STATE OF MICHIGAN

COURT OF APPEALS

DONALD GUNTER,

Plaintiff-Appellant,

v

OTM CORPORATION and
OAKLAND TOOL & MANUFACTURING,

Defendants-Appellees.

UNPUBLISHED
March 26, 2002

No. 222557
Macomb Circuit Court
LC No. 98-001444-NO

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motions for summary disposition, pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was employed by defendant OTM when John Burnell, his supervisor, bypassed a malfunctioning safety device on a press. Plaintiff placed his arm inside the danger area of the press to adjust a die. The press operator did not see plaintiff and activated the press. The press cycled because the safety device had been bypassed and plaintiff's left arm was amputated below the elbow. The circuit court dismissed plaintiff's action, concluding that the claims against both defendant OTM and defendant Oakland Tool & Manufacturing (Oakland) were barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1).

Issues pertaining to the exclusive remedy provision of the WDCA are reviewed, pursuant to MCR 2.116(C)(4), to establish whether the circuit court lacks subject matter jurisdiction because the plaintiff's claim is barred by the provision. *Bock v General Motors Corp*, 247 Mich App 705, 709-710; 637 NW2d 825 (2001). We review a decision under MCR 2.116(C)(4) de novo "to determine if the moving party was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000).

The WDCA permits recovery for employees injured during the course of employment. *Bock, supra* at 710. However, this near automatic liability limits an employee's ability to bring a tort action against the employer. *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000). MCL 418.131(1) provides:

> The 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 or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

Plaintiff contends that Oakland was not his employer and that the circuit court erred in dismissing it from the case. The economic reality test is applied "to determine whether an employment relationship exists for purposes of the exclusive remedy provision, and thus whether an individual or entity is the 'employer' of a given employee." *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 687; 594 NW2d 447 (1999). The economic reality test looks to the totality of the circumstances surrounding the performed work. The relevant factors considered are: (1) control of a worker's duties; (2) payment of wages; (3) the right to hire, fire and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. *Howard v Dundee Mfg Co, Inc*, 196 Mich App 38, 41; 492 NW2d 478 (1992). "[W]hether a business entity is a particular worker's "employer" . . . is a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference." *Clark, supra* at 693-694. However, the issue is one for the trier of fact if evidence of a putative employer's status is disputed or conflicting inferences may reasonably be drawn from the known facts. *Id*. at 694.

Defendants assert that the following factors show that Oakland was plaintiff's employer: (1) that the sole shareholder of OTM, who is related to the sole shareholder of Oakland, is also an officer and director of Oakland and receives payment from Oakland; (2) that both OTM and Oakland are insured under the same worker's compensation policy; (3) that Oakland personnel perform central bookkeeping and check writing functions for OTM; (4) that the bulk of OTM's work is subcontracted from Oakland; (5) that combined financial statements of the two companies are used in obtaining loans; and (6) that salaried employees receive their pay from Oakland, subject to reimbursement by OTM to Oakland.

The foregoing facts show that the two companies are related. However, the only factor supporting a finding that Oakland was plaintiff's employer is that, as an employee working on business subcontracted to OTM, plaintiff's duties were an integral part of Oakland's business. Indeed, there is no indication in the record that Oakland controlled plaintiff's duties, paid his wages, or had the right to hire, fire or discipline him. Therefore, we conclude that the circuit court erred in concluding that Oakland was entitled to the protection of the exclusive remedy provision of the WDCA.

Nonetheless, we find that summary disposition in favor of Oakland was proper because liability was dependent upon Oakland being vicariously liable for the negligence of John Burnell. In order to determine whether Oakland was Burnell's employer for purposes of respondeat superior liability, the proper test is the control test. *Norris v State Farm & Casualty Co*, 229 Mich App 231, 239; 581 NW2d 746 (1998). The control test focuses on who has the right to

direct and control the employee. *May v Harper Hospital*, 185 Mich App 548, 553; 462 NW2d 754 (1990). Liability arises from the detailed activities of an employee that are controlled by the employer. *Hoffman v JDM Assoc, Inc*, 213 Mich App 466, 469; 540 NW2d 689 (1995). "In applying this test, we look at the work the employee was performing when the injury for which suit has been brought was sustained." *May, supra*.

In this case, the evidence showed that Oakland did not have control over Burnell at the time of plaintiff's injury. On the contrary, the submitted evidence established that Burnell was under OTM's control. The facts show that Burnell was hired as a production manager for OTM and that OTM had the right to hire and fire Burnell. OTM was also ultimately responsible for Burnell's salary and paid it by reimbursing Oakland. Further, Burnell's work was an integral part of OTM because his office was located at OTM's facility and his job focused on the daily plant operations at OTM. More importantly, at the time of the accident, Burnell was performing a supervisory function for OTM. Although Burnell's direct supervisor, Johann Geisz, was a shared employee of Oakland and OTM, was the Vice President of Operations for both Oakland and OTM, and had offices at both Oakland and OTM, there was no evidence that Geisz was acting other than as an OTM employee in his supervision of Burnell. Accordingly, there is no basis for subjecting Oakland to vicarious liability for Burnell's actions. We will not reverse the circuit court's decision when the right result was reached for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). Accordingly, we affirm the circuit court's grant of summary disposition in favor of Oakland.

Plaintiff further purports that the circuit court erred in granting summary disposition in favor of OTM. We disagree.

The facts in this case do not support a conclusion that Burnell specifically intended to injure plaintiff. Further, there is no evidence that Burnell had actual knowledge that an injury was certain to occur. In determining whether something is "certain to occur," our Supreme Court has stated:

> According to one court, "certain" means sure and inevitable. The legislative history requires us to interpret "certain to occur" as setting forth an extremely high standard. When an injury is "certain" to occur, no doubt exists with regard to whether it will occur. Thus, the laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. [*Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 174; 551 NW2d 132 (1996).]

Knowledge that a dangerous condition exists is insufficient unless an employer is actually aware that an injury is certain to occur based upon an employee's assigned job function. *Id*. at 176.

Here, Burnell testified that he thought the sensor had been repaired before plaintiff's accident. Burnell also stated that he felt the machine could be operated safely without the bypassed fuse. Further, had the safety instructions on the machine been followed, the injury would not have occurred. Moreover, Burnell did not believe that such an accident was inevitable because the machine's vertical light curtains remained operational. Because the evidence does

not permit a finding that Burnell had actual knowledge that an injury was certain to occur, the circuit court properly granted summary disposition to OTM.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper