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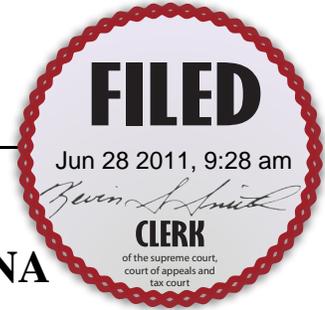
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**IN THE
COURT OF APPEALS OF INDIANA**

JANE GONZALES, Natural Guardian)
and Custodial Parent of STEPHANIE F.)
WAGNER, deceased,)
)
Appellant/Cross-Appellee-Plaintiff,)

vs.)

No. 09A05-1006-CT-375)

MIKE FITOUSIS, HEIDI FITOUSIS,)
MIKE FITOUSIS ENTERPRISES, INC.,)
and JASON WAGNER,)
)
Appellees/Cross-Appellants-Defendants.)

APPEAL FROM THE CASS CIRCUIT COURT
The Honorable Leo T. Burns, Judge
Cause No. 09C01-0807-CT-5

June 28, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

On November 1, 2006, the body of a sixteen-year-old girl was found murdered in a Cass County cornfield. Authorities were led to the victim's body by the man who murdered her. He was one of the victim's co-employees at the restaurant where she worked as a waitress. The murderer is currently serving a life sentence in prison. The victim's mother brought a wrongful death suit seeking civil damages against her daughter's employer, the owner of the restaurant, claiming that the employer negligently hired and retained the murderer as an employee. The victim's mother also claimed that the employer voluntarily assumed a duty to protect her daughter. Following a five-day jury trial, the jury found in favor of the employer and awarded no damages to the victim's mother. The mother appeals, asserting error in three of the final instructions submitted to the jury. The employer cross-appeals, arguing that the mother's sole remedy is pursuant to the Indiana Worker's Compensation Act, and thus the trial court was without subject matter jurisdiction to hear the case. Concluding that the trial court indeed had jurisdiction to hear the case and that the mother has failed to show reversible error in the jury instructions, we affirm.

Facts and Procedural History

The relevant facts most favorable to the verdict indicate that Mike and Heidi Fitousis were the officers of Mike Fitousis Enterprises (collectively "the Fitousises"), which operated the Indian Head restaurant (the "Restaurant") located on U.S. Highway 35 in Winamac. On May 10, 2006, Danny Rouse was hired by the Fitousises as "kitchen help" at the Restaurant. Tr. at 132. At the time he has hired, Rouse was on parole for crimes he committed in the

State of Kansas. He was permitted to leave Kansas and move to Indiana pursuant to the grant of transfer request from the Interstate Commission for Adult Offender Supervision. Defendant's Ex. 8. Rouse, an Indiana native, had been convicted in Kansas of murder and aggravated battery and sentenced to life in prison on June 12, 1980. Rouse stabbed a female victim and then slit the throat of the victim's five-year-old son, killing him. When he was hired at the Restaurant, Rouse told Mike Fitousis that he was on parole or probation, that he had stabbed someone twenty-five years ago, and that drugs and alcohol had been involved. Tr. at 133. Rouse did not offer any additional details regarding his criminal history, and Mike did not inquire further.

In July of 2006, Rouse left the Restaurant for a factory job. In late September of 2006, sixteen-year-old Stephanie Wagner began work at the Restaurant as a waitress. Stephanie's mother, Jane Gonzales, was nervous about Stephanie working at the Restaurant. Mike told Jane not to worry and told Jane that he would look after Stephanie like she was his own daughter. Stephanie wanted to work the second shift at the Restaurant so that she could babysit during the day. The Restaurant generally closed at 10:00 p.m., but clean-up would take until around 11:00 p.m. Because the Restaurant was located on the north side of Winamac in Pulaski County, the drive to Stephanie's house in Cass County took about one-half hour. Jane drove Stephanie to and from work at the Restaurant a few times, but eventually let Stephanie drive herself on a regular basis. On the nights she worked, Stephanie would usually arrive home from work around 11:30 p.m. or 12:00 a.m.

On October 20, 2006, Rouse returned to working at the Restaurant after his employment at the factory was terminated. On October 31, 2006, Stephanie, Rouse, Mike, and Heidi were all working at the Restaurant. After closing time, Stephanie cleaned the waitress area, the dining area, and the bathroom. Rouse finished his work in the kitchen but then came into the dining room and began wrapping silverware in napkins. Mike thought it was odd that Rouse was wrapping silverware because that was Stephanie's job and Rouse could have just gone home. Heidi did not think it was odd and just figured that Rouse was helping out. When Stephanie finished cleaning, she picked up the wrapped silverware and thanked Rouse for his help. Stephanie punched the time clock and proceeded out the back door of the Restaurant. Heidi spoke briefly to Rouse about something and then Rouse also proceeded out the back door. When Heidi subsequently looked outside, she observed that both Stephanie's and Rouse's vehicles were gone.

Early the next morning, Jane reported to police that Stephanie had never returned home from work. Police ran a criminal background check on Rouse, and he immediately became a suspect. After police took Rouse into custody, he admitted to murdering Stephanie and led authorities to her body. Her body was found about one mile east of the intersection of 900 North and U.S. 35 in Cass County. Rouse is currently serving a life sentence in the Indiana Department of Correction.

Jane filed her complaint against the Fitousises for wrongful death of a child on July 18, 2008. Jane alleged claims for negligent hiring of Rouse, negligent retention of Rouse, and breach of an assumed duty to protect Stephanie from harm. On August 12, 2009, the

Fitousises filed a motion for summary judgment and dismissal, asserting, among other things, affirmative defenses of fault against several non-party defendants¹ and that the trial court lacked subject matter jurisdiction over the claims due to the exclusivity provision of the Indiana Worker's Compensation Act. The trial court subsequently denied that motion. Jane also filed a motion for partial summary judgment on the non-party defenses, which the trial court granted in part.

A five-day jury trial began on November 16, 2009. At the close of Jane's evidence, the Fitousises moved for judgment on the evidence, arguing insufficient evidence as to all claims and again asserting that the trial court lacked subject matter jurisdiction. The trial court granted judgment on the evidence in favor of the Fitousises as to Jane's claim that Heidi assumed a duty to Stephanie, but denied the motion as to all other claims. Thereafter, at the close of all the evidence, the Fitousises renewed their motion for judgment on the evidence, which was denied. On November 20, 2009, the jury returned a verdict in favor of the Fitousises. Jane subsequently filed a motion to correct error, which was denied following a hearing. This appeal ensued.² We will state additional facts in our discussion when necessary.

Discussion and Decision

I. Subject Matter Jurisdiction

¹ The Fitousises named Rouse, the Kansas Department of Correction, and the Indiana Department of Correction, Parole Services Division, as non-party defendants. The trial court granted Jane's motion for partial summary judgment regarding the Fitousises' affirmative defense naming Rouse as a non-party defendant.

² By separate order issued contemporaneously with this opinion, we deny the Fitousises motion to strike portions of the Appellant's Brief and their motion to dismiss this appeal.

Before reaching the merits of Jane’s contentions on appeal, we first address the Fitousises’ claim on cross-appeal that the trial court was without subject matter jurisdiction to consider Jane’s wrongful death action because her claims fall within the exclusivity provision of the Indiana Worker’s Compensation Act (“WCA”). The Fitousises argue that the trial court erred when it denied their motion to dismiss for lack of subject-matter jurisdiction.³ We disagree.

When ruling on a motion to dismiss for lack of subject matter jurisdiction pursuant to Indiana Trial Rule 12(B)(1), the trial court may consider not only the complaint and motion but also any affidavits or evidence submitted in support. *Eichstadt v. Frisch’s Rests., Inc.*, 879 N.E.2d 1207, 1209 (Ind. Ct. App. 2008). The trial court may additionally weigh the evidence and determine the existence of the requisite jurisdictional facts. *Id.* Our standard of review for the trial court’s ruling is dependent upon whether the trial court resolved disputed facts, and if so, whether it conducted an evidentiary hearing or ruled on a paper record. *Id.* If the facts before the trial court are not disputed, the question of subject matter jurisdiction is purely one of law and our review is de novo. *Johnson v. Patriotic Fireworks, Inc.*, 871

³ Prior to trial, the Fitousises moved to dismiss Jane’s claims for lack of subject matter jurisdiction. On appeal, the Fitousises mistakenly frame their subject matter jurisdiction argument as an error by the trial court in denying their Indiana Trial Rule 50 motion for judgment on the evidence. When an employer defends against an employee’s negligence claim on the basis that the employee’s exclusive remedy is to pursue a claim for benefits under the Indiana Worker’s Compensation Act, the defense is properly advanced through a motion to dismiss for lack of subject matter jurisdiction under Indiana Trial Rule 12(B)(1). *GKN Co., v. Magness*, 744 N.E.2d 397, 400-01 (Ind. 2001). In any event, subject matter jurisdiction cannot be waived and may be raised by the parties or the court at any time, including on appeal. *Madison Ctr., Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2008), *trans. denied*.

N.E.2d 989, 992 (Ind. Ct. App. 2007). Here, the facts relevant to our determination of subject matter jurisdiction are not disputed, and, thus we review the issue de novo.⁴

The relevant question in determining subject matter jurisdiction is whether the type of claim presented by the plaintiff falls within the general scope of the authority conferred upon the court by constitution or statute. *Hart v. Webster*, 894 N.E.2d 1032, 1036 (Ind. Ct. App. 2008). The WCA governs compensation “for personal injury or death by accident arising out of and in the course of the employment[.]” Ind. Code § 22-3-2-2. Indiana Code Section 22-3-2-6 provides that the rights and remedies granted to an employee pursuant to the WCA “shall exclude all other rights and remedies of such employee, the employee’s personal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury or death[.]” Accordingly, the WCA provides the exclusive remedy for recovery of personal injuries arising out of and in the course of employment and bars a court from hearing any common law claim brought against an employer for an “on-the-job” injury. *GKN Co. v. Magness*, 744 N.E.2d 397, 401-02 (Ind. 2001) (citing Ind. Code § 22-3-2-6). A person is free to use the courts to resolve disputes with someone who may happen to be his

⁴ Although we are able to discern that the facts relevant to subject matter jurisdiction are not disputed, we admonish the Fitousises for challenging the trial court’s jurisdiction but then failing to provide us with a complete and adequate record on appeal. Neither of the parties’ appendices includes the Fitousises motion to dismiss for lack of subject matter jurisdiction and supporting argument. *See* Ind. Appellate Rule 50(A) (appendix shall include pleadings and other documents that are necessary for resolution of the issues raised on appeal). Moreover, although the chronological case summary indicates that the trial court conducted an evidentiary hearing on the motion to dismiss, no transcript of that hearing has been provided.

employer, so long as the matter in dispute is not an injury “by accident arising out of and in the course of employment.” *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 972 (Ind. 1986). For example, “where an off-duty employee is injured when struck by his employer’s truck in the middle of town on his day off,” the legislature did not intend for the Worker’s Compensation Board to have jurisdiction. *Id.*

Whether an injury arose “by accident” for purposes of the WCA focuses on the intent to harm, not the intent to act. *Tippmann v. Hensler*, 716 N.E.2d 372, 375-76 (Ind. 1999). The appropriate test is whether the party who is advocating the applicability of the WCA intended for the harm to result from the actions that party undertook. *Id.* Therefore, in the case at bar, it is not the intent to harm of Rouse, the co-employee tortfeasor, that is determinative here, but rather it is the Fitousises’ intent that must be considered. It is undisputed that the Fitousises did not intend for Stephanie to be harmed or murdered by Rouse. Accordingly, as to those parties, Stephanie’s death was unexpected and accidental.

Injury or death “arises out of” employment for purposes of the WCA when there is a causal relationship between injury or death and duties or services of employment. *Wolf Corp. v. Thompson*, 609 N.E.2d 1170, 1173 (Ind. Ct. App. 1993). The causal relationship is established when a reasonably prudent person considers a risk to be incidental to her employment at the time of entering into it. *DePuy, Inc. v. Farmer*, 847 N.E.2d 160, 164 (Ind. 2006). Injury or death arises “in the course of” employment if it occurs within the period of employment, at a place where the employee may reasonably be, and while she is fulfilling the duties of her employment, or is engaged in doing something incidental to it. *Wolf Corp.*, 609

N.E.2d at 1173. In other words, an injury or death may be said to have arisen in the course of employment when the employee is engaged in an action that directly or indirectly advances an employer's interest or is for the mutual benefit of the employer and employee. *Bertoch v. NBD Corp.*, 813 N.E.2d 1159, 1161 (Ind. 2004).

The undisputed facts of the case at bar do not fit squarely within the confines of the exclusivity provision of the WCA. Stephanie's death occurred miles away from the restaurant premises after her shift at the Restaurant had ended. Stephanie was neither fulfilling the duties of her employment nor was she engaged in doing anything incidental to her employment at the time of the murder. She was simply on her way home after work had concluded for the night. Stephanie was not engaged in an activity which advanced, either directly or indirectly, the Fitousises' interests. Significantly, a reasonably prudent person in Stephanie's position would not consider an intentional murder by a co-employee after work hours, to be a risk incidental to her employment as a waitress at the time she entered into that employment. Under the circumstances, Stephanie's murder did not arise out of or in the course of her employment at the Restaurant, and thus Jane's wrongful death action does not fall within the purview of the WCA. Accordingly, the trial court properly exercised subject matter jurisdiction.

II. Jury Instructions

Having determined that the trial court indeed had subject matter jurisdiction to consider Jane's claims, we now turn to her contention that the trial court committed

reversible error when it instructed the jury. We apply the following standard of review regarding jury instructions:

In reviewing a trial court's decision to give or refuse a tendered instruction, this Court considers whether the instruction (1) correctly states the law, (2) is supported by the evidence in the record, and (3) is covered in substance by other instructions. The trial court has discretion in instructing the jury, and we will reverse on the last two issues only when the instructions amount to an abuse of discretion. When an instruction is challenged as an incorrect statement of law, however, appellate review is *de novo*.

Wal-Mart Stores, Inc. v. Wright, 774 N.E.2d 891, 893-94 (Ind. 2002) (citations omitted). In determining whether sufficient evidence exists to support an instruction, we look only to that evidence most favorable to the appellee and any reasonable inferences to be drawn therefrom. *Hatter v. Pierce Mfg., Inc.*, 934 N.E.2d 1160, 1169 (Ind. Ct. App. 2010), *trans. denied*. Jury instructions are to be considered as a whole and in reference to each other. *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 300 (Ind. 2009). Thus, an error in a particular instruction will not result in reversal unless it is shown that the instructional error prejudiced the party's substantial rights. *Lovings v. Cleary*, 799 N.E.2d 76, 79 (Ind. Ct. App. 2003), *trans. denied*.

A. Final Instruction Number 24

Jane first argues that the trial court committed reversible error when it read to the jury Final Instruction Number 24. That instruction provided as follows:

Before the Plaintiff can recover in this case for breach of an assumed duty, she must prove the following propositions by a preponderance of the evidence.

First: that Mike and Heidi Fitousis specifically undertook a duty to protect Stephanie Wagner after leaving the Indian Head Restaurant, and,

Second: that Mike and Heidi Fitousis actually did assume the duty to protect Stephanie Wagner once she left the Indian Head Restaurant.

If you find the Plaintiff has proved each of these two propositions by a preponderance of the evidence, you should return a verdict for the Plaintiff and against the Defendants. However, if you find the Plaintiff has failed to prove any one of these propositions by a preponderance of the evidence, you should return a verdict for the Defendants and against the Plaintiff.

Appellant's App. at 25. Indiana law provides that a duty to exercise care and skill may be imposed on one who, by affirmative conduct, assumes to act, even gratuitously, for another. *Schlotman v. Taza Café*, 868 N.E.2d 518, 523 (Ind. Ct. App. 2007), *trans. denied*. The actor must specifically undertake to perform the task he is charged with having performed negligently, for without actual assumption of the undertaking there can be no correlative legal duty to perform the undertaking carefully. *Id.* Stated differently, the assumption of a duty creates a special relationship between the parties and a corresponding duty to act in a reasonably prudent manner. *Id.*

Jane first asserts, without citation to authority, that Instruction Number 24 is an incorrect statement of law because it inappropriately placed a "geographical component" to her burden of proof by requiring the jury to find that the Fitousises assumed a duty to protect Stephanie after she left the restaurant premises. Appellant's Br. at 23. Jane fails to direct us to authority, and we are unaware of any, that persuades us that a geographical component is not appropriate, especially in light of the facts of this case. Stephanie was murdered by Rouse after her work shift was completed and after she had driven miles away from the

restaurant. The task Jane charges the Fitousises with gratuitously assuming and performing negligently is the task of protecting Stephanie from harm. While Jane characterizes this assumed duty in very general terms, such characterization of the assumed duty as either general or specific is of no moment. The fact remains that no harm befell Stephanie while she was on the restaurant premises. The harm that befell Stephanie occurred after her shift had ended and she had left the restaurant. Therefore, in order to recover for a breach of the assumed duty to protect alleged in this case, Jane was required to prove that the duty to protect assumed by the Fitousises extended beyond the work premises and after work hours.⁵ Final Instruction Number 24 instructed the jury accordingly and, under the circumstances, instructed the jury properly. Jane has not established that the instruction constituted an erroneous statement of law.

Jane also asserts that Final Instruction Number 24 was an erroneous mandatory instruction. However, Jane did not object to the instruction on those grounds at trial. Indiana Trial Rule 51(C) requires that a party who claims as error the giving on an instruction must state “distinctly” the grounds of the objection. The purpose of Trial Rule 51(C) is to protect

⁵ We note that Jane’s arguments on appeal with respect to breach of an assumed duty to protect are inconsistent with her arguments regarding subject matter jurisdiction and the WCA. Although Stephanie’s murder occurred miles away from the restaurant premises and after work hours, Jane maintains that the breach of duty by the Fitousises occurred on the Restaurant premises when Mike Fitousis failed to warn Stephanie that Rouse was dangerous and/or failed to control Rouse to prevent him from leaving the Restaurant at the same time as Stephanie on the night of the murder. Thus, while strenuously trying to connect Stephanie’s murder to the Restaurant and Stephanie’s employment on one hand, Jane is trying to distance Stephanie from the Restaurant and the employment relationship on the other so as not to fall under the exclusivity provision of the WCA. This inconsistency, while understandable from a legal advocacy perspective, makes for perplexing arguments.

the trial court from inadvertent error, so an objection to an instruction must be sufficiently specific to make the trial judge aware of the alleged error before he or she reads the instruction to the jury. *Elkhart Comm. Schools v. Yoder*, 696 N.E.2d 409, 414 (Ind. Ct. App. 1998). Because Jane did not challenge the instruction as mandatory at trial, she cannot do so on appeal.⁶ *See Lampkins v. State*, 749 N.E.2d 83, 85 (Ind. Ct. App. 2001) (issue of whether jury instruction was mandatory not preserved for appeal), *trans. denied*.

B. Final Instruction Number 18

Jane next contends that the trial court committed reversible error when it read to the jury Final Instruction Number 18. That instruction provided:

Under the law of voluntary assumption of duty, one person may assume a duty to exercise reasonable care for the protection or safety of another, either gratuitously or voluntarily. The assumption of such a duty creates a special relationship between the person assuming the duty and the person intended to benefit from it, and imposes a corresponding duty to act as would a reasonably prudent person. Although no duty to act for the protection or safety of another might exist in the absence of a voluntary assumption of that duty, once that duty has been assumed it must be exercised carefully.

In order for an assumption of duty to occur, there must be evidence that a person specifically undertook to assume a specific duty, and actually did assume that duty. Without such a specific assumption, there is no legal assumption to perform that duty carefully.

Appellant's App. at 24. Jane challenges a portion of a sentence in the second paragraph which provides that there must be evidence that "a person specifically undertook to assume a

⁶ Jane mentions that she also objected at trial that Final Instruction Number 24 was redundant of another instruction. However, Jane offers no cogent argument on this issue. Consequently, any challenge to the instruction on this ground is also waived. *See* Ind. Appellate Rule 46(A)(8)(a) (argument must be supported by cogent reasoning); *see also Doughty v. Review Bd. of Dep't of Workforce Dev.*, 784 N.E.2d 524, 527 (Ind. Ct. App. 2003) (failure to put forth cogent argument results in waiver of issue on appeal).

specific duty[.]” Jane argues that “[t]here is no limitation imposed under the law to the effect that the duty assumed must be to perform a specific act or of a specific nature to be applicable[.]” Appellant’s Br. at 28. Jane’s argument misses the mark.

As we stated regarding Final Instruction Number 24, the law of assumed duty provides that the actor must specifically undertake to perform the task he is charged with having performed negligently, for without actual assumption of the undertaking there can be no correlative legal duty to perform the undertaking carefully. *Schlotman*, 868 N.E.2d at 523. Indeed, in light of our determination that Final Instruction Number 24 was not erroneous, we are not troubled by the insertion of the word “specific” prior to the word “duty” in the instruction and, in fact, find that the addition helped to clarify Jane’s burden. Whatever the assumed task may be, the actor must specifically undertake to perform *that* task – not just any task, but that specific task. Jane’s arguments to the contrary are merely a reiteration of her arguments regarding Final Instruction Number 24, which we have already addressed. Jane has shown no error.

C. Final Instruction Number 17

Jane’s final contention of error relates to Final Instruction Number 17. That jury instruction provides:

Under the law of negligent hiring, retention or control, an employer has a duty to exercise reasonable care so to control an employee while the employee is acting outside the scope of his employment, as to prevent him from harming others, if

- (a) the employee

- (i) is upon the premises in possession of the employer or upon which the employee is privileged to enter only as his employee, and
- (b) the employer
 - (i) knows or has reason to know that he has the ability to control his employee, and
 - (ii) knows or should know of the necessity and opportunity for exercising such control.

pp. Appellant's App. at 23. Other than a few non-material changes, this instruction mirrors the relevant language of the Restatement (Second) of Torts section 317 ("Section 317"). At trial, Jane objected to the instruction's reference to "negligent hiring, retention, or control" as an inaccurate statement of law. Jane argues that negligent hiring and negligent retention are separate torts and that Section 317 applies solely to a claim for negligent retention. Therefore, she contends, the inclusion of both the terms "hiring" and "retention" in the same jury instruction was inaccurate and misleading. Again, we disagree.

Contrary to Jane's contention, our courts have often considered negligent hiring and retention as one tort which relies on interrelated evidence regarding the hiring and retention of an employee. Specifically, in *Clark v. Aris*, 890 N.E.2d 760 (Ind. Ct. App. 2008), *trans. denied*, we specifically applied the test enunciated in Section 317 to determine if an employer exercised reasonable care in hiring and retaining an employee. *Id.* at 763. Also, in *Sandage v. Board of Commissioners of Vanderburgh County*, 897 N.E.2d 507 (Ind. Ct. App. 2008), we grouped the concepts of both hiring and retention together and stated that "Indiana recognizes the tort of negligent hiring and retention of an employee" and has adopted Section

317 “as the standard with regard to this tort.” *Id.* at 511-12; *accord Konkle v. Henson*, 672 N.E.2d 450, 455 (Ind. Ct. App. 1996).

In light of our case law, Jane has not shown how the use of the terms hiring and retention within the same jury instruction constituted an inaccurate statement of law. Moreover, to the extent Jane contends that the jury was misled as to the law of negligent hiring, we note that the jury was given an additional separate instruction regarding negligent hiring, Final Instruction Number 16, to which Jane did not object. Jane has shown no error.

Affirmed.⁷

NAJAM, J., and ROBB, C.J., concur.

⁷ Because we affirm the jury’s verdict, we need not reach the Fitousises’ additional claims on cross-appeal that the trial court erred when it denied their motion for judgment on the evidence.