STATE OF MICHIGAN

COURT OF APPEALS

APRIL HARMER,

Plaintiff-Appellant,

v

R.E. DAILEY AND CO., and BATESON DAILEY, a Joint Venture,

Defendants-Appellees.

UNPUBLISHED
December 18, 1998

No. 202137
Wayne Circuit Court
LC No. 95-505893 NO

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm.

Defendants were the general contractors at the Veterans Administration Hospital in Detroit, when plaintiff, who was working for a subcontractor known as JWP, was injured at the work site when she stepped on an unsecured piece of plywood that was covering a hole. Plaintiff filed suit against defendants, alleging that defendants had negligently failed to secure the piece of plywood and failed to protect her against danger at the work site. Defendants moved for summary disposition, arguing that the suit was barred by the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131; MSA 17.237(131). The trial court agreed.

Plaintiff raises several issues on appeal; however, resolution of this case turns on whether the trial court erred in determining that plaintiff's claim was barred by the exclusive remedy provision of the WDCA Although defendant moved for summary disposition under several provisions of MCR 2.116, the trial court did not specify under which provision of the rule it decided the motion. However, because the exclusive remedy provision is, in effect, a form of immunity granted by §131 of the WDCA, we perceive the trial court's ultimate determination as a grant of summary disposition under MCR 2.116(C)(7) (the claim is barred because of immunity granted by law).

We review a trial court's decision to grant summary disposition under MCR 2.116(C)(7) de novo on appeal. *Pendzsu v Beazer East, Inc*, 219 Mich App 405, 408; 557 NW2d 127 (1996).

When reviewing a trial court's decision under MCR 2.117(C)(7), we accept the plaintiff's well-pleaded allegations as true and construe them in favor of the plaintiff. *Id*. If there are no questions of fact, then the question whether the claim is barred is one of law for the court to decide. *Id*. A moving party may support a motion under MCR 2.116(C)(7) with affidavits, admissions, or other documentary evidence. *Home Ins Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522; 527; 538 NW2d 424 (1995). However, we will accept the factual support submitted by the nonmoving party as true, and will affirm a trial court's decision to grant summary disposition only if the moving party has shown that it is entitled to judgment as matter of law. *Id*. at 527-528.

Plaintiff first argues that defendants are not entitled to protection under the exclusive remedy provision of the WDCA because defendants were not plaintiff's statutory employers under MCL 418.171; MSA 17.237(171). If an employer is a statutory employer under § 171 of the WDCA, the exclusive remedy provision under § 131 of the WDCA applies. *Dagenhardt v Special Machine & Engineering, Inc*, 418 Mich 520, 529-530; 345 NW2d 164 (1984). However, we decline to address whether defendants were plaintiff's statutory employers because the trial court did not reach this issue. Rather, the trial court used the economic reality test in finding the existence of an employment relationship. Although plaintiff relies upon *Burger v Midland Cogeneration Venture*, 202 Mich App 310, 315; 507 NW2d 827 (1993), where this Court held that a defendant was not a statutory employer under § 171 of the WDCA because the employer with whom the defendant had contracted complied with the WDCA by being named as an insured in the defendant's so-called wrap-up workers' compensation insurance policy, this Court expressly limited its analysis to whether the defendant was entitled to the protection of § 131 of the WDCA as a statutory employer under § 171. This Court in *Burger* specifically noted that it was not addressing whether the defendants were entitled to application of the exclusive remedy provision under some other theory. *Id.* at 315 n 1. Accordingly, because the trial court in this case did not rely on §171 of the WDCA, but rather based its decision on the economic reality test, we conclude that *Burger* is distinguishable from the case at bar.

Our review, therefore, will focus on whether the trial court properly concluded that defendants were plaintiff's employers under the economic reality test. Michigan uses the economic reality test to determine whether an employer-employee relationship exists for workers' compensation purposes. *Williams v Cleveland Cliffs Iron Co*, 190 Mich App 624, 626; 476 NW2d 414 (1991).

> The economic reality test involves four basic 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. In applying these four factors, the totality of the circumstances surrounding the performed work must be examined, with no single factor controlling. [*Amerisure Ins Co v Time Auto Transportation, Inc*, 196 Mich App 569, 575; 493 NW2d 482 (1992) (citations omitted).]

With respect to the first factor, defendants have conceded that they did not control plaintiff's work. However, as indicated above, no single factor controls the analysis. See also *Kidder v Miller-Davis Co*, 455 Mich 25, 42; 564 NW2d 872 (1997). With respect to the second factor, the record establishes that defendants were indirectly responsible for paying plaintiff's wages. Steven L. Williams,

defendants' loss control manager, indicated in his affidavit that defendants paid plaintiff's wages, and set forth the specific procedure that was followed. Defendants were required to submit certified payrolls of every subcontractor to the owner, and payment to JWP was based on labor expenses to work-in-place. Plaintiff failed to present any contradictory evidence respecting this arrangement. Although it does not appear that defendants paid plaintiff directly, that fact is not dispositive. *Id*. at 44 ("who writes the check is not dispositive of the employer-employee relationship" when the defendant reimburses the direct employer dollar for dollar). Therefore, we conclude that the second factor under the economic reality test favors the existence of an employment relationship.

We would note that plaintiff also argues that a general contractor cannot employ an employee of a subcontractor when the general contractor pays the costs of salaries and workers' compensation premiums for the subcontractor. Although plaintiff cites *Schulte v American Box Board Co*, 358 Mich 21; 99 NW2d 367 (1959), citing *Miller v JA Utley Construction Co*, 154 F Supp 138 (ED Mich, 1957), to support this proposition, these cases do not create a per se rule that a general contractor, for purposes of the WDCA, cannot be considered the employer of a subcontractor's employee when there is a so-called cost plus fee contract. Rather, the economic reality test requires consideration of the totality of the circumstances, which includes any contractual relationships between the parties.

The third factor also supports the existence of an employer-employee relationship. Although defendants did not hire plaintiff, defendants submitted evidence establishing that they exercised a significant amount of control with respect to discipline and the right to fire JWP's employees. Williams asserted in his affidavit that defendants had the right to hire, fire, and discipline contractors. Further, paragraph sixteen of the subcontract provided that defendants had the right to demand removal of any workers that were unsatisfactory to them. This provision establishes that defendants at least shared responsibility with JWP with respect to the firing and discipline of individual workers, even though the record does not support that defendants could directly hire, fire, or discipline JWP's workers. *Kidder*, *supra* at 44-45 (holding that a shared responsibility existed with respect to hiring, firing, and discipline under similar facts because the defendant "could accomplish indirectly that which it could not do directly"). The record also reveals that defendants provided certain project safety rules to JWP's employees, the violation of which would result in disciplinary action. For all of these reasons, we conclude that the third factor supports the existence of an employment relationship.

With respect to the fourth factor, we find that plaintiff was performing her duties toward the accomplishment of a common goal. The common goal involved in this case was the construction of the hospital in a safe manner and the reduction of work site hazards. Although the record is not entirely clear with respect to the nature of plaintiff's specific duties, it is clear that defendants' and JWP's employees were working toward the same goal of completing the construction project. Further, the common goal of workplace safety is apparent from the requirement that that plaintiff abide by defendants' policies and safety rules. In addition, we believe that, unless otherwise shown, a common goal is inherent in the nature of a general contractor-subcontractor relationship, because the subcontractor is by definition working on the same project as the general contractor, but usually has a more specific assignment, with the overall goal remaining the same. Therefore, we conclude that the fourth factor supports the existence of an employment relationship.

Finally, we are particularly persuaded that an employment relationship existed because defendants purchased the workers' compensation coverage involved in this case. See, generally, *Verhaar v Consumers Power Co*, 179 Mich App 506, 509; 446 NW2d 299 (1989) (in the context of a parent-subsidiary corporate relationship, a salient factor in determining whether there is an employment relationship is the use of a combined workers' compensation policy).

In sum, in considering the totality of the circumstances surrounding the work situation involved here, we agree with the trial court that an employment relationship existed between defendants and plaintiff under the economic reality test.

Plaintiff also contends that he is entitled to proceed in tort against defendants because of our Supreme Court's holding in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974). In *Funk*, the plaintiff was the employee of a subcontractor who sued the general contractor in tort for injuries sustained on the job. *Id*. at 99. Our Supreme Court held that it was "an appropriate development of the law of torts to impose responsibility on a general contractor for failure to implement safety measures in common work areas guarding against readily observable, avoidable serious risks of personal injury." *Id*. at 112. The Court did not, however, address the issue raised in this case: whether an employee of a subcontractor may be considered an employee of the general contractor for purposes of the exclusive remedy provision of the WDCA. Moreover, in *Smith v Allendale Mutual Ins Co*, 410 Mich 685, 739; 303 NW2d 702 (1981), our Supreme Court clarified that liability under *Funk* could be imposed "on a general contractor *who was not plaintiff's employer*." (emphasis supplied.) Therefore, we conclude that plaintiff's reliance on *Funk* is misplaced. *Funk* merely establishes that a theory of liability would be available to plaintiff *if* defendants were not her employers. The *Funk* holding is not relevant to the question of whether an employment relationship existed between defendants and plaintiff for purposes of the WDCA.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage