STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH THOMPSON and NAM THOMPSON,

Plaintiffs-Appellees,

v

NOVI INDUSTRIES, INC.,

Defendant-Appellant,

and

SQUARE D COMPANY and MADISON ELECTRIC COMPANY,

Defendants.

UNPUBLISHED
September 28, 1999

No. 213248
Oakland Circuit Court
LC No. 97-543781 NO

Before: Gribbs, P.J., and O'Connell and R.B. Burns*, JJ.

PER CURIAM.

Defendant Novi Industries, Inc.,[1] appeals by leave granted the trial court's order denying its motion for summary disposition of plaintiff Joseph Thompson's[2] negligence claim. We reverse and remand for entry of an order of dismissal.

Plaintiff was an electrician with Machine Tool Services Co., Inc. (MTS), and was assigned to assist defendant in a specific project in which temporary electrical power was to be provided to an assembly line being built on defendant's premises. While working on defendant's premises, plaintiff was injured when an electrical box exploded. Plaintiff brought an action against defendant for negligence, or, alternatively, for intentional tort if defendant were considered to be plaintiff's employer. Defendant moved for summary disposition, and the trial court held that defendant was not plaintiff's employer and that defendant was therefore not protected by the exclusive-remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1); MSA 17.237(131)(1). The court therefore concluded that plaintiff had failed to state a claim under the intentional-tort exception to the exclusive-

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

remedy provision of the WDCA. *Id*. Accordingly, the trial court granted defendant's motion for summary disposition with respect to plaintiff's intentional-tort claim, but denied defendant's motion with respect to plaintiff's negligence claim.

The trial court denied defendant's motion pursuant to MCR 2.116(C)(10). We review the trial court's decision whether to grant a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we consider all documentary evidence in favor of the party opposing the motion. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

The exclusive-remedy provision of the WDCA provides as follows:

> 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. [MCL 418.131(1); MSA 17.237(131)(1).]

Therefore, if defendant was an "employer" of plaintiff for purposes of the WDCA, defendant is shielded from liability for negligence and the trial court erred in denying defendant's motion for summary disposition.

Where the evidence warrants, a court may determine as a matter of law whether a defendant was an employer for purposes of determining whether the exclusive-remedy provision applies. "[W]hether a business entity is a particular worker's 'employer,' as that term is used in the WDCA, 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 v United Technologies Automotive, Inc*, 459 Mich 681, 693-694; 594 NW2d 447 (1999); *Kidder v Miller-Davis Co*, 455 Mich 25, 37; 564 NW2d 872 (1997). The economic-reality test governs determinations whether an employment relationship exists between the parties. *James v Commercial Carriers, Inc*, 230 Mich App 533, 537; 583 NW2d 913 (1998). This test examines the totality of the circumstances surrounding the work performed, and no one factor controls. *Id*. However, courts generally consider four basic factors: (1) the control of the worker's duties, (2) the payment of the worker's wages, (3) the right to hire, fire, and discipline the worker, and (4) the performance of the worker's duties toward accomplishing a common goal. *Clark*, *supra* at 688; *James*, *supra* at 537.

The exclusive-remedy provision applies in a situation where a labor broker supplies workers to a business entity, such that both the labor broker and the business entity are protected from liability for negligence. *Kidder*, *supra* at 42; *Farrell v Dearborn Mfg Co*, 416 Mich 267, 278; 330 NW2d 397

(1982). A labor broker is "a company engaged in the business of furnishing employees to others." *Farrell*, *supra* at 272. We conclude that the trial court erred in finding that MTS was not a labor broker. Plaintiff's own deposition testimony indicates that MTS was a company that supplied workers to other companies to perform specific jobs. This "dual-employer" situation does not end the inquiry, however, and the economic-reality test must still be applied in order to determine whether defendant is in fact protected by the exclusive-remedy provision. *Kidder*, *supra* at 42.

We conclude that, under the economic-reality test, the evidence supports only one inference—that defendant was an employer of plaintiff. Defendant exercised control over plaintiff's work. Plaintiff reported to one of defendant's supervisors, who instructed him regarding what work to perform. On the day of the explosion, plaintiff approached the supervisor with concerns about the electrical box and was instructed by the supervisor to continue wiring the box. In order for defendant to exercise control over plaintiff's work, it need not "stand over each worker's shoulder, explaining what to do minute by minute . . . ." *Id*. at 44.

Additionally, the payment of plaintiff's wages indicates that both MTS and defendant were his employers. MTS paid wages and provided benefits to plaintiff; however, MTS charged defendant for providing it with plaintiff's services as an electrician. The economic reality is that defendant paid plaintiff's wages through MTS. *Id*. Which entity writes the checks is not dispositive. *Id*.

Furthermore, the evidence indicates that defendant had the ability to terminate plaintiff's work on defendant's premises. In plaintiff's deposition, he stated that if he failed to do what defendant required, defendant could have ordered him to leave. The trial court erred in concluding that there was no evidence that defendant could have refused to employ plaintiff.

Moreover, the performance of plaintiff's duties was designed to accomplish a common goal. In looking at this factor, we must determine whether the work performed "is part of a common objective integral to the employer's business, and whether this work would normally follow the usual path of an employee." *Id.* at 34; *James*, *supra* at 537. The work plaintiff was performing was an integral part of providing electrical power to an automotive assembly line being built on defendant's premises, in order to enable defendant to test the operation of the assembly line. Thus, the work performed was part of an integral objective of defendant's business. Additionally, the objective was common to both MTS and defendant because defendant needed plaintiff, the MTS worker, to perform electrical work in order to accomplish its goal, and an MTS worker was working toward defendant's goal. See *Kidder*, *supra* at 45.

Therefore, the trial court erred by concluding that defendant was not an employer of plaintiff for purposes of the WDCA. As plaintiff's employer, defendant was protected by the exclusive-remedy provision from liability for negligence. We therefore reverse the trial court's denial of defendant's motion for summary disposition with respect to plaintiff's negligence claim.

The only exception to the exclusive remedy provision of the WDCA is where the employer commits an intentional tort. MCL 418.131(1); MSA 17.237(131)(1). Because the trial court concluded that defendant was not plaintiff's employer, it granted summary disposition with respect to

plaintiff's intentional-tort claim without determining whether plaintiff had alleged facts that demonstrated that defendant committed an intentional tort. Although the trial court failed to address this issue, we may do so because the parties presented the issue to the trial court. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Additionally, the WDCA provides that the question whether an act was an intentional tort is one of law. MCL 418.131(1); MSA 27.237(131)(1); *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 146-147; 565 NW2d 868 (1997). Therefore, "[a]lthough the trial court did not resolve these issues, our review is nevertheless proper because these issues involve the determination of a question of law and the facts necessary for their resolution have been presented." *The Gillette Co v Dep't of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

We conclude that plaintiff failed to allege sufficient facts to bring his action within the intentional-tort exception. The WDCA provides that an intentional tort exists "only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury." MCL 418.131(1); MSA 17.237(131)(1). Therefore, plaintiff must "show a specific intent to injure on the part of the employer." *Gray v Morley*, 460 Mich 738, 742; 596 NW2d 922 (1999). Specific intent to injure may be inferred "if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." MCL 418.131(1); MSA 17.237(131)(1); *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 180; 551 NW2d 132 (1996). Plaintiff failed to present facts to demonstrate that defendant specifically intended to injure him. Plaintiff in fact testified at his deposition that defendant did not purposefully intend to injure him, but that defendant did hurt him indirectly through its negligence. Accordingly, we conclude that plaintiff's action does not fall within the intentional-tort exception to the exclusive-remedy provision of the WDCA.

Because defendant was an "employer" of plaintiff, the exclusive-remedy provision of the WDCA applies, and plaintiff's claim does not fall within the intentional-tort exception. We therefore reverse the order of the trial court denying defendant's motion for summary disposition of plaintiff's negligence claim, and remand for entry of an order dismissing plaintiff's claim.

Reversed and remanded for entry of an order of dismissal. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Peter D. O'Connell
/s/ Robert B. Burns

[1] Defendants Square D Company and Madison Electric Company were granted summary disposition and are not parties to this appeal. Therefore, references to "defendant" in this opinion refer solely to defendant Novi Industries, Inc.

[2] The action was also brought by plaintiff Nam Thompson, the wife of plaintiff Joseph Thompson, because a daim for loss of consortium was included in the complaint. However, because the facts pertinent to this appeal involve only plaintiff Joseph Thompson, references to "plaintiff" in this opinion refer solely to plaintiff Joseph Thompson.