STATE OF MICHIGAN

COURT OF APPEALS

PAULETTE KARSCHNICK, as Personal Representative of the Estate of GORDON KARSCHNICK, Deceased,

Plaintiff-Appellee,

v

STATE WIDE EXCAVATING, INC.,

Defendant-Appellant.

UNPUBLISHED
May 21, 1999

No. 203095
Wayne Circuit Court
LC No. 95-505843 NO

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(4) ("The court lacks jurisdiction of the subject matter."). We reverse and remand for further proceedings.

Defendant argues that plaintiff's action should be barred by Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq.*; MSA 17.237(101) *et seq.*, § 131(1) of which establishes that "[t]he right to the recovery of benefits as provided in this act shall be the employee's *exclusive* remedy against the employer for a personal injury" (emphasis added). We review a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996).

Plaintiff's decedent was injured while working on a newly constructed water main in Livonia. The decedent was working for Mid-Way Equipment, Inc., but the equipment that plaintiff alleges was responsible for the injury was owned by defendant. Not is dispute is that Mid-Way Equipment, as the decedent's employer, may invoke the exclusive-remedy provision of the WDCA in this matter. At issue is whether defendant and Mid-Way constitute a single business entity for purposes of bringing defendant under the exclusive-remedy provision of the WDCA. The determination of the status of employer for purposes of the WDCA is a mixed question of fact and law. Where no material facts are in dispute, or the evidence gives rise to only one reasonable conclusion, the question is a legal one for the court to decide; where the evidence on which the question hinges is contested, the issue should be left to the trier

of fact to resolve. See *Howard v Dundee Mfg Co*, 196 Mich App 38, 40; 492 NW2d 478 (1992), and cases cited.

This Court uses the "economic-reality" test to determine the existence of an employer-employee relationship for purposes of the WDCA, which involves considering all the facts surrounding the employment relationship. *James v Commercial Carriers, Inc*, 230 Mich App 533, 537; 583 NW2d 913 (1998). This test requires consideration of four factors: "(1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties toward the accomplishment of a common goal." *Id.* The goal of this analysis is to secure the rights and privileges of all the parties under the statutory scheme of worker's compensation law. *Id.*

According to uncontroverted documentary evidence, Mid-Way Equipment and defendant are owned by the same two co-owners, operate from the same building and mailing address, and perform the same kinds of excavation services. The major difference between the two companies is that defendant's employees are unionized whereas Mid-Way's are not. Further, the two companies keep substantially separate books, and at the end of each month Mid-Way submits an invoice charging defendant for the leasing of Mid-Way employees to defendant. However, Mid-Way Equipment does not solicit or submit bids in its own name, but rather works solely on projects solicited by defendant. In addition, the two companies operate under a single workers' compensation policy, and defendant pays all general liability insurance premiums for itself and Mid-Way Equipment alike. This weighs heavily in favor of recognizing the two companies as a single entity. "A salient factor in determining an employee-employer relationship in the parent-subsidiary context is the use of a combined worker's compensation insurance policy by both parent and subsidiary." *Jones, supra* at 539. See also MCL 418.131(2); MSA 17.237(131)(2) ("'employer' includes the employer's insurer").

One of the co-owners stated on deposition that plaintiff's decedent worked for Mid-Way Equipment and not for defendant. The record further shows that the co-owners have characterized the two companies as distinct entities when that characterization has afforded some advantage concerning tax liability. Indeed, the trial court observed that the co-owners sometimes characterized Mid-Way Equipment and defendant as separate entities, and other times insisted as they do here that they composed a single entity, the characterization at any moment naturally being the one that worked out to their best advantage. The trial court stated that "they cannot have their cake and eat it too," and declared Mid-Way and defendant to be "distinct companies." However, to affirm the trial court would be to sustain the opposite error, allowing plaintiff to "structure[] her cause of action in such a way as to reap all the benefits, and none of the drawbacks, of the Worker's Disability Compensation Act." *Bitar v Wakim*, 456 Mich 428, 433; 572 NW2d 191 (1998). In light of the identity of ownership, address, insurance provisions, and nature of business of Mid-Way and defendant, and the substantial intermingling of operations, employees, and equipment, we conclude as a matter of law that the two companies are so closely linked that defendant shares Mid-Way's status as the decedent's employer for purposes of coming under the exclusive-remedy provision of the WDCA.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Peter D. O'Connell