STATE OF MICHIGAN

COURT OF APPEALS

PROGRESSIVE MICHIGAN INSURANCE COMPANY, Plaintiff-Appellant, v CONTRACT TOWING, INC., and LARRY DODSON, Defendants-Appellees.	UNPUBLISHED October 1, 2009 No. 286570 Wayne Circuit Court LC No. 06-633349-CK

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Plaintiff Progressive Michigan Insurance Company appeals as of right the trial court's June 25, 2008, order declaring as a matter of law that defendant Larry Dodson was not an employee of defendant Contract Towing when Dodson was injured on January 21, 2006, and therefore that plaintiff, Contract Towing's insurer, could not avail itself of an exclusion in its commercial automobile insurance policy for employees of Contract Towing. We reverse and remand. This case is being decided without oral argument in accordance with MCR 7.214(E).

Dodson approached James Wilson, Contract Towing's owner and operator in response to a help-wanted sign. Wilson initially suggested that he might engage Dodson at the rate of $6 per hour, but in fact no such hourly arrangement followed. Instead, Dodson worked at Wilson's business, and sometimes Wilson's home, five or six days per week, and Wilson allowed Dodson to sleep in a vehicle in his driveway, then live rent-free in a spare residence, while routinely providing him food, and sometimes providing him small amounts of cash for sundry purposes.

At his deposition, Wilson confirmed that Dodson was present at his business at least five days a week, but suggested that there was no regular structure to the days or hours worked. Wilson stated that Dodson was not an employee of Contract Towing, and that nothing he ever provided to Dodson was bargained-for compensation for his services.

Dodson, in the course of doing work on the premises of Contract Towing, stationed himself under a car, one end of which was raised by a tow truck, in order to manually disengage the transmission for easier towing. The car shifted and dropped some distance, injuring Dodson severely.

Contract Towing had no worker's compensation insurance, but had a commercial automobile insurance policy with plaintiff. That policy excluded coverage for "[**b**]**odily injury** to an employee of an **insured** . . . arising out of or within the course of employment . . ." (bold in the original). Plaintiff, seeking to avoid paying benefits in light of that exclusion, brought the instant declaratory action.

The trial court summarized the evidence, and its conclusions, as follows:

> [Dodson] shows up on Mr. Wilson's door and knocks on the door. Mr. Wilson sort of takes him in in the broad sense. He lets him sleep in the truck and then sleep in the house and so forth.
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> In doing that this man does various things in and about the house for Mr. Wilson and in and about Contract Towing until this faithful [sic] day until he's climbing up under that car, crossed his leg and starts banging on the transmission and the car fell on his head. Now he's here.
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> There was never any checks issued. There was never any deductions, any reporting to the State, the Feds or anyone else that this man was an employee. None of those sorts of things.
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> True enough everybody considered Mr. Wilson the boss. They said he went over there at Contract and he may have driven the tow truck at times. He certainly did some cleanups. Maybe he went out with Mr. Wilson at times to pick up another car or something from Contract.
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> I looked at the whole situation and I just came to the conclusion that this man was . . . more like an indentured servant than he was an employee. You guys know all the things he did or didn't do. It's no sense in me repeating them. . . .

The court commented on its expectation that its decision would be appealed to this Court, then concluded, "I find from the facts and the circumstances in this case that . . . Mr. Dodson was not an employee, but rather was just a hanger-oner."

Plaintiff's counsel asked the court if it did not at least think Dodson's employment status presented a question of fact. The court elaborated in response:

> There is nothing to suggest that he ever was paid $6 an hour.
>
> There is suggestion that Mr. Wilson, who is the owner of Contract Towing, did allow him to sleep in the camper. Did allow him to stay in this house that one man said should have been condemned. . . . Did on his own admission give him food. When he [sic] wife cooked she cooked for him too. Did take him to Big Lots or someplace from time to time to buy things. Did on occasion when he said I need a few bucks did give him, advance him money.
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> Mr. Dodson did cleanup work at his home, at Mr. Wilson's home in and about the property. He also at times did what he was doing apparently when he

> got hurt, that is, to fuss around . . . these cars that they were towing in and out. . . . He did things, there's no doubt about it. But those things did not amount under the circumstances to him becoming an employee because there were never any checks that were written to him, no evidence of any checks. There was no reporting of Social Security, no 1099s, no W-2s, no nothing. He was just there.
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> Mr. Wilson says it was the kindest [sic] of my heart. He says not only have I done it for him, I've done it for other people. He was a kind of a homeless guy, and I kind of just let him hang around and do all of that.

Plaintiff's counsel then protested that Dodson did not live in Wilson's house for free, but rather "Wilson deducted rent from the money that he owed Mr. Dodson," adding, "He wasn't living in that house for free. He was working and being paid for $6 an hour cash." The trial court replied, "Agreed," but again likened Dodson to an indentured servant. The court concluded, "His motion for summary disposition is based on the premise that Mr. Dodson was an employee. . . . I find that as a matter of law that he wasn't."

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). The court considers the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id.* "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

In determining whether a party had the status of employee, "[i]f the evidence . . . is reasonably susceptible of but a single inference, the question is one purely of law to be decided by the court," but "where the facts bearing on such issue are either disputed, or conflicting inferences may be reasonably drawn from the known facts, it is error to withhold the issue from the determination of the jury." *Nichol v Billot*, 406 Mich 284, 306; 279 NW2d 761 (1979) (internal quotation marks and citation omitted). Comporting with this approach is the general rule that, when deciding motions for summary disposition, "[t]he court may not make factual findings or weigh credibility." *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). Accordingly, the court should make this determination only if it can do so from facts not in dispute. *Nichol, supra* at 306.

As an initial matter, we note that the trial court seems to have strayed from evaluating matters not in dispute and engaged in credibility determinations, e.g., apparently crediting Wilson's testimony concerning why he provided Dodson with support. We also find error in the court's substantive analysis.

Because this case does not arise under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., the inquiry is not restricted to its statutory criteria. See *Reed v Yackell*, 473 Mich 520, 527, 529-530; 703 NW2d 1 (2005). Under the common law economic realities test, a court should consider "(1) control of a worker's duties, (2) payment of wages, (3) 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."[1] *Derigiotis v J M Feighery Co*, 185 Mich App 90, 94; 460 NW2d 235 (1990).

The trial court acknowledged that, "everybody considered Mr. Wilson the boss," and that Dodson occasionally drove Wilson's tow truck, did some cleanup work, and accompanied Wilson on towing jobs. "Wages" include "all compensation for services rendered without regard to manner in which such compensation is computed," Black's Law Dictionary (6th ed), p 1579, and thus potentially include the provision of food or shelter, along with petty cash. Driving tow trucks, or otherwise assisting in towing operations, and helping with cleanup, constitute performance of services integral to Contract Towing's operations.

In his brief on appeal, Dodson describes the trial court's characterization of him as an indentured servant as an apt one. But neither Dodson nor the trial court has provided any explanation why performing services to work off a debt in lieu of direct monetary compensation constitutes something other than a master-servant relationship.

However, Wilson stated flatly that Dodson was not his employee, and characterized the support he provided him as mere charity. The tacit implication, then, is that Dodson was a mere volunteer, showing up at Wilson's workplace at least five days a week with no sense on the part of either man that the work Dodson did bore any connection, beyond mutual favors, to the housing, food, and cash that Wilson provided. Because the evidence admits of this interpretation, we decline plaintiff's invitation to decide on appeal that Dodson was in fact an employee of Contract Towing, and decree that plaintiff is entitled to summary disposition. But, we accept plaintiff's alternative suggestion to reverse the decision below and remand this case to the trial court with instructions for the factfinder to determine at trial whether Dodson was injured in the course of employment with Contract Towing.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

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[1] These criteria do not include complying with the laws of taxation, or otherwise documenting work done or compensation paid. Cases that do call for inquiry into tax withholding and the like generally concern distinguishing employees from independent contractors. See, e.g., *Reed*, *supra* at 527.