IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED
March 24, 1999
Cecil Crowson, Jr.
Appellate Court
Clerk

DEBRA FAY ABBOTT, surviving spouse of Jeffrey Abbott, and RAYMOND MITCHELL ABBOTT, a minor, by next friend, Debra Fay Abbott, CV-00328	)	BLOUNT CIRCUIT
	)	Appeal No. 03A01-9810-
Plaintiffs/Appellants	)	
v.	)	HON. W. DALE YOUNG, JUDGE
KLOTE INTERNATIONAL CORPORATION,	)	
Defendant/Appellee	)	AFFIRMED

J. Anthony Farmer, Knoxville, for the Appellants.

Linda J. Hamilton Mowles, Knoxville, for the Appellee.

O P I N I O N

INMAN, Senior Judge

Jeffrey Abbott was killed in an industrial accident on the premises of the defendant, who had engaged his services through Atwork Personnel Services, Inc.

Atwork and its insurer settled the workers' compensation claim of the surviving spouse of Jeffrey Abbott, who filed this tort action against the defendant for damages for the alleged wrongful death of her husband. The defendant moved for summary judgment, pleading the bar of the workers' compensation law on the theory that the decedent was its special employee and thus both parties were bound by the workers' compensation law. The trial judge granted the motion, holding

that workers' compensation was the exclusive remedy because the defendant was the statutory employer of the deceased. The correctness of this ruling is the issue presented.

We measure the propriety of the trial court's grant of summary judgment against the standard of RULE 56.04, TENN. R. CIV. P., which provides that summary judgment is appropriate where

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

We also note that the nonmoving party is entitled to the benefit of any doubt. *Byrd v. Hall,* 847 S.W.2d 208, 211 (Tenn. 1993). When reviewing a grant of summary judgment, an appellate court must decide anew if judgment in a summary fashion is appropriate. *Cowden v. Sovran Bank/Central South,* 816 S.W.2d 741, 744 (Tenn. 1991); *Gonzales v. Alman Constr. Co.,* 857 S.W.2d 42, 44-45 (Tenn. App. 1993). Since this determination involves a question of law, there is no presumption of correctness as to the trial court's judgment. *Hembree v. State,* 925 S.W.2d 513, 515 (Tenn. 1996).

The record reflects that Sherry Bass, the Assistant Plant Manager and Personnel Director of the defendant, contacted Atwork with the request that an employee be furnished to work on a molding press.[1] Jeffrey Abbott was assigned to the temporary job. Atwork did not suggest how Abbott should perform his job, nor did Atwork attempt to limit the nature or scope of his work.[2]

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[1]Bass had previously utilized Atwork's services for temporary help in performing the identical work.

[2]Abbott's time sheet with Atwork provides that any Atwork employee is prohibited from operating machinery while on a temporary employment assignment. If the deceased was an employee of Klote, his assignment to the molding machine works neither a destruction of nor a metamorphosis of the relationship.

On January 2, 1997, the decedent presented himself to the defendant, and was assigned to the night shift, working under the direction and control of Craig Turner, a supervisor of the defendant, who trained and familiarized the decedent with the molding press which killed him the following evening.

It is not materially disputed that during his brief tenure with the defendant, Abbott received no work instructions from Atwork, or that he worked under the control and supervision of the defendant.

Ms. Sharma Floyd, owner of the Atwork office which assigned Plaintiff's decedent to the defendants, testified that she did expect the client (the defendant) to control the work done by the employee assigned to that company.

> Q: Okay. When you send an employee, a temporary employee to a client, you don't go with that employee and tell them what to do when they are at your client's place of business, do you?
>
> A: We don't go with them but we tell them what we are told when the job order is placed.
>
> Q: So you don't know day in and day out, hour by hour, minute by minute what that employee is doing at a client's place of business; fair statement?
>
> A: That's true.
>
> Q: And you anticipate when a client asks you to provide them with an employee, you expect that client to supervise that employee's activities, correct?
>
> A: Correct . . . Do I expect the client to control the work? -- yes.

Moreover, Ms. Bass, the defendant's Personnel Director and Assistant Plant Manager, had the authority to hire and fire temporary employees sent to her from Atwork, and on occasion did so. This is not controverted.

The agreement between Atwork and the defendant provided that the defendant would pay to Atwork a specified hourly rate for each temporary employee furnished by Atwork, who furnished the employee (Abbott) an Atwork

time card that had to be signed by the supervisor at the work assignment, in this case the supervisor at Klote, before the employee would be paid by Atwork. This time card verifies the hours the employee works and forms the basis for the billing sent to the client company by Atwork, so that Atwork can obtain the appropriate fees for its placement services. Under this agreement, Atwork carried workers' compensation insurance on all employees sent by it to the defendant, including Mr. Abbott. Atwork compensated Abbott for the hours that he worked for the defendant at a different wage than the rate defendant paid Atwork for his services. The differential provided funds for Atwork for the payment of workers' compensation insurance premiums, withholding and profits to Atwork.

All the principals in this case, viz, Ms. Floyd (owner of the Atwork office which assigned Mr. Abbott), Ms. Pierson (the Atwork service representative for the defendant's account) and Ms. Bass, testified that Abbott was an employee of both Atwork and the defendant.

Ms. Floyd testified:

> Q: You would agree with me, would you not, Ms. Floyd, that once you send an employee to a client to go to work there at their place of business, such as Klote, that you both are employers of that individual, subject to [counsel's] objection?
>
> A: I don't know the law behind it, but I think that there has to be a firm understanding that we are both responsible for that employee.

Ms. Pierson testified:

> Q: When you sent one of your employees to a client such as Klote, would you agree with me that both Klote and you were employing that individual, subject to [counsel's] objection?
>
> A: Yes.
>
> Q: Okay.

A: Because he worked through us for them.

Ms. Bass testified:

Q: What does co-employee mean to you?

A: Jointly a co - they are our employee and they are Atwork's employee.

The Witness: Our employee is, my word, the co-employee. Atwork's employee is our employee.

Q: You could fire them even though they were employed by Atwork?

A: When that employee came to our - when Atwork sent the person to our plant, that become our employee (sic), I could go to that employee and say, you are not working out, report back to your office, to Atwork office.

T.C.A. § 50-6-108(a) provides:

> (a) The rights and remedies herein granted to an employee subject to the Workers' Compensation Law on account of personal injury or death by accident, including a minor whether lawfully or unlawfully employed, shall exclude all other rights and remedies of such employee, such employee's personal representative, dependents or next of kin, at common law or otherwise, on account of such injury or death.

The exclusivity of the workers' compensation remedy against the employer has withstood all attacks against it. *See, e.g., Castleman v. Ross Eng'g., Inc.*, 958 S.W.2d 720 (Tenn. 1997), holding that a covered employee had no right to sue his employer in tort either prior to or subsequent to the adoption of comparative fault.

The plaintiff does not dispute that her decedent was an employee of Atwork, by whom she has been paid workers' compensation benefits. She does not agree, however, that the decedent was also an employee of the defendant as found by the trial court. An employee, for workers' compensation purposes, includes every person . . . whether lawfully or unlawfully employed . . . in the service of an employer under any contract of hire . . . written or implied. T.C.A. § 50-6-

102(a)(3)(A). An employer includes any individual, firm, or corporation . . . using the services of not less than five persons for pay . . . T.C.A. § 50-6-102(a)(4). The right to control the job duties when distinguishing employees and independent contractors is an emphasized factor in all of the cases. *Galloway v. Memphis Drum Service,* 822 S.W.2d 584 (Tenn. 1991).

Under established Tennessee precedent, an employee of a temporary manpower service is considered also to be an employee of the company to which the employee is assigned, for workers' compensation purposes. This was the issue in *Bennett v. Mid-South Terminals Corp.,* 660 S.W.2d 799 (Tenn. 1983). On the day of the alleged injury, the plaintiff in *Bennett* was an employee of Labor Force, Inc., a supplier of temporary manpower to industries and other companies in the Mid- South area. On February 24, 1981, the defendant requested that Labor Force supply it with some temporary day labor to assist in the loading of a barge at its terminal. Labor Force thereupon supplied Mr. Bennett, the plaintiff, who arrived at defendant's premises and began work as directed by his Mid-South supervisor. Labor Force maintained no supervisor at the scene of plaintiff's employment.

Bennett was loading the barge for Mid-South at the time of his injuries. Although the parties disputed the presence of a Mid-South supervisor on site at the time of the accident, there was no dispute that Mid-South exercised, at least, some supervision over the Plaintiff's work at Mid-South's premises.

Pursuant to a pre-existing agreement between Labor Force and Mid-South Terminals, Labor Force was required to carry workers' compensation insurance on all employees sent by it to the defendant and others. Labor Force compensated plaintiff for the hours that he worked for the defendant, paying him the minimum wage, and Labor Force billed for and was paid a higher rate for plaintiff's work

from Mid-South. The differential between the hourly rate provided funds for the payment of workers' compensation insurance premiums, withholding taxes on the plaintiff, various out-of-pocket expenses for Labor Force and Labor Force's profits.

The plaintiff sued Mid-South for damages as a result of the injuries received while working on its premises; the trial court held that the workers' compensation law immunized Mid-South from all tort claims, since Mid-South was plaintiff's co-employer. We affirmed, citing *Winchester v. Seay,* 409 S.W.2d 378 (Tenn. 1966), which considered the "borrowed servant" or "loaned employee" doctrine and adopted a three-pronged test according to Larson on Compensation:

> § 48. LENT EMPLOYEES AND DUAL EMPLOYMENT. When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if
>
> (a) The employee has made a contract of hire, express or implied, with the special employer;
>
> (b) The work being done is essentially that of the special employer; and
>
> (c) The special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

409 S.W.2d at 381.

Regarding part (a) of the *Winchester* test, the *Bennett* Court then stated:

> In determining whether plaintiff had made a contract of hire, either express or implied, with the defendant, the language used by the Supreme Court of Minnesota in *Danek v. Meldrum Mfg. & Engineering Co., Inc.,* 312 Minn. 404, 252 N.W. 2d 255 (1977) in a case similar to the one sub judice becomes relevant:
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> We think it is quite clear that the Plaintiff consented to work for Defendant and that such was pursuant to an implied contract between them. In this case Plaintiff knew when he was hired by Manpower that all his work would actually be performed for various customers of his general employer. The very fact that he entered into an employment arrangement of that nature would constitute a general consent to work for special employers such as Defendant.

The *Bennett* Court then applied the factors set out in *Winchester* and *Danek* and found that (a) plaintiff Bennett had consented to work for whomever Labor Force sent him and had specifically consented to work for defendant on the day in question, thus providing the implied contract between the co-employer and Bennett; (b) the work done by Bennett was work of the defendant special employer, being performed on defendant's premises, and (c) the defendant had the right to control the details of the work being done by the plaintiff at the time of the injury.

In the case at Bar, each of these facts is virtually undisputed and compels the conclusion that Abbott was an employee of both Atwork and Klote, for workers' compensation purposes, because, under *Winchester* analysis part (a), there was, at a minimum, an implied contract for hire by virtue of the fact that Mr. Abbott had gone to Atwork, a temporary employment agency, and had accepted employment by the assignment to Klote International. Just as in *Danek, Winchester* and *Bennett,* Mr. Abbott's presence and work at Klote's premises established a contract of hire, express or implied, with the special employer. This employment relationship was further recognized by the testimony of all three deposition witnesses heretofore quoted.

As to the *Winchester* test (b), the work being done by the decedent in the molding department at defendant's plant was the work of the defendant, not of Atwork. This point is not materially disputed.

As to the *Winchester* test (c), the testimony is clear that the defendant, the special employer, had the right to control the details of the work done by the temporary employee assigned to them by Atwork. This point is not materially disputed.

We agree with the appellee that the *Bennett* and *Winchester* analyses are controlling. This conclusion finds additional support in the testimony of the Atwork owner and service representative and testimony of the defendant's personnel director, all of whom considered Abbott to be an employee of both Atwork and Klote, thus making the defendant a statutory employer or "special employer" for workers' compensation purposes.

We accordingly affirm the judgment and assess the costs to the appellant.

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William H. Inman, Senior Judge

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge