[Cite as *Lewis v. Cartijo*, 2010-Ohio-5546.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DENEEN LEWIS Plaintiff-Appellant -vs- DAVID CARTIJO/DAVE'S PAVING, et al. Defendants-Appellees	JUDGES: Hon. Julie A. Edwards, P. J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case No. 2010 CA 00032 O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 00736
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 15, 2010

APPEARANCES:

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Wise, J.

{¶1} Appellant Deneen Lewis appeals from the grant of summary judgment, in the Stark County Court of Common Pleas, in favor of Appellees David Cortijo/Dave's Paving Co. and the Ohio Bureau of Workers' Compensation. The relevant facts leading to this appeal are as follows.

{¶2} On July 12, 2006, appellant's husband, Jeffery Lewis, was hauling a dirt load in a 1977 Mack truck owned by appellee, when he lost control of the vehicle and suffered fatal injuries in the resulting crash. Appellant thereafter filed a workers' compensation application for death benefits. The Industrial Commission ultimately denied appellant's application.

{¶3} On February 20, 2009, appellant filed an appeal under R.C. 4123.512 in the Stark County Court of Common Pleas. On November 30, 2009, Cortijo filed a motion for summary judgment. On January 26, 2010, the trial court granted summary judgment in favor of appellees.

{¶4} Appellant filed a notice of appeal on February 11, 2010. She herein raises the following sole Assignment of Error:

{¶5} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEE, DAVID CORTIJO/DAVE'S PAVING."

I.

{¶6} In her sole Assignment of Error, appellant contends the trial court erred in granting summary judgment in favor of appellee as to her eligibility for workers' compensation death benefits as a surviving spouse. We disagree.

Standard of Review

{¶7} As an initial matter, we note "R.C. 4123.519 [now 4123.512] contemplates a trial *de novo* upon appeal to the common pleas court; thus, the Rules of Civil Procedure apply to the proceedings in the trial court." *Beeler v. R.C.A. Rubber Co*. (1989), 63 Ohio App.3d 174, 177, 578 N.E.2d 496, citing *Swanton v. Stringer* (1975), 42 Ohio St.2d 356, 328 N.E.2d 794. We have thus on numerous occasions analyzed Civ.R. 56 summary judgment rulings in the context of workers' compensation statutory appeals. See, e.g., *George v. Miracle Solutions, Inc*., Stark App.No. 2009-CA-00088, 2009-Ohio-3659; *Etto v. Alliance Tubular Products Co.*, Stark App.No. 2003CA00202, 2004-Ohio-3486.

{¶8} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, we must refer to Civ.R. 56 which provides, in pertinent part: "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶9} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264.

Analysis

{¶10} Appellant first challenges the trial court's conclusion that Jeffery Lewis, decedent, was not an "employee" of Dave's Paving.

{¶11} Ohio's system of workers' compensation has, historically, resolved questions more in favor of coverage than against. *Skaggs v. Mayfield* (1989), 62 Ohio App.3d 355, 358, 575 N.E.2d 861 (citation omitted). Generally, however, independent contractors are not employees for the purpose of Workers' Compensation benefits. See *Coviello v. Industrial Commission of Ohio* (1935), 129 Ohio St. 589. The question of whether a worker is an employee or an independent contractor is ordinarily an issue to be decided by the trier of fact. *Bostic v. Connor* (1988), 37 Ohio St.3d 144. However, if the evidence is not in conflict or the facts are admitted, the question of whether a

person is an employee or independent contractor may be decided by the trial court as a matter of law. Id. at 146.

{¶12} In *Gillum v. Industrial Commission* (1943), 141 Ohio St. 373, the Ohio Supreme Court set forth the test to determine whether a person is an independent contractor or an employee. If the employer reserves the right to control the manner or means of doing the work, the worker is an employee, whereas if the worker controls the manner or means of doing the work, or if the worker is responsible to the employer only for the result, the worker is an independent contractor. Id. at paragraph 2 of the syllabus. In *Bostic,* supra, the Ohio Supreme Court set out various factors for the "employee or independent contractor" question, including, but not limited to: who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools and personnel used; who selects the routes traveled; the length of the employment; the type of business; the method of payment; and any pertinent agreements or contracts.

{¶13} Among the evidentiary materials before the trial court for purposes of summary judgment were the affidavits and depositions of David Cortijo and Appellant Lewis.

{¶14} Appellant averred, inter alia, the following regarding her position that Jeffery was an "employee" for purposes of workers' compensation: (1) Cortijo owned, maintained, and insured the 1977 Mack Truck which was in the accident; (2) Jeffery worked for appellee, and no one else, from late May 2006 until the accident occurred on July 12, 2006; (3) Cortijo supplied a credit card to Jeffery for fueling the Mack Truck; (4) Jeffery and appellant received cash and check payments from Cortijo from late May

2006 until July 12, 2006; (5) Appellant received a cash payment of $250.00 after the accident for work done on the week of said accident; (6) Cortijo called appellant's residence on a frequent basis to discuss work assignments and completions; (7) The Mack Truck was kept "primarily" at appellant's residence from late May 2006 until July 12, 2006; (8) Appellant had discussions with Jeffery concerning working on a paving job for Cortijo. Affidavit of Deneen Lewis at 1-4.

{¶15} In Cortijo's affidavit, he averred that he met Jeffery through Cortijo's acquaintance Donald Jackson; Jeffery asked Cortijo if he could earn some extra money. According to Cortijo, he told Jeffery up front that he did not hire employees for his part-time business,[1] but that Jeffery could possibly do some hauling jobs as an independent contractor. In the affidavit, Cortijo asserted that he paid Jeffery cash just four times in June/July 2006, in the amount of $20.00 each time. Cortijo also wrote two checks to Jeffery (via appellant) during the period in question, totaling $450.00; Cortijo emphasized, however, that these funds were in response to Jeffery's need for car payments, and were not paid as wages. Although Cortijo supplied the Mack Truck and a key to a storage facility, he did not direct Jeffery as to material to be hauled, or where and how deliveries were to be made.[2] Cortijo also did not set forth a required number of loads per day or a required number of hours to be worked. Lewis was not provided a W-2 or 1099 form for what he was paid. See Cortijo Affidavit.

{¶16} Appellant points out, inter alia, certain inconsistencies in Cortijo's testimony, particularly as to the varying recollections of how much Jeffery was paid.

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[1] Cortijo testified that he works full-time for the City of Canton, and he chiefly operates Dave's Paving on the weekends or other off-hours.

[2] In his deposition, however, Cortijo seemed to indicate that he did direct his drivers as to specific asphalt hauling destinations. See Cortijo Affidavit at 16.

However, appellant admitted in her deposition that she had never spoken directly with Cortijo about any of the hauling details. We also note that appellant was much less certain about Jeffery's job and pay details in her deposition. She therein testified, for example, that she did not know if Cortijo took taxes out of Jeffery's checks (which were actually made out to her), that she did not know if Jeffery was paid "under the table," that she did not know the types of materials Jeffery hauled (other than asphalt), and that she could not remember how much Jeffery made per hour. In *LaSalle Bank Natl. Assn. v. Street*, Licking App.No. No. 08 CA 60, 2009-Ohio-1855, we stated: "To respond properly to a motion for summary judgment, the nonmoving party must set forth specific facts which are based on personal knowledge and would be admissible in evidence. A court may not consider inadmissible statements, such as hearsay or speculation, which are inserted into an opposing affidavit. If the opposing affidavits, disregarding the inadmissible statements, do not create a genuine issue of material fact, then the court may grant summary judgment, if the moving party is otherwise entitled to judgment." Id. at ¶ 16, citing *Southern Elec. Supply v. Patrick Elec. Co., Inc.,* Lorain App. No. 04CA008616, 2005-Ohio-4369, ¶ 10, quoting *State ex rel. Martinelli v. Corrigan* (1991), 71 Ohio App.3d 243, 248.

{¶17} Upon review of the record, in light of the limited length of time Jeffery worked for Cortijo, the irregular and "as-available" nature of the individual voluntary hauling jobs, the lack of a formal agreement and limited direction between the two men, and Jeffery's level of autonomy on the details of the hauling runs, we hold reasonable minds could only conclude that Jeffery was not an employee of Cortijo under the *Gillum*/*Bostic* standard.

{¶18} Appellant secondly challenges the grant of summary judgment in light of R.C. 4123.01(A)(1)(b)(i), which defines an "employee," in relevant part, as "[e]very person in the service of any person * * * that employs * * * one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from any single household and *casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer* * * *." (Emphasis added).

{¶19} Although neither side provides significant guidance on the issue in the briefs, we are unconvinced that R.C. 4123.01(A)(1)(b)(i), supra, was intended to completely supplant the prerequisite *Gillum*/*Bostic* tests for determining whether a workers' compensation applicant is an "employee," as appellant seems to suggest. In other words, even if there were a question of fact in this case as to whether the purported check payments of $450.00 to Jeffery or appellant were actual wages, a simple application of R.C. 4123.01(A)(1)(b)(i) does not resolve the issue. We note in *Clark v. Dolence*, Lake App.No. 2007-L-027, 2007-Ohio-5622, the Court recognized: "*** [I]t does not necessarily follow that a household or casual worker is automatically entitled to definition as an employee where there is no clear evidence that he has met the statutory requirements. *** 'Until a person is determined to be an employee, the workers' compensation statutes do not even apply.' " Id. at ¶ 16-17, in part quoting *Koch v. Conrad* (Dec. 9, 1997), Franklin App.No. 97APE05-663, 1997 WL 770985.

{¶20} We therefore find no merit in appellant's secondary arguments under R.C. 4123.01(A)(1)(b)(i).

Conclusion

{¶21} Accordingly, we find no error in the grant of summary judgment in favor of appellees in this matter. Appellant's sole Assignment of Error is overruled.

{¶22} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Edwards, P. J., and

Gwin, J., concur.

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JUDGES

JWW/d 1019

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DENEEN LEWIS	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DAVID CARTIJO/DAVE'S PAVING, et al.	:	
	:	
Defendants-Appellees	:	Case No. 2010 CA 00032

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

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JUDGES