

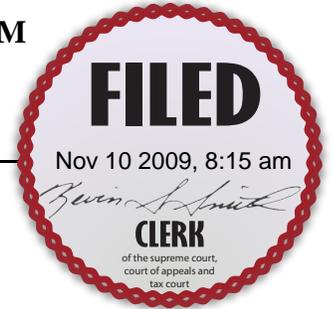
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**IN THE
COURT OF APPEALS OF INDIANA**

DARIN W. CHAMBERLAIN,)

Appellant-Plaintiff,)

vs.)

KYLE A. DAUGHERTY,)

Appellee-Defendant.)

No. 82A04-0904-CV-230

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0808-CT-326

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Darin W. Chamberlain appeals from the trial court's order granting the motion of Kyle A. Daugherty to dismiss Chamberlain's complaint for damages arising from personal injuries he suffered in an accident at his place of employment. Chamberlain presents a single issue for review, namely, whether Indiana Code Section 22-3-2-6, the exclusivity provision in the Indiana Worker's Compensation Act ("the Act"), bars Chamberlain's complaint against Daugherty. We hold that it does.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 5, 2006, Chamberlain and Daugherty were employed at First Avenue Car Wash in Evansville. After Daugherty's supervisor, Mark Call, reprimanded him, Daugherty returned to work, entering a car to move it forward. At that time, Chamberlain was cleaning the rear bumper of a car approximately one and one-half car lengths in front of the car Daugherty was driving. Daugherty, with an "angry and crazed look on his face[,] "gunned" the car he was in, pinning Chamberlain between the two vehicles. Appellant's App. at 13. Chamberlain suffered severe injury to his leg as a result of the accident.

On August 4, 2008, Chamberlain filed a complaint against Daugherty, seeking damages for the injury to his leg. On October 28, Daugherty filed a motion to dismiss the complaint under Indiana Trial Rule 12(B)(1), citing in support the exclusivity provision of the Act. On January 12, 2009, Chamberlain filed his brief in opposition to the motion to dismiss the complaint. On January 16, Daugherty filed a response to Chamberlain's

brief in opposition, on January 26 Chamberlain filed his reply brief, and on February 13, Daugherty filed his sur-reply brief.¹ On March 25, the court held a hearing on Daugherty's motion to dismiss. The court issued an order granting the motion, stating in part:

[The Court] now finds that the act of [Daugherty] which allegedly caused the injury to [Chamberlain] was the moving of an automobile, and moving of automobiles was one of the jobs that [Daugherty] normally performed for the benefit of his employer. The fact that [Daugherty] may have operated the vehicle recklessly or outrageously, or in a dangerous way because he was angry at his employer, does not take his actions outside of the course and scope of his employment. Consequently, the Worker's Compensation Act bars [Chamberlain's] Complaint and this Court does not have the subject matter jurisdiction to entertain it.

Appellant's App. at 15. Chamberlain now appeals.

DISCUSSION AND DECISION

Standard of Review

Our standard of review of a trial court's ruling on a Trial Rule 12(B)(1) motion "is a function of what occurred in the trial court and is dependent upon: (i) whether the trial court resolved disputed facts; and (ii) if the trial court resolved disputed facts, whether it conducted an evidentiary hearing or ruled on a paper record." H.D. v. BHC Meadows Hosp., 884 N.E.2d 849, 852 (Ind. Ct. App. 2008), trans. denied. If a factual dispute exists and the trial court conducts an evidentiary hearing, we defer to its findings and judgment. Id. at 852-53. Where, as here, the facts before the trial court were in dispute, and an evidentiary hearing was held, we will give the trial court's factual findings and judgment deference. See Eichstadt v. Frisch's Rests., Inc., 879 N.E.2d 1207, 1209-10 (Ind. Ct.

¹ The parties have not included in the record on appeal any of the pleadings filed in response to Daugherty's motion to dismiss.

App. 2008) (citing Argabright v. R.H. Marlin, Inc., 804 N.E.2d 1161, 1165 (Ind. Ct. App. 2004), trans. denied). We will only reverse if the findings and judgment are clearly erroneous. Id.

In this case, we must determine whether, under the exclusivity provision of the Indiana Worker's Compensation Act, the trial court lacked subject matter jurisdiction over Chamberlain's complaint. The Act provides an exclusive remedy against an employer for accidental injuries that arise out of and in the course of the injured employee's employment. Ind. Code §§ 22-3-2-6, 22-3-6-1(e). The Act extends the immunity provided by the exclusivity provision to those "in the same employ" as the injured employee when the injury occurred. Tippmann v. Hensler, 716 N.E.2d 372, 375 (Ind. 1999).

Our supreme court has described the analysis for determining the application of the exclusivity provision in a suit against a coworker as follows:

[A] suit against a co-employee can proceed at trial under one of two circumstances. First, if the plaintiff can show that the Act does not apply to that particular litigation, then the trial court, and not the Worker's Compensation Board, has jurisdiction. The plaintiff accomplishes this by showing that the injury was not "by accident," that it did not "arise out of his employment," or that it did not "occur in the course of his employment." Ind. Code Ann. §§ 22-3-2-6, 22-3-6-1(e) (West Supp. 1997). Second, even if the Act applies, its exclusive remedy provision will not bar a common law suit against an employee who was not "in the same employ" as the plaintiff when the injury occurred. Ind. Code Ann. § 22-3-2-13.

Id. at 375 (some citations omitted).

Here, Chamberlain does not argue that Daugherty's conduct was intentional, but he raises a single issue, namely, whether Daugherty was in the same employ as

Chamberlain at the time of the accident. The test for that determination was clarified in Wine-Settergren v. Lamey, 716 N.E.2d 381, 388-89 (Ind. 1999):

[F]or an employee defendant to be “in the same employ” for purposes of the Act, two things must exist. First, he must be employed by the same employer as the plaintiff. Second, he must have been engaging in actions reasonably related to his employment during a time and under circumstances reasonably incidental to that employment when he accidentally causes the injury. The best way to determine the latter, once the plaintiff’s and defendant’s co-employment status is resolved, is with the framework currently in place, i.e., by asking whether the defendant’s actions causing the accidental injury arose out of and occurred in the course of his and the plaintiff’s mutual employment.

Here, Chamberlain does not dispute that he and Daugherty were employed by the same employer. Thus, we are left to consider whether the accident arose out of and occurred in the course of his and Daugherty’s mutual employment at the car wash.

At the time of the accident, Chamberlain was cleaning the rear bumper of a car. After receiving a reprimand from his supervisor, Daugherty entered a car one and one-half car lengths behind Chamberlain. Daugherty pulled the car forward, pinning Chamberlain between the two bumpers and severely injuring Chamberlain’s leg. The trial court found that the “moving of automobiles was one of the jobs that [Daugherty] normally performed for the benefit of his employer.” Appellant’s App. at 15. Chamberlain does not dispute this fact. Thus, we cannot say that the trial court’s findings or conclusions are clearly erroneous.

Nevertheless, Chamberlain contends that he and Daugherty were not “in the same employ” because Daugherty’s actions were not reasonably related to his employment or “born out of a risk incidental to his employment.” Appellant’s Brief at 8. Specifically, Chamberlain argues that the manner in which Daugherty pulled the car forward violated

the employer's policy of moving vehicles at idle speed. He further maintains that "Daugherty was acting contemptuously and deliberately[,] acting against his employer by engaging in highly dangerous and reckless conduct[.]" Id. As a result, Chamberlain continues, Daugherty's conduct is "akin to horseplay" and, therefore, "does not fall within the ambit of the exclusivity provision of the Act." Id. We cannot agree.

A participant in horseplay is not entitled to workmen's compensation. Neidige v. Cracker Barrel, 719 N.E.2d 441, 443 (Ind. Ct. App. 1999). That rule considers the conduct of the injured person, not just the conduct of the person who caused the injury. Chamberlain has not alleged that he participated in any way in Daugherty's allegedly negligent or reckless behavior. Thus, Chamberlain's attempt to extend the horseplay rule to this case must fail.

Chamberlain also describes Daugherty's conduct in part as deliberate, which sounds like intentional conduct that would not be covered by the Act. The test for determining whether an injury arose "by accident" focuses on the intent to harm, not the intent to act. Tippman, 716 N.E.2d at 375-76. Thus, the test is whether the party who is advocating the applicability of the Act intended for harm to result from the actions that party undertook. Id. If so, then the injury did not occur "by accident" for that particular litigant. Id. Of course, Daugherty, who seeks application of the Act, does not argue that he intended for harm to result from his actions. And while Chamberlain refers to Daugherty's conduct as "deliberate," he does not allege an intent to harm. Appellant's Brief at 8. Thus, despite Chamberlain's reference to deliberate conduct, this case falls within the ambit of the Act and its exclusivity provision.

Further, regarding Chamberlain's argument involving the manner of Daugherty's conduct, we have held that mere employer negligence or recklessness is "not sufficient to strip the Worker's Compensation Board of jurisdiction and instead vest jurisdiction in a court of law." Coble v. Joseph Motors, Inc., 695 N.E.2d 129, 134 (Ind. Ct. App. 1998), trans. denied. Thus, because the exclusivity provision applies only to injuries sustained "by accident," the negligence or recklessness of a coworker likewise is insufficient to give a court jurisdiction over a complaint against a coworker regarding a workplace injury. See Tippman, 716 N.E.2d at 375-76. Considering these cases together, we conclude that Chamberlain's argument that his injury resulted from Daugherty's reckless behavior does not remove this case from the realm of the exclusivity provision in the Act. The trial court's conclusion that the exclusivity provision in the Act bars Chamberlain's complaint is not clearly erroneous.

Affirmed.

KIRSCH, J. and BARNES, J., concur.