STATE OF MICHIGAN

COURT OF APPEALS

RACHEL BAKER, Individually and as Personal Representative of the ESTATE of JONATHAN BAKER,

Plaintiff-Appellant,

v

TRANS-PORTE, INC.,

Defendant-Appellee,

and

BRISTOL WEST INSURANCE COMPANY,

Defendant.

UNPUBLISHED
May 20, 2010

No. 289191
Oakland Circuit Court
LC No. 2007-086703-NF

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant Trans-Porte, Inc. (TPI). Plaintiff's decedent, Jonathan Baker,[1] was killed at work when he was struck by a truck driven by a coworker on the employer's premises. Baker and the coworker were both employed by U.S. Foodservice, Inc. (USF). Plaintiff received worker's compensation benefits from USF. TPI, which claimed to be a wholly owned subsidiary of USF, was alleged by plaintiff to be the owner of the truck for purposes of the owner's liability statute, MCL 257.401, under the Motor Vehicle Code, MCL 257.1 *et seq*. The trial court dismissed plaintiff's action pursuant to the exclusive remedy provision, MCL 418.131(1), of the Worker's Disability Compensation Act (WDCA), 418.101 *et seq.* We reverse and remand for further proceedings.

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[1] For purposes of this opinion, we shall refer to Jonathan Baker as "Baker" and plaintiff Rachel Baker as "plaintiff."

We shall initially address the issue concerning the applicability of the owner's liability statute, MCL 257.401, relative to the dispute over who owned the truck at the time of the accident.[2] The trial court found this issue to be irrelevant given its decision to disregard the separate corporate entities and to treat USF and TPI as one in the same entity, thereby providing TPI protection under the exclusive remedy provision even assuming that TPI owned the truck. MCL 257.401 provides in relevant part:

> (1) This section shall not be construed to limit the right of a person to bring a civil action for damages for injuries to either person or property resulting from a violation of this act by the owner or operator of a motor vehicle or his or her agent or servant. The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. . . .
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> (2) A person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days, or a dealer acting as agent for that lessor, is not liable at common law for damages for injuries to either person or property resulting from the operation of the leased motor vehicle, including damages occurring after the expiration of the lease if the vehicle is in the possession of the lessee.

Additionally, MCL 257.401a provides that an "'owner' does not include a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than

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[2] This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Likewise reviewed de novo on appeal are issues of statutory interpretation, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), matters of subject-matter jurisdiction, *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003), and questions of law generally, *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). For purposes of seeking dismissal of a court action pursuant to the exclusive remedy provision of the WDCA, the proper analytical framework requires application of MCR 2.116(C)(4). *Herbolsheimer v SMS Holding Co, Inc*, 239 Mich App 236, 240; 608 NW2d 487 (2000); *James v Commercial Carriers, Inc*, 230 Mich App 533, 536; 583 NW2d 913 (1998). "In reviewing a motion under MCR 2.116(C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008).

30 days."[3] The Motor Vehicle Code, and specifically MCL 257.37, provides the underlying definition of an owner:

> "Owner" means any of the following:
>
> (a) Any person, firm, association, or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (b) Except as otherwise provided in section 401a [see above], a person who holds the legal title of a vehicle.
>
> (c) A person who has the immediate right of possession of a vehicle under an installment sale contract.

"'To subject an owner to liability under the statute, an injured person need only prove that the defendant is the owner of the vehicle and that it was being operated with the defendant's knowledge or consent.'" *Poch v Anderson*, 229 Mich App 40, 52-53; 580 NW2d 456 (1998) (citation omitted).

TPI claims that it was not the "owner" of the truck for purposes of the statutory scheme because it was a lessor of the vehicle entitled to protection under the parameters of MCL 257.401(2) and MCL 257.401a. In TPI's answer to the complaint, it stated, "Defendant [TPI] admits that it was the registered owner of the [truck]." This admission was binding on TPI and needed to be considered in relation to the motion for summary disposition. See MCR 2.110(A)(5) and (B)(1); MCR 2.111(C) and (E)(3); MCR 2.507(B); MCR 2.116(G)(5). The admission by TPI that it was the registered owner of the truck is consistent with the certified application for a Michigan vehicle title, which listed Fifth Third Leasing Company (Fifth Third) and TPI as owners and further classified TPI as a lessee. Under MCL 257.37(a), an "owner" includes a corporation "renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period that is greater than 30 days." And pursuant to MCL 257.217(1), "[a]n *owner* of a vehicle that is subject to registration under this act *shall apply* to the secretary of state, upon an appropriate form furnished by the secretary of state, for the registration of the vehicle and issuance of a certificate of title for the vehicle." (Emphasis added.) The fact that TPI was involved in submitting an application for a vehicle title as a listed owner-lessee shortly

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[3] Aside from a statutory claim, we note that plaintiff's complaint can be viewed as additionally alleging a common-law claim against TPI on the basis of negligent entrustment. See *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 288; 597 NW2d 235 (1999) (finding that common-law claim of negligent entrustment is an action arising out of the use of a motor vehicle for purposes of implicating the no-fault act). Plaintiff's appellate brief does not specifically explore the common-law claim, focusing instead on the statutory claim. Given that the language in MCL 257.401(2), which covers a common-law claim and an exception for certain vehicle lessors, mimics the language in MCL 257.401a, our analysis is equally applicable to both the statutory and common-law claims.

before the accident supports a conclusion that there existed a lease arrangement with Fifth Third that was consistent with MCL 257.37(a). Further support for the proposition that TPI was a lessee-owner of the truck was TPI's own response to a request for admissions which conceded that, at the time of the crash, Fifth Third was the lessor of the truck and TPI was the lessee. See MCR 2.312(D)(1) (admitted matters in response to a request for admissions are conclusively established); *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 419-421; 551 NW2d 698 (1996).

Nonetheless, TPI seeks the shelter of MCL 257.401(2) and MCL 257.401a, claiming that it was an entity engaged in the business of leasing motor vehicles who, as lessor, leased the truck to USF, as lessee, pursuant to a lease providing for the use of the truck by USF for a period that was greater than 30 days. However, this argument does not find evidentiary support in the record and it runs contrary to TPI's own admission that Fifth Third leased the truck to TPI. TPI relies on the affidavit of Dona Fox, its fleet tax manager, but her affidavit only contained a simple, cursory averment that TPI "leases its trucks to [USF]." She did not specifically aver that TPI was "engaged in the business of leasing motor vehicles," MCL 257.401(2) and MCL 257.401a. More importantly, Fox also failed to particularly aver that TPI was the lessor of the truck at issue, nor did she aver that the truck was leased to USF as lessee pursuant to a lease providing for the use of the truck by USF for a period of greater than 30 days. Although TPI denied that there did not exist a lease between TPI as lessor and USF as lessee, no such lease was ever produced, and TPI conceded that this supposed lease was never formally executed. The master lease agreement that was part of the record listed Fifth Third as the lessor and Alliant Foodservice, Inc., a USF subsidiary, as the lessee. This lease, aside from not being fully executed, certainly did not establish TPI as the lessor of the truck and it contradicted the binding discovery and pleading admissions. And Alliant, the listed lessee, is a separate corporate entity from USF.

Given the admission in TPI's answer that it was the truck's registered owner, the language in the Michigan vehicle title application indicating that TPI was a lessee-owner of the truck, TPI's discovery admission that Fifth Third had leased the truck to TPI at the time of the accident, and given TPI's failure to provide evidentiary support for its claim that it was not an "owner" under MCL 257.401(2) and MCL 257.401a, TPI is not entitled to summary dismissal of the action under the owner's liability statute. And, for these same reasons, we hold that plaintiff is entitled to summary disposition on this issue. MCR 2.116(I)(2). The answer's binding admission that TPI was the registered owner of the truck could only be overcome by TPI, for purposes of the owner's liability statute, with proof that it leased or subleased the truck to USF under the parameters of MCL 257.401(2) and MCL 257.401a. But TPI did not provide any such proof and, more importantly, it bound itself in the discovery admissions to a position that, on the day of the accident, the truck was subject to a lease as between Fifth Third as lessor and TPI as lessee. We now move on to address the WDCA.

Plaintiff argues that TPI is not protected by the exclusive remedy provision of the WDCA because it admitted that it was not Baker's employer in discovery responses and because imposition of the economic realities test leads to the conclusion that TPI was not Baker's employer, or, minimally, that there existed a genuine issue of material fact on the question. TPI argues that analysis under the economic realities test demands a conclusion that the separate corporate entities must be disregarded, effectively making TPI and USF one in the same entity

and thus providing TPI protection as Baker's employer for purposes of the exclusive remedy provision. On the issue of the discovery admissions, TPI contends that the admissions do not work to undercut its legal theory that it was protected by the exclusive remedy provision pursuant to the economic realities test.

MCL 418.131(1) provides, in relevant part, that "[t]he right to the recovery of benefits as provided in this act [WDCA] shall be the employee's exclusive remedy against *the employer* for a personal injury or occupational disease." (Emphasis added.) "The only exception to this exclusive remedy is an intentional tort." *Id.* This Court has held that "an action based upon the owner's liability statute is not precluded by the immunity of the [motor vehicle's] operator . . . under the Worker's Disability Compensation Act." *North v Kolomyjec*, 199 Mich App 724, 727; 502 NW2d 765 (1993); see also *Wilson v Al-Huribi*, 55 Mich App 95, 98; 222 Mich App 49 (1974). This proposition is supported by MCL 418.827, a statute within the WDCA cited by plaintiff, which provides in relevant part:

> (1) Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section. . . .

In *Beaudrie v Anchor Packing Co*, 231 Mich App 242, 246; 586 NW2d 96 (1998), this Court observed that MCL 418.827(1) "expressly permits an injured employee who is entitled to worker's compensation benefits to also obtain damages from a third party." Here, assuming negligence by the truck's operator or negligent entrustment, the circumstances created a legal liability in the truck's owner, TPI, under MCL 257.401 and the common law, and TPI was not a natural person in the employ of USF, nor was it Baker's employer, as we shall explain below. Accordingly, TPI is a third party subject to potential liability under MCL 418.827.

In *Dale v Whiteman*, 388 Mich 698, 708; 202 NW2d 797 (1972), our Supreme Court expressed that "the exclusive remedy provision of the [WDCA] is intended to be a bar only to any action against an employer by the employee or one which is derivative from his claim." Liability that arises under the owner's liability statute is not derivative nor vicarious. *Freed v Salas*, __ Mich App __; __ NW2d __, issued December 1, 2009 (Docket No. 283317), slip op at 5; *Poch*, 229 Mich App at 52; *Wilson*, 55 Mich App at 98. And TPI is not properly characterized as having been Baker's employer. We also note that TPI does not present an argument that the WDCA precludes an injured employee from suing a third-party owner of a motor vehicle for the operator's negligent operation of the vehicle that caused the injury. Rather, TPI simply claims that it was not a third-party owner but was effectively Baker's employer.

We first hold that TPI's discovery admissions prevent it from claiming that it was Baker's employer. MCR 2.312 is the court rule that provides for the use of a request for admissions as a discovery mechanism. MCR 2.312(D) provides:

> (1) A matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of an admission. For good cause the court may allow a party to amend or withdraw an admission. The court may condition amendment or withdrawal of the admission on terms that are just.
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> (2) An admission made by a party under this rule is for the purpose of the spending action only and is not an admission for another purpose, nor may it be used against the party in another proceeding.

TPI never moved to withdraw or amend any of its admissions. Admissions under MCR 2.312 are used to narrow the issues and they constitute formal concessions that have the effect of withdrawing a matter from issue, dispensing with the need to introduce evidence on the matter. *Radtke*, 453 Mich at 420. A matter that is admitted is not subject to contradiction or explanation. *Id.* at 421.[4] Binding admissions under MCR 2.312 are insignificant unless they are offered as evidence at trial or used in connection with a motion for summary disposition. *Id.* at 421 n 7.

Consistent with MCR 2.312(D) and *Radtke*, TPI's repeated admissions and adamant expressions that it was not Baker's employer, nor anyone's employer, conclusively established that TPI was not Baker's employer. TPI's admissions effectively withdrew from issue the question of whether Baker was an employee of TPI. Following the admissions, there was no longer any obligation to submit evidence in order to prove the nature of the relationship between Baker and TPI.

A request for an admission may relate to "statements or opinions of fact or the application of law to fact[.]" MCR 2.312(A). The issue of whether a party is an "employer" for purposes of the WDCA entails underlying factual questions and the application of law to those facts, see *Tucker v Newaygo Co*, 189 Mich App 637, 639; 473 NW2d 706 (1991), and TPI pled the affirmative defense that it was protected by the WDCA's exclusive remedy provision. Therefore, TPI was aware that in the course of the litigation there likely would arise the question whether it was Baker's employer under the law based on the facts. The discovery requests for admissions touching on employer status necessarily implicated matters of fact and the application of law, and TPI's responses thus established, both factually and legally, that Baker was not TPI's employee.[5] If TPI and USF were one in the same entity under worker's

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[4] In *Cervantes v Farm Bureau Gen Ins Co of Michigan*, 272 Mich App 410, 412; 726 NW2d 73 (2006), two of the plaintiffs admitted, in response to a request for admissions, that they had unlawfully entered and remained in the United States and were subject to deportation. This Court stated that, under MCR 2.312(D)(1), it was conclusively established that these two plaintiffs were illegal aliens at the time of the accident at issue in the suit. *Id.*

[5] Furthermore, MCL 418.151 provides in part:

> The following constitutes employers subject to this act [WDCA]:
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> * * *

(continued…)

compensation law, TPI should have responded to the discovery requests by stating that it, whether under the name TPI or USF, *was effectively Baker's employer under the law*.

Furthermore, even if the admissions were not controlling, TPI's arguments fail. We shall proceed on the assumption that TPI was indeed a wholly owned subsidiary of USF at the time of the accident, noting that the evidence and plaintiff's arguments to the contrary raise some valid questions on the issue. In *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 688-689; 594 NW2d 447 (1999), the Michigan Supreme Court set forth the economic realities test, which is used to determine whether an employment relationship exists for purposes of the exclusive remedy provision:

> Although the totality of the circumstances are considered, in applying the economic realities test, the courts generally consider the following four factors "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." No one factor is controlling. [Citations omitted; alteration in original.]

The *Clark* Court pointed out that two broad lines of authority or cases had developed with respect to application of the economic realities test. *Id.* at 689. One line was the dual employer or coemployer cases, and the other involved cases concerning parent and subsidiary corporations. *Id.* The Court stated that in regard to the classic parent-subsidiary scenario addressed in *Wells v Firestone Tire & Rubber Co*, 421 Mich 641; 364 NW2d 670 (1984), "an essentially vertical relationship exists between two business entities who, if warranted by the application of the economic realities test and the equities of the case, will be treated as essentially one entity for purposes of the exclusive remedy provision." *Clark*, 459 Mich at 691. "[I]in these cases, if warranted, the separate existence of the two entities is disregarded." *Id.*

In *Wells*, an employee was injured during the course of his employment at a wholly owned subsidiary corporation, and he proceeded to file a products liability suit against the subsidiary's parent corporation. Our Supreme Court applied the economic realities test, finding that the parent corporation was the employer and therefore entitled to protection under the exclusive remedy provision of the WDCA. *Wells*, 421 Mich at 645-650. The *Clark* Court, reflecting on *Wells*, stated that the Court in *Wells* recognized that its ruling effectively

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(…continued)

> (b) Every . . . private corporation . . . who has any person in service under any contract of hire, express or implied, oral or written . . . .

TPI admitted that it had no authority or control over Baker's employment, that it did not pay wages to Baker, and that TPI did not have the right to hire, fire, or discipline Baker. TPI stated that it "did not have the authority to hire, fire or discipline . . . Baker as it was not Mr. Baker's employer." In a response to a document production request, TPI stated that "it does not employ any individuals." According to the affidavit of Dona Fox, TPI was not required by law to maintain worker's compensation benefits because "it has no individuals in its employ." Indeed, she averred that the truck drivers were all employees of USF.

constituted a reverse-piercing of the parent corporation's corporate veil and acknowledged that the general rule in Michigan is that separate entities will be respected. *Clark*, 459 Mich at 690.

We find that *Wells* is distinguishable because it entailed an effort to sue the parent corporation where the employee worked for the subsidiary, which is the reverse of the situation here, and because the *Wells* Court placed much emphasis on the fact that the parent company carried worker's compensation insurance and supplied such benefits through its insurer. *Wells*, 421 Mich at 652. Here, the corporation seeking to use the exclusive remedy provision as a shield, TPI, did not carry worker's compensation insurance. We find that *Wodogaza v H & R Terminals, Inc*, 161 Mich App 746; 411 NW2d 848 (1987), which utilized the analytical framework set forth in *Wells*, is very similar to the case at bar and thus instructive.

In *Wodogaza*, this Court ruled that the exclusive remedy provision of the WDCA did not bar the action brought by the plaintiff against subsidiary corporations. The plaintiff was employed by Preston Trucking Company, Inc. (Preston Trucking), which was the parent corporation. He suffered an injury while on the premises of defendant H & R Terminals, Inc. (H & R), which was a wholly owned subsidiary of employer and parent company Preston Trucking. The plaintiff was injured by a tractor that was owned by S & P Equipment, Inc. (S & P), which was another wholly owned subsidiary of employer and parent company Preston Trucking. As occurred in the case at bar, the plaintiff received worker's compensation benefits from parent company Preston Trucking, and he then proceeded to file suit against the two subsidiary corporations. The trial court granted summary disposition in favor of the defendants H & R and S & P, ruling that the parent corporation had dominion over all operations; therefore, the exclusive remedy provision applied. *Wodogaza*, 161 Mich App at 748-750.

The *Wodogaza* panel reversed the lower court's ruling after analyzing the economic realities test as well as taking into account certain equitable considerations. *Id.* at 748. This Court held that H & R had been organized solely for the purpose of owning land and then leasing it back to Preston Trucking, while S & P had been organized for the purpose of owning equipment and then leasing it to Preston Trucking. Neither subsidiary had any employees other than their statutorily required officers, and their offices and activities were ultimately controlled by Preston Trucking. Further, neither subsidiary carried worker's compensation insurance. And no one other than the parent corporation, Preston Trucking, paid the plaintiff's wages, exercised any control over the plaintiff, or was responsible for disciplinary actions. *Id.* at 753-754. The Court, distinguishing *Wells*, further elaborated:

> First, the equities involved in these two instances are not identical. Most significantly, the subsidiaries in this case are seeking to shield themselves from tort liability without having assumed any concomitant liability for the payment of workers' compensation benefits. Defendants have never accepted any responsibility for the work-related injuries of their parent's employees. Second, as noted by the majority in *Wells*, the general principle in Michigan is that separate corporate identities will be respected, and thus corporate veils will be pierced only to prevent fraud or injustice. In the present case, defendants point to no injustice resulting from our recognition of their nonemployer status, as determined under an economic reality test analysis. Liability alone constitutes no such injustice. [*Wodogaza*, 161 Mich App at 756.]

Under the facts, the *Wodogaza* panel held that the parent corporation, not the subsidiaries, was the plaintiff's employer and that he could thus sue the subsidiaries for damages, as they were not protected by the exclusive remedy provision of the WDCA. *Id.* at 748.

As is readily apparent, the facts in *Wodogaza* closely parallel those presented here. TPI admitted that it was formed solely for tax purposes, that it only rendered transportation and backhauling services, that it carried no worker's compensation insurance, that it did not pay for any insurance coverage, that it had no authority or control over Baker's employment, that it did not pay him or anyone wages, that it had no control over hiring, firing, and discipline, that it employed no one, and that its officers and directors held similar positions with USF. Aside from *Wodogaza*, these facts clearly support plaintiff's position under the economic realities test outlined in *Clark*. Accordingly, TPI was not Baker's employer and is thus not protected from liability by the exclusive remedy provision of the WDCA.

In sum, we hold, as a matter of law, that TPI was the owner of the truck for purposes of the owner's liability statute. We further hold, as a matter of law, that TPI was not Baker's employer and therefore not shielded by the exclusive remedy provision of the WDCA. Finally, with respect to an issue raised by plaintiff concerning her counsel's opportunity to speak at the summary disposition hearing, it has been rendered moot.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens