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Mello v. Killeavy, 205 A.3d 454 (R.I. 2019)

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Workers' Compensation. *Mello v. Killeavy*, 205 A.3d 454 (R.I. 2019). Pursuant to Rhode Island General Laws section 28-29-20, when a Rhode Island employee collects workers' compensation for an injury, his or her right to recovery based on the wrongful conduct of his or her fellow employees or employers is extinguished, as workers' compensation benefits are meant to fully compensate the injured employee, and extend immunity to co-employees under the act's exclusivity provision.¹ Any common-law remedy is waived "if the employee fails to notify the employer of his or her intention to rely on common law recovery."²

FACTS AND TRAVEL

Joshua Mello (Mello) and Sean Killeavy (Killeavy) were coworkers at a Rhode Island groundskeeping and cemetery maintenance company, Ramsay's Inc. (Ramsay's).³ Mello was hired by Ramsay's in 2008, and Killeavy was hired in 2015.⁴ The two employees had rapport and would often engage in practical jokes while they were working together.⁵ On August 17, 2016, while Mello and Killeavy were working a job at St. Mary's Cemetery in Bristol, Rhode Island, Killeavy, in jest, poured gasoline from a canister that he found on the grounds into the bathroom while Mello was using the facilities.⁶ As a practical joke, Killeavy ignited the gasoline with the intention of creating a "loud popping noise" in order to scare Mello.⁷ Unfortunately, Killeavy's practical joke went awry when the gasoline spilled into the stall that Mello occupied

1. *Mello v. Killeavy*, 205 A.3d 454, 459 (R.I. 2019) (citing 28 R.I. GEN. LAWS § 28-29-20).

2. *Id.* at 462.

3. *Id.* at 456.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

and burst into flames, causing Mello serious injury, which subsequently disabled him from working for over a year.⁸

On September 7, 2016, through its insurer, Ramsay's filed for workers' compensation benefits to be paid to Mello, and Mello accepted.⁹ In the meantime, Ramsay's fired Killeavy.¹⁰ On September 30, 2016, after having already accepted workers' compensation through his employer, Mello brought suit in Providence County Superior Court against Killeavy, alleging negligence.¹¹ Killeavy denied Mello's claims in his answer and on February 21, 2017, Killeavy filed a motion for summary judgment, along with a statement of undisputed facts, in which he argued that because Mello had accepted workers' compensation, Mello's negligence claim was barred by the exclusivity provision of Rhode Island General Laws section 28-29-20 (Workers' Compensation Act).¹²

Though he did not dispute Killeavy's statement of undisputed facts, Mello contended that because Killeavy may have been on a lunch break when the accident occurred, he was not acting within his scope as an "employee" at the time, and section 28-35-58 of the General Laws would "allow Mello to maintain a separate cause of action against Killeavy as a 'third party,' despite Mello's acceptance of workers' compensation."¹³ At Killeavy's summary judgment hearing on April 21, 2017, Mello alleged that Ramsay's provided workers' compensation benefits before launching an investigation regarding whether or not Mello's injury occurred while he was on a break.¹⁴ Mello then reiterated that Killeavy was on a lunch break at the time of the incident, and as such was not working in the scope

8. *Id.* at 456–57. Mello was hospitalized and treated for significant burns. *Id.* at 456.

9. *Id.* at 457. Ramsay's, through its insurer Beacon Mutual, filed a memorandum agreement with the Rhode Island Department of Labor and training for workers' compensation benefits. *Id.*

10. *Id.*

11. *Id.* Mello stated in his complaint that he was "at all times in the exercise of due care and performing duties on behalf of his employer when the accident occurred." *Id.*

12. *Id.*

13. Mello attached a correspondence which stated that breaks were noncompensable, and there was no set time or policy dictating when employees should take their lunch breaks. *Id.*

14. *Id.*

of his employment.¹⁵ However, the Superior Court justice interpreted that the exclusivity provision provided immunity to employees and employers and that there was no exception to this immunity.¹⁶ Therefore, Mello could not maintain his suit against Killeavy.¹⁷ On April 27, 2017, Mello appealed to the Rhode Island Supreme Court (the Court).¹⁸

ANALYSIS AND HOLDING

The Court reviewed the case *de novo*, as it pertained to “questions of statutory interpretation.”¹⁹ To determine whether Mello could bring a tort claim against his fellow employee despite having already collected workers’ compensation benefits for the incident, the Court considered the exclusivity provision of the Workers’ Compensation Act.²⁰ The provision provides that, “[t]he right to compensation for an injury under chapters 29–38 . . . shall be in lieu of all rights and remedies as to that injury now existing, either at common law or otherwise against an employer, or its directors, officers, agents, or *employees*.”²¹ Additionally, the Court pointed to section 28-29-17 of the Workers’ Compensation Act, which provides that an employee

shall be held to have waived his or her right of action at common law to recover damages for personal injuries if he or she has not given his or her employer at the time of the contract of hire . . . notice in writing that he or she claims that right.²²

Here, Mello, who conceded to having been injured while at work, and who had admitted to collecting workers’ compensation benefits, did not notify his employer of his desire to preserve any

15. *Id.* at 458.

16. *Id.* The hearing justice referenced *Manzi v. State*, 687 A.2d 461, 462 (R.I. 1997), which stated that the Workers’ Compensation Act “bars a plaintiff from filing a second cause of action on the basis of a different legal theory in circumstances in which a plaintiff seeks recovery for the same injuries on which his or her workers’ compensation claim was based.” *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 459 (quoting *State v. Hazard*, 68 A.3d 479, 485 (R.I. 2013)).

20. *Id.*

21. *Id.* (quoting 28 R.I. GEN. LAWS § 28-29-20).

22. *Id.* (quoting 28 R.I. GEN. LAWS § 28-29-17).

common law right to sue in accordance with section 28-29-17.²³ As such, the Court held that summary judgment would be appropriate on Mello's negligence claim against Killeavy.²⁴ Nevertheless, Mello argued that under section 28-35-58, he was still able to maintain a suit against Killeavy, even though he received workers' compensation benefits.²⁵ Under this provision, an injured employee is not barred from "seeking damages from an entity not immune under section 28-29-20 for any loss or harm due to the wrongful conduct of such an entity."²⁶ As the basis for his argument, Mello contended that the omission of the word "employees" in section 28-35-58 implied that the legislature did not intend to extend immunity to co-employees when liability arose from conduct of a party other than the employer;²⁷ however, this was complicated by the fact that section 28-35-58 is intended to apply to persons not made immune under section 28-29-20.²⁸ Employees are listed as an immune party under section 28-29-20, and Killeavy was Mello's co-employee.²⁹

To combat this detail, Mello suggested that Killeavy was acting outside the scope of his employment when his conduct caused Mello's injury, and as such Killeavy did not qualify as an "employee" under the exclusivity provision.³⁰ Mello attempted to substantiate this contention by comparing his situation to *D'Andrea v. Manpower, Inc. of Providence*, in which the Court stated "that an employee acts within the scope of his . . . employment when 'at the

23. *Id.* at 460.

24. *Id.*

25. *Id.* "Where the injury for which compensation is payable under chapters 29–38 of this title was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect of the injury, the employee may take proceedings, both against that person to recover damages and against any person liable to pay compensation under those chapters for that compensation, and the employee shall be entitled to receive both damages and compensation." 28 R.I. GEN. LAWS § 28-35-58.

26. *Id.* (quoting *DiQuinzio v. Panciera Lease Co.*, 612 A.2d 40, 43 (R.I. 1992)).

27. *Id.* at 460.

28. *Id.* (citing *DiQuinzio*, 612 A.2d at 43).

29. *Id.* at 459.

30. *Id.* at 458.

time and place of the injury [the employee] was reasonably fulfilling the duties of his employment.”³¹

However, the Court relied on several cases to hold that there was no basis to create a “judicial exception” for injuries caused by coworkers.³² The Court first pointed to *DiQuinzio v. Panciera Lease Co.*, in which an employee was injured after his co-employee was driving a truck that collided with another vehicle.³³ In *DiQuinzio*, the Court held that the plaintiff’s cause of action against the third party truck leasing company was derivative of the conduct of the plaintiff’s co-employee, and, as such, the plaintiff could not maintain an action.³⁴ Similarly, in *Kong v. Kuncio*, the Court held that the plaintiff, who was struck by his co-employee’s car in the employer’s parking lot, could not sue his co-employee after already accepting workers’ compensation benefits for the injury.³⁵

Although Mello relied on *D’Andrea* to support his argument, the Court held that the case was inapplicable to Mello’s situation because it did not involve a situation where the plaintiff was injured by a co-employee, and it did not involve the exclusivity clause of the Workers’ Compensation Act.³⁶ The Court held that Mello waived his right to common-law remedy for failing to notify his employer of his intent to preserve it, and his acceptance of workers’ compensation benefits barred him from bringing a suit against his fellow employee for wrongful conduct.³⁷

COMMENTARY

Although Mello’s link to *D’Andrea* is tenuous, there is an argument to be made that if the employee in that case was within his scope of employment when at the time of injury he was performing reasonable work-related duties, it should follow that an employee, such as Killeavy, who was not performing reasonable duties of his employment at the time of the injury was not within

31. *Id.* at 462 (citing *D’Andrea v. Manpower, Inc. of Providence*, 249 A.2d 896, 899 (1969)).

32. *Id.* at 460.

33. *Id.* (citing *DiQuinzio*, 612 A.2d at 43).

34. *Id.* at 460–61.

35. *Id.* at 462 (citing *Kong v. Kuncio*, 754 A.2d 103, 103).

36. *Id.* (citing *D’Andrea*, 249 A.2d at 899).

37. *Id.*

the scope of his employment. Clearly, pouring gasoline into a bathroom and igniting it was not a reasonable employment duty of a cemetery groundskeeper. The Court, however, dismissed the parallels drawn between the injured employee in *D'Andrea* and Mello. It stated that *D'Andrea* was distinct from Mello's case because it was not a situation where an injury was caused by a co-employee and it did not involve the exclusivity provision of the Workers' Compensation Act.³⁸

This reasoning seems to overlook Mello's point that based on the *D'Andrea* definition of scope of employment, Killeavy would not be considered an employee because at the time of the injury, he was not performing reasonable employment duties. Because Killeavy was not an "employee" at the time of injury, it could be argued that section 28-35-58 applied to Mello's situation. However, absent precedent specifically addressing scope of employment, and absent a concrete scope of employment exception under the Workers' Compensation Act, the Court stated that it would not extend the *D'Andrea* standard to situations involving co-employees.³⁹ Additionally, the Court acknowledged that Mello addressed policy arguments in support of a scope of employment exception, but the Court did not elaborate further on what those arguments entailed, nor did it provide reasons for dismissing Mello's concerns.⁴⁰

CONCLUSION

The Rhode Island Supreme Court held that because the Plaintiff had accepted and received workers' compensation benefits for his injury, the exclusivity provision of the Workers' Compensation Act barred him from bringing a cause of action against his fellow employee for the employee's tortious conduct. The Court further held that absent a "legislatively created exception" to the provision, it would adhere to the principle that an employee waives his or her common law rights if he or she fails to notify his or her employer of the intent to retain them.

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38. *Id.*

39. *Id.*

40. *Id.*