IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01964-COA

JERRY WILLIAMS, AS ADMINISTRATOR OF THE ESTATE OF PHILLIP C. HOSCH — **APPELLANT**

v.

MUELLER COPPER TUBE COMPANY, INC. AND MUELLER INDUSTRIES, INC. — **APPELLEES**

DATE OF JUDGMENT:	10/31/2012
TRIAL JUDGE:	HON. JAMES LAMAR ROBERTS JR.
COURT FROM WHICH APPEALED:	ITAWAMBA COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	TYLER CHARLES VAIL STEVEN W. COUCH
ATTORNEYS FOR APPELLEES:	J. LAWSON HESTER JASON EDWARD DARE
NATURE OF THE CASE:	CIVIL - OTHER
TRIAL COURT DISPOSITION:	MOTION TO DISMISS GRANTED
DISPOSITION:	REVERSED AND REMANDED: 04/22/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

FAIR, J., FOR THE COURT:

¶1. Philip Hosch was killed in an explosion at work in Fulton, Mississippi. Hosch's estate brought suit against his employer, Mueller Copper Tube Company, alleging that it "willfully, recklessly, egregiously[,] and intentionally" failed to provide Hosch with a safe working environment, "with an intent to injure." The estate also sued the employer's parent corporation, Mueller Industries, essentially contending that it failed to supervise its subsidiary. The trial court granted the Mueller defendants' Rule 12(b)(6) motion to dismiss

and certified the judgment as final under Rule 54(b).[1] Numerous other defendants in the original suit are not parties to this appeal.

¶2. The trial court found that Hosch's estate, by accepting $2,000 in funeral expenses as workers' compensation benefits, had made an election of remedies and could not pursue a tort claim against either Mueller defendant. We conclude that the dismissal cannot be upheld under Rule 12(b)(6) because it depends on evidence outside the pleadings. And since both sides agree the trial court did not convert the Rule 12(b)(6) motion to dismiss into a motion for summary judgment, we must reverse and remand this case for further proceedings consistent with this opinion.

DISCUSSION

¶3. Our analysis of this issue is hobbled by the parties' failure to recognize the fundamental difference between motions to dismiss under Rules 12 and 56. "Rule 12(b)(6) tests the legal sufficiency of a complaint, and provides that dismissal shall be granted to the moving party where the plaintiff has failed to state a claim upon which relief can be granted." *Chalk v. Bertholf*, 980 So. 2d 290, 293 (¶4) (Miss. Ct. App. 2007). A Rule 12(b)(6) motion to dismiss must be decided on the face of the pleadings alone. *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1211 (¶15) (Miss. 2001). This differs from a motion for summary judgment under Rule 56, which tests the sufficiency of evidence; summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as

[1] M.R.C.P. 54(b); M.R.C.P. 12(b)(6).

to any material fact . . . ." M.R.C.P. 56(c).

¶4. The parties contend that this is an appeal from the granting of a Rule 12(b)(6) motion to dismiss. And both sides, in their briefs on appeal, accurately describe a Rule 12(b)(6) motion, what it tests, and how it should be reviewed on appeal. But they nonetheless center their arguments around evidence or assertions not contained in the complaint. This goes all the way back to the original motion to dismiss, to which the Mueller defendants attached the Mississippi Workers' Compensation Commission file on Hosch's death as an exhibit. The MWCC file included a "Notice of Final Payment" prepared by Mueller Copper's insurance carrier, indicating it had paid $2,000 in funeral expenses.[2] The estate countered this by asserting that no meaningful election had occurred because the money had been paid directly to the funeral home.

¶5. When presented with a Rule 12(b)(6) motion, there is only one way for the trial court to consider evidence outside the pleadings – converting the 12(b)(6) motion into a motion for summary judgment. Rule 12(c) provides in relevant part that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56 . . . ." But conversion must be explicit: "Whenever a trial judge converts a Rule 12(b)(6) motion to dismiss into one for summary

[2] The MWCC record also included an acknowledgment that the carrier had paid $500 toward the MWCC second injury fund, as required by Mississippi Code Annotated section 71-3-73 (Rev. 2011).

judgment by considering matters outside the pleadings, the judge *must* give all parties ten days' notice that he is converting the motion." *Delta MK LLC v. Miss. Transp. Comm'n*, 57 So. 3d 1284, 1289 (¶13) (Miss. 2011) (citation omitted) (emphasis in original).

¶6. The circuit court's opinion expressly depends on accepting the contents of the MWCC file as "uncontested." This is evidence outside the pleadings, but we cannot find any indication in record that the court gave the parties notice it intended to convert the 12(b)(6) motion to one for summary judgment.

¶7. It might be argued that the estate's acquiescence (or obliviousness) amounts to a waiver of the notice requirement. However, "[Rule 12]'s requirements are not triggered by which party submits the outside matters, nor does it contain any estoppel or actual-notice language." *Id.* at 1290 (¶17). And the Mueller defendants have never argued that the trial court granted summary judgment; they steadfastly maintain that the ruling was made under Rule 12(b)(6). They likewise admit that the judgment should be reviewed under Rule 12(b)(6) on appeal.

¶8. Therefore, notwithstanding the ambiguity of the circuit court's decision, we will take the dismissal as having been made under Rule 12(b)(6). Because the dismissal here depends on evidence outside the pleadings, and such evidence cannot be considered in a 12(b)(6) motion to dismiss, the circuit court erred in finding the estate's claims barred under the theory of election of remedies.

¶9. The estate has raised as a separate issue the question of whether Mueller Industries, which it contends is a third-party defendant, can claim immunity even if Mueller Copper is found to be protected from suit by the workers' compensation statute. Given our holding on

the first issue, that question is moot.

¶10. **THE JUDGMENT OF THE CIRCUIT COURT OF ITAWAMBA COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEES.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. JAMES, J., CONCURS IN PART WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION. BARNES, J., NOT PARTICIPATING.

CARLTON, J., DISSENTING:

¶11. I respectfully dissent from the majority's opinion. Because the pleadings reflect that the Mississippi Workers' Compensation Act (MWCA) provided the sole remedy in this case, I would affirm the trial court's dismissal pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure.

¶12. The complaint reflects that Hosch, the deceased, was employed by a Mississippi corporation, Mueller Copper Tube Company, in Fulton, Mississippi, when he was killed by an explosion at work. Jerry Williams, the administrator of Hosch's estate, sued both Mueller Copper and its parent corporation, Mueller Industries. As the majority notes, the complaint alleges that Mueller Copper "failed to provide Hosch with a safe working environment" and that the foreign parent corporation, Mueller Industries, "failed to supervise its subsidiary." The averments of the pleadings are insufficient to avoid application of the exclusive statutory remedy provided by the MWCA.[3] The pleadings do not allege that Hosch worked for

[3] *See Brock v. Alaska Int'l Indus. Inc.*, 645 P.2d 188, 190 (Alaska 1982). *See generally Buchanan v. Ameristar Casino Vicksburg Inc.*, 957 So. 2d 969, 979 (¶42) (Miss. 2007) (discussing that a claimant must allege specific acts undertaken by the parent corporation).

Mueller Industries, and the pleadings do not allege specific facts showing any independent acts engaged in by Mueller Industries to allegedly negligently or intentionally fail to supervise Hosch.[4]

¶13. As the pleadings reflect, Mueller Copper constitutes a corporation licensed to conduct business in Mississippi, and Mueller Industries, its parent corporation, is a foreign corporation. The corporations constitute distinct corporate entities, and the pleadings show that Hosch was employed in Mississippi by Mueller Copper, not Mueller Industries, when the explosion occurred. Mississippi case law generally favors the concept that corporations are distinct and separate entities. *See Buchanan v. Ameristar Casino Vicksburg Inc.*, 957 So. 2d 969, 977 (¶27) (Miss. 2007).

¶14. In the present case, Hosch's estate failed to plead sufficient facts to show that Mueller Industries, the foreign parent corporation, acted as an alter ego of its Mississippi subsidiary corporation, Mueller Copper.[5] The pleadings also fail to allege sufficient facts to state an

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[4] Additionally, the record reflects that Mueller Copper provided Hosch's estate with $2,000 in workers' compensation benefits through Zurich American Insurance Company. Thus, Mueller Copper complied with the MWCA's requirement of providing compensation in accordance with Mississippi Code Annotated section 71-3-9 (Rev. 2011). The record further reflects that Hosch's estate accepted this benefit payment. In my view, Mueller Copper and Mueller Industries argue that the MWCA constituted the exclusive remedy available in this case, and the instant claims raised by the estate are barred by the MWCA's exclusivity provision. *See Wingerter v. Bhd. Prods. Inc.*, 822 So. 2d 300, 303 (¶8) (Miss. Ct. App. 2002) ("The claimant may not collect on the tort claim against his employer . . . if the evidence shows that he is entitled to [workers'] compensation."); Miss. Code Ann. § 71-3-9.

[5] *See Buchanan*, 957 So. 2d at 980 (¶¶42-43) (finding that the claimant could not pierce the corporate veil in a suit against her employer, its workers' compensation carrier, and the employer's parent corporation because she failed to show that the employer's parent corporation was the employer's alter ego); *but cf. Bacon v. DBI/SALA*, 822 N.W.2d 14, 19 (Neb. 2012) (liberally construing the Nebraska Workers' Compensation Act to give the

independent claim against Mueller Industries for failure to supervise. The pleadings fail to plead specific facts sufficient to state a claim for relief for an alleged failure to supervise the work environment of a distinct subsidiary corporation's employees and to pierce the corporate veil. *See Castillo v. MEK Constr. Inc.*, 741 So. 2d 332, 342 (¶¶26-27) (Miss. Ct. App. 1999) (affirming the trial court's grant of summary judgment where the claimant failed to present sufficient facts to pierce the corporate veil).[6] Thus, Hosch's estate failed to sufficiently aver facts to state a claim, independent from the MWCA's exclusive remedy, for allegedly failing to supervise a subsidiary corporation.

¶15. The Mississippi Supreme Court, in its opinion in *Buchanan*, and this Court, in *Castillo*, both relied upon ten factors used by Mississippi federal courts when applying Mississippi law for alter-ego theories. *See Buchanan*, 957 So. 2d at 976-77 (¶¶25-26); *Castillo*, 741 So. 2d at 340 (¶20); *see also Gammill v. Lincoln Life & Annuity Distrib. Inc.*, 200 F. Supp. 2d 632, 635 (S.D. Miss. 2001) (listing ten factors that are relevant when considering whether to pierce the corporate veil). "While these ten factors are instructive on the alter[-]ego theory, [Mississippi courts have] not adopted the factors as applied by the federal courts." *Buchanan*, 957 So. 2d at 977 (¶26). As the supreme court has previously held:

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claimant prompt relief and allow him to bring a negligence action against the employer's parent corporation and to join the employer and its workers' compensation insurer).

[6] *See also Saucier v. Biloxi Reg'l Med. Ctr.*, 708 So. 2d 1351, 1354 (¶11) (Miss. 1998) ("A motion for summary judgment is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." (citation omitted)); *Palmer v. Anderson Infirmary Benevolent Ass'n*, 656 So. 2d 790, 794 (Miss. 1995) ("A fact is material if it tends to resolve any of the issues[] properly raised by the parties." (citation and internal quotation marks omitted)); M.R.C.P. 56(c).

> Mississippi case law generally favors maintaining corporate entities and avoiding attempts to pierce the corporate veil. *Gray*[*v. Edgewater Landing Inc.*], 541 So. 2d [1044,] 1047 [(Miss. 1989)]. "[T]he cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders." *Id.* at 1047 . . . ; *see also* [*N. Am.*] *Plastics*[] *Inc. v. Inland Shoe* [*Mfg.*] *Co.*[], 592 F. Supp. 875, 877 (N.D. Miss. 1984). This rule applies "whether such shareholders are individuals or corporations." [*N. Am.*] *Plastics*, 592 F. Supp. at 877.

Buchanan, 957 So. 2d at 977 (¶27); *see also Johnson & Higgins of Miss. Inc. v. Comm'r of Ins. of Miss.*, 321 So. 2d 281, 284 (Miss. 1975) ("The general rule of law basic to the concept of the corporation is that the distinct corporate identity will be maintained unless to do so would subvert the ends of justice.").

¶16. The complaint in the present case clearly pleads Hosch's status as an employee of the Mississippi corporation, Mueller Copper, and that Hosch was working within the course and scope of his employment for Mueller Copper when he was killed. *See* Miss. Code Ann. § 71-3-7 (Rev. 2011); Miss. Code Ann. § 71-3-9 (Rev. 2011). To establish liability against a parent corporation for the unsafe working conditions of a subsidiary corporation's employees, it is not sufficient for a claimant to merely plead that a corporation is a parent corporation responsible for enforcing safety rules and working conditions. To impose liability, the claimant must allege, and the facts must show, that the parent corporation undertook "specifically to safeguard, or to inspect, the particular procedures, or areas, in which the injury occurred, or had generally undertaken overall obligations of this nature." *Brock v. Alaska Int'l Indus. Inc.*, 645 P.2d 188, 190 (Alaska 1982). *See generally Buchanan*, 957 So. 2d at 979 (¶42).

¶17. The complaint in this case fails to set forth such facts. Instead, without asserting facts,

the complaint asserts bare allegations against the parent corporation, Mueller Industries, for failing to supervise the work environment of the separate and distinct subsidiary corporation. Therefore, without resort to matters outside the pleadings, I would affirm the trial court's dismissal since the pleadings fail to state a claim, independent from the MWCA's exclusive remedy, and since the pleadings fail to plead sufficient facts to state a claim against Muller Industries, the separate and distinct parent corporation, by any piercing of the corporate veil. I therefore would affirm the trial court's judgment.