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Selby v. Baird, 240 A.3d 243 (R.I. 2020)

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Workers' Compensation. *Selby v. Baird*, 240 A.3d 243 (R.I. 2020). According to the Workers' Compensation Act, an injured employee's right to workers' compensation benefits is in lieu of all other rights and remedies the employee may have had against the employer. Therefore, an employee who collects workers' compensation is prohibited from filing a cause of action against the employer when the plaintiff seeks additional recovery for the same injury that led to the workers' compensation claim. It is well-settled in Rhode Island jurisprudence that the determinative factors for the existence of an employment relationship are dominion and control.

FACTS AND TRAVEL

On November 19, 2010, plaintiff Joshuah Selby (Selby) arrived at a Cranston residence to provide tree removal services for the Mollicone family.[1] Eugene Mollicone (Mollicone) had previously contracted with Mike's Professional Tree Services, Inc. (MPTS), owned by defendant Michael Baird (Baird), for tree removal and trimming services to be performed at his residence on that day.[2] After discussing the details of the job with Mollicone, Selby, the foreman of tree services crew, proceeded to set up the job site for the day's work.[3] While the crew was positioning vehicles and equipment in the driveway, Selby was seriously injured when the bucket truck rolled backwards and pinned him against the dump truck, resulting in a permanent disability.[4]

Selby received workers' compensation benefits through the insurance provider of Mulch-N-More, an entity also owned by Baird.[5] Selby later commuted his workers' compensation case and filed a

1. Selby v. Baird, 240 A.3d 243, 244 (R.I. 2020).

2. *Id.* The plaintiff also filed suit against Mollicone but voluntarily dismissed these claims. *Id.* n.3.

3. *Id.*

4. *Id.*

5. *Id.* at 245. Mulch-N-More performs mulching services but is not in the business of tree cutting or removal. *Id.*

cause of action for negligence in Providence County Superior Court, naming MPTS, Baird, and one Mr. Rossi as defendants.[6] The defendants collectively filed a motion for summary judgment in September 2015.[7] The key issue on summary judgment was whether Selby was employed by MPTS as asserted by the defendants, or whether he was employed by Mulch-N-More, as Selby argued.[8] The defendants submitted a remarkable amount of evidence to support their contention that Selby was indeed employed by MPTS, including deposition testimony in which Selby admitted to being an MPTS employee.[9]

Selby responded with the following three arguments: the complaint alleged that he was an employee of Mulch-N-More, Baird's deposition indicated that Mulch-N-More was Selby's employer, and the court should take judicial notice of the Workers' Compensation Court's finding that Selby was employed by Mulch-N-More rather than MPTS.[10] Essentially, the plaintiff argued that summary judgment was inappropriate in this case because Baird's status as the owner of both MPTS and Mulch-N-More—the entity that paid the plaintiff and processed his workers' compensation benefits—created an ambiguity as to which of the two entities was Selby's employer.

The Superior Court justice ruled in favor of the defendants, noting that there was "no genuine issue of material fact as to the

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6. *Id.* Mr. Rossi was an employee of MPTS who was a member of the crew on the day of the accident. *Id.*

7. *Id.* The motion for summary judgment was not heard until almost a year later in August 2016. *Id.*

8. *Id.* The identity of the plaintiff's employer was the most critical issue in the case because if Selby was an employee of MPTS, his tort claims against the defendants would be barred by the Act. *Id.*; *see* 28 R.I. GEN. LAWS § 28-29-20 (1956).

9. *See Selby*, 240 A.3d at 245. The defense's evidence also included deposition testimony in which plaintiff admitted that his job at MPTS involved tree services, MPTS owned the machinery that caused his injury on the day of the accident, and he wore clothing bearing the MPTS brand. *Id.* The defendants also submitted MPTS documents signed by the plaintiff, a statement taken by the police in which Mollicone acknowledged that he had hired MPTS to perform tree services on his property that day, and photographs of equipment labeled with "Mike's Professional Tree Service" at the scene of the accident. *Id.* Finally, the defendants submitted the affidavits of Baird and Rossi, who both swore that Selby was an MPTS employee. *Id.*

10. *Id.* at 246.

identity of plaintiff's employer," which was found to be MPTS.[11] The plaintiff appealed, maintaining that a genuine issue of material fact existed as to the identity of Selby's employer because Mulch-N-More processed the workers' compensation claim.[12] Alternatively, the plaintiff alleged that Baird committed fraud by allowing Selby to be insured under Mulch-N-More's workers' compensation plan while he was an employee of MPTS.[13]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court ultimately held that dominion and control are the key factors to be considered for determining whether an employment relationship exists and affirmed summary judgment for the defendants. The Court began by acknowledging that it "reviews a decision granting a party's motion for summary judgment *de novo*."[14] Viewing the evidence in the light most favorable to the nonmoving party, the Court noted that it will affirm summary judgment if it concludes that "there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law."[15]

The Court turned to the Workers' Compensation Act (the Act) which states, in relevant part, that an employee's right to compensation benefits for a workplace injury "shall be in lieu of all rights and remedies as to that injury . . . against an employer, or its directors, officers, agents, or employees[.]"[16] The injured employee is prohibited 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."[17]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* (quoting Boudreau v. Automatic Temperature Controls, Inc., 212 A.3d 594, 598 (R.I. 2019).
15. *Id.* at 247.
16. *Id.*; 28 R.I. GEN. LAWS § 28-29-20 (1956). The Court commonly refers to this section of the Act as the "exclusivity provision." *See Selby*, 240 A.3d at 247; *see also* Deus v. S.S. Peter and Paul Church, 820 A.2d 974 at 975 (R.I. 2003) (identifying section 28-29-20 as the exclusivity provision of the Workers' Compensation Act).
17. *Selby*, 240 A.3d at 247 (quoting *e.g.* LaFreniere v. Dutton, 44 A.3d 1241, 1244 (R.I. 2012)).

On appeal, the defendants argued that they were immune from suit under the exclusivity provision because Selby was an MPTS employee.[18] The Court relied on its holdings in *Deus v. S.S. Peter and Paul Church*[19] and *Sorenson v. Colibri Corp.*[20] to decide this case.[21] *Deus* concerned a plaintiff employee who was injured while performing cleaning services for the church.[22] The plaintiff received workers' compensation benefits from the Diocesan Service Corporation (DSC) and subsequently filed a negligence suit against the church, arguing that DSC, rather than the church, was the employer.[23] The Court affirmed summary judgment for the defendant church based on the exclusivity provision, and noted that "the determinative factor in the existence of an employer-employee relationship is the employer's right to exercise control and superintendence over his employees."[24]

In *Sorenson*, an employment agency assigned the plaintiff, a temporary employee, to work for the defendant company.[25] During the assignment, the plaintiff suffered an injury and received workers' compensation benefits through the employment agency's insurer.[26] The plaintiff filed a negligence suit against the defendant company, which then moved for summary judgment based on the argument that the exclusivity provision shielded it from liability.[27] The Court determined that even if the general employer (the employment agency) was responsible for the workers' compensation benefits, the special employer (the defendant company) was immune from suit under the Act.[28] Furthermore, the Court emphasized that an employment relationship existed between the parties

18. *Selby*, 240 A.3d at 247.
19. 820 A.2d 974 (R.I. 2003).
20. 650 A.2d 125 (R.I. 1994).
21. *See Selby*, 240 A.3d at 247.
22. *Selby*, 240 A.3d at 247 (citing *Deus*, 820 A.2d at 975).
23. *Id.*
24. *Id.* (quoting *e.g., Deus*, 820 A.2d at 976). The Court emphasized that the church's ability to control the plaintiff's schedule, supervise her activities, and the authority to terminate employment were indicative of an employment relationship. *See id.* (citing *Deus*, 820 A.2d at 975).
25. *Selby*, 240 A.3d at 248 (citing Sorenson v. Colibri Corp., 650 A.2d 125, 127 (R.I. 1994)).
26. *Id.*
27. *Id.*
28. *Id.* (citing *Sorenson*, 650 A.2d at 132).

because the defendant supervised the plaintiff, was responsible for determining the scope of the plaintiff's work, and provided the necessary equipment for the job.[29]

The Court recognized that this case fell squarely within the precedent set by *Deus* and *Sorenson*.[30] The Court found uncontroverted evidence to support the conclusion that Mulch-N-More's only connection to Selby was the administrative duty of providing payroll and benefits, while MPTS exercised "dominion and control over the plaintiff."[31] Consequently, the Court affirmed summary judgment for the defendant on the basis that Selby was indeed an employee of MPTS.[32]

COMMENTARY

The wheels of justice turn slowly. Nearly a decade separated the date of the plaintiff's injury and the Rhode Island Supreme Court's decision to affirm summary judgment in favor of the defendant.[33] The critical issue in this case was whether Selby was employed by MPTS or Mulch-N-More. Selby's cause of action for negligence against MPTS was entirely barred by the Act's exclusivity provision if the Superior Court justice determined that the plaintiff was an employee of MPTS while he was working at the Cranston residence.[34] Alternatively, if the Superior Court had found that a genuine issue of material fact existed regarding the identity of the plaintiff's employer, Selby likely would have been able to pursue the case further, unshackled from the strictures of the exclusivity provision.

The Act's exclusivity provision prohibits injured employees from receiving workers' compensation benefits then turning around and suing their employers for the same injury.[35] Generally, an injured employee may either collect workers' compensation benefits or sue their employer, but not both. The Court specifically noted that a key objective of the Act was to "curtail litigation by injured

29. *Id.* (citing *Sorenson*, 650 A.2d at 127).
30. *See Selby*, 240 A.3d at 248.
31. *Id.*
32. *Id.*
33. *See id.* at 244.
34. *See id.* at 245.
35. *See* 28 R.I. GEN. LAWS § 28-29-20 (1956).

employees who elected to take advantage of its expedited procedure for obtaining compensation for work-related injuries."[36]

Accordingly, a finding by the Superior Court that the plaintiff—who had already collected workers' compensation benefits for his injuries at the time of the case—was in fact employed by defendant MPTS would ensure that the proverbial goose of the negligence suit was cooked. Knowing this, the defense wasted little time moving for summary judgment[37] and presenting substantial evidence to the Superior Court seeking a conclusion that Selby was employed by MPTS at the time of his injury.[38] Unfortunately, the plaintiff was unable to match the defense's enthusiasm for the case. The plaintiff was granted several continuances until, almost a year after it was filed, the motion was finally scheduled to be heard, at which point the Court openly acknowledged that the plaintiff was still wholly unprepared to contest summary judgment.[39]

The Court arrived at the correct conclusion on the issue of the plaintiff's employment. The Court appropriately used this case as an opportunity to stress the key factors it considers when determining the existence of an employment relationship: dominion and control as evidenced by, among other things, supervision, instruction, provision of tools and equipment, superintendence, and termination authority.[40] The Court noted that an entity's performance of administrative functions such as payroll and benefits alone does not establish that entity as an individual's employer.[41]

On appeal, the plaintiff also attempted to assert another cause of action for fraud.[42] The Court pounced on the opportunity to make quick work of this issue in a footnote to the opinion, observing that this was the first time the plaintiff had made this argument.[43] Accordingly, the Court held that the issue of whether the defendant

36. *See Selby*, 240 A.3d at 245 (quoting *e.g.,* Sorenson v. Colibri Corp., 650 A.2d 125, 129 (R.I. 1994)).

37. *See supra* note 7 and accompanying text.

38. *See supra* note 9.

39. *Selby*, 240 A.3d at 245. When the day for the summary judgment hearing arrived, the plaintiff had failed to file an objection to the motion, provide a memorandum of law, or submit any other evidence to contest the defense's assertions. *Id.*

40. *See id.* at 248.

41. *Id.*

42. *See supra* note 13 and accompanying text.

43. *Selby*, 240 A.3d at 246 n.9.

committed fraud had been waived under the well-settled "raise-or-waive" rule.[44]

CONCLUSION

The Rhode Island Supreme Court held that dominion and control are the key factors to be considered for determining whether an employment relationship exists in the context of workers' compensation cases.[45] *Selby*, along with *Deus* and *Sorenson*, set the modern standard for this conclusion.[46] The Court emphasized that the exclusivity provision of the Act strictly bars a plaintiff employee from seeking additional recovery against their employer for the same injury that led to the workers' compensation claim.[47]

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44. *Id.* "[I]n accordance with this Court's longstanding 'raise-or-waive' rule, if an issue was not properly asserted, and thereby preserved, in the lower tribunals, this Court will not consider the issue on appeal." *Id.* (quoting *e.g.,* Adams v. Santander Bank, N.A., 183 A.3d 544, 548 (R.I. 2018)).

45. *Selby*, 240 A.3d at 248.

46. In each case the Court ruled in favor of the defendant, which was found to be the plaintiff's employer. *See id.* at 244; *see also* Deus v. S.S. Peter and Paul Church, 820 A.2d 974 (R.I. 2003); *see also* Sorenson v. Colibri Corp., 650 A.2d 125 (R.I. 1994).

47. *See supra* note 17 and accompanying text.