused by

wilful and wanton negligence of an employer were compensable under the Act, and further, that the only injuries outside the Act, "if any," were intentional torts. *Id.* at 381. The supreme court favorably cited this holding in *Lannom*, and we do the same today. See *Lannom*, 158 Ill. 2d at 541; see also *In re Clifton R.*, 368 Ill. App. 3d 438, 440 (2006) (lower courts are bound by Illinois Supreme Court precedent). Accordingly, we conclude that notwithstanding the tragic circumstances and utterly avoidable conditions leading to decedent's death, the death remains accidental within the meaning of the Act.

¶ 19 In the alternative, plaintiff argues that defendant cannot rely on the exclusivity provisions of the Act where it was not a "borrowing employer." Our supreme court has held that an employee in the general employment of one employer may be loaned to another for the performance of specific work and thus become the employee of the "borrowing" employer to whom he is loaned. See *A.J. Johnson Paving Co. v. Industrial Commission*, 82 Ill. 2d 341, 346-47 (1980). Under the Act, both the loaning and the borrowing employers are immune from damages actions for work-related injuries to employees. *O'Loughlin v. Service Master Co. Ltd. Partnership*, 216 Ill. App. 3d 27, 34 (1991) (citing *Saldana v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 388 (1978)).

¶ 20 In order to determine whether an employee has been "loaned" to a borrowing employer, we must ask: (1) whether the borrowing employer had the right to direct and control the manner in which the employee performed his work; and (2) whether there was an express or implied contract of hire between the borrowing employer and the employee. *Trenholm v. Edwin Cooper, Inc.*, 152 Ill. App. 3d 6, 7-8 (1986) (citing *A.J. Johnson*, 82 Ill. 2d at 348). Ordinarily, these are

factual questions for a jury to decide, but where the facts are undisputed and capable of only one inference they may be determined as a matter of law. *Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 15.

¶ 21 Turning first to the direction and control of decedent's work, this is the primary factor to consider when evaluating whether a loaned employee relationship exists. *Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 641 (1995). We may also examine the manner of hiring (*Mosley v. Northwestern Steel & Wire Co.*, 76 Ill. App. 3d 710, 719 (1979)), the right to discharge (*M & M Electric Co. v. Industrial Commission*, 57 Ill. 2d 113, 119 (1974)), and the freedom from control of the original employer (*Mosley*, 76 Ill. App. 3d at 719).[1] See generally, *O'Loughlin*, 216 Ill. App. 3d at 34.

¶ 22 In the case *sub judice*, plaintiff argues that because the Agreement restricted RSI from assigning REM workers certain jobs without REM's consent, or changing the workers' duties without first notifying REM, there is a question of fact regarding direction and control. We decline to take such a narrow view. Considered in their totality and viewed in the light most favorable to plaintiff, the undisputed facts establish that RSI directed and controlled the work of REM employees. First, the Agreement states that RSI was the entity who initially provided REM with the "job functions to be performed by [REM] employees." Merely because REM needed to be made aware of subsequent changes to these functions, it does not follow that they controlled the work. To the contrary, decedent's daily tasks, along with the tasks of other REM employees,

[1] Contrary to plaintiff's contention, the fact that an employee receives wages from a loaning employer is of no significance to the issue of direction and control. *Haight v. Aldridge Electric Co., Inc.*, 215 Ill. App. 3d 353, 366 (1991) (citing *A.J. Johnson*, 82 Ill. 2d at 349).

were assigned by Patino, an RSI employee, who received orders from Cisneros. Indeed, Noe Chavez, an REM employee placed at RSI, explicitly testified that he cleaned the baler at the direction of Patino, not an REM employee. There is no testimony that REM at any point directed its employees regarding the work they were to perform. *Contra Palomar v. Metropolitan Sanitary District of Greater Chicago*, 225 Ill. App. 3d 182, 190 (reversing grant of summary judgment in favor of defendant borrowing employer where plaintiff and co-workers averred that their work was directed and controlled by the loaning employer). In addition, though REM hired its own employees, they were subject to an interview process at RSI before beginning work. Similarly, RSI made the sole decision as to which employees it wanted to retain. If RSI no longer wanted an REM employee to return to its plant, it would inform REM, who would then place the employee elsewhere. We have routinely held that this procedure is sufficient to confer a right to discharge. See *Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 829 (2000) (where borrowing employer could dismiss loaned employee from service at plant, this was "equivalent of a right to dismiss"); see also *Evans v. Abbott Products, Inc.*, 150 Ill. App. 3d 845, 849 (1986).

¶ 23 Next, we determine whether there is an issue of fact with regard to whether decedent implicitly or explicitly agreed to a loaned-employee relationship – *i.e.*, whether a contract for hire existed. See *Trenholm*, 152 Ill. App. 3d at 7-8. Plaintiff maintains that decedent's signature on a form stating that although he would be performing work for a client, he was nevertheless an employee of REM raises an issue of fact as to whether decedent consented to an employment relationship with RSI. We fail to see how decedent's explicit consent to an employment

relationship with REM bears on the issue of whether he implicitly consented to a loaned employee relationship with RSI.

¶ 24 Implied consent to an employment relationship exists "where the employee knows that the borrowing employer generally controls or is in charge of the employee's performance." *Prodanic*, 2012 IL App (1st) 110993, ¶ 17. In the instant case, the form to which plaintiff cites goes on to state that decedent would receive instructions from the client's management and employees and that those instructions "must" be followed. Decedent acceded to these terms by reporting to RSI daily for a period of three years and performing the work of a paper sorter. Additionally, he specifically demonstrated his willingness to take direction from RSI supervisors when he asked defendant Patino whether it was time to clean the baler and had cleaned the baler on several occasions prior to the accident, ostensibly at Patino's direction. This is more than sufficient to establish decedent's consent to a loaned-employee relationship with RSI. See, *e.g.*, *Evans*, 150 Ill. App. 3d at 849 (where the plaintiff agreed to work for a temporary agency and accepted temporary employment assignments, this was sufficient to show plaintiff's implicit acceptance of a loaned employee relationship); see also *Crespo*, 275 Ill. App. 3d at 642 ("[i]mplied consent exists where the employee is aware that the borrowing employer 'is in charge' or generally controls the employee's performance."). Because defendants directed and controlled decedent's work and decedent implicitly consented to his relationship with RSI, there is no issue of fact with regard to whether defendant was a borrowing employer.

¶ 25 Finally, plaintiff contends that even if RSI is entitled to the protections of the Act due to the accidental nature of decedent's injury and its status as a borrowing employer, it has waived

such protection by way of certain provisions in the Agreement. Specifically, plaintiff directs our attention to section 6 of the Agreement, entitled "Hold Harmless." Section 6 begins by requiring RSI, "the Client," to obtain the consent of REM, "the Provider," prior to asking REM's employees to drive motor vehicles, operate machinery, and handle cash. Sections 6.2 and 6.3 of the Agreement then go on to state:

> 6.2 If this prior written consent is not obtained, the Client agrees to waive all rights to make a claim against the Provider, and to relieve the Provider from all liability and responsibility for any damage, loss or expense which the Client incurs as a result of the Provider's employee engaging in such activities, and the Client further agrees to indemnify and hold harmless the Provider from and against all claims, damages, bodily injuries, losses and expenses which might be caused as a result of the Provider's employee engaging in any of these activities.
>
> 6.3 Furthermore, the Client agrees not to expose any of the Provider's employees to unnecessary hazard or extra hazard, and not to violate any OSHA or safety law, rule or regulation whether federal, state, or local. The Client may be held liable as a result of their breach of this agreement.

¶ 26 Plaintiff has failed to explain how either the indemnification provision or the statement that RSI "may be liable" for breaches of the Agreement evince defendant's intent to waive the exclusivity provision of the Act. Where an employer has been found to have contractually waived certain protections to which it is entitled by law or statute, the contractual language has

been explicit. For example, in *Estate of Willis v. Kiferbaum Const. Corp.*, 357 Ill. App. 3d 1002, 1007 (2005), we held that a sub-subcontractor who agreed to indemnify a subcontractor waived the *Kotecki* cap on contribution where the contract stated: " 'the indemnification obligation *** shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Subcontractor under *** workmen's compensation acts.' " Needless to say, the language of sections 6.2 and 6.3 does not come close to approaching this kind of specificity. Instead, the Agreement contains only a general statement that RSI will indemnify REM for certain damages and that it "may be liable" for exposing REM employees to safety hazards. This is insufficient to waive the exclusivity provisions of the Act.

¶ 27 The Wisconsin case of *Deminsky v. Arlington Plastic Machinery*, 657 N.W.2d 411 (Wis. 2003), on which plaintiff relies, is wholly inapposite. There, the plaintiff, Todd Deminsky, was injured while using a grinding machine sold by the defendant Arlington Plastics Machinery (Arlington), to his employer, Image Plastics, Inc. *Deminsky*, 657 N.W.2d at 414. Deminsky filed his original complaint against Arlington, but later impleaded Image Plastics after learning that Image Plastics and Arlington had entered into an indemnification agreement. *Id.* at 416. The indemnification agreement provided that Image Plastics would indemnify Arlington against any and all losses or claims made against it. *Id.* at 415-16. The court was not called upon to address the issue of whether Deminsky was entitled to sue Image Plastics in tort based on the indemnity agreement, because Deminsky had been assigned Arlington's rights under the agreement. *Id.* at 417. As no such assignment occurred here, this case has no relevance to the one at bar.

¶ 28 In summary, we hold that the circuit court properly granted summary judgment in favor

of defendant where the Act provides the exclusive remedy for plaintiff's injuries.

¶ 29 CONCLUSION

¶ 30 For the reasons stated, we affirm the circuit court's order granting summary judgment.

¶ 31 Affirmed.