

STATE OF MICHIGAN
COURT OF APPEALS

TYRONE A. BENON,

Plaintiff-Appellant,

v

R.W. O'NEAL CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED

August 22, 1997

No. 192211

Washtenaw Circuit Court

LC No. 95-001850-NI

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

Plaintiff appeals by right summary disposition in favor of defendant, which was predicated on the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1); MSA 17.237(131)(1). This case is being decided without oral argument pursuant to MCR 7.214(E).

While employed in the capacity of a cook for a Burger King Restaurant, plaintiff was assigned by the manager of the restaurant to assist in completion of a remodeling project at the restaurant which was being performed by defendant R.W. O'Neal Construction. Throughout the time frame in which plaintiff was providing such assistance, his wages were paid by his regular employer, and only his regular employer had the authority to discipline plaintiff. Under these circumstances, defendant, if negligent, may be properly held liable in tort unless plaintiff was defendant's employee. Only if an employer-employee relationship existed does the exclusive remedy provision insulate defendant from tort liability.

Here, whether under the control test or the economic reality test, plaintiff was not an employee of O'Neal Construction. *Goodchild v Erickson*, 375 Mich 289, 292-293; 134 NW2d 191 (1965). As the Court there said, "the hand that holds the paycheck wields also the whip of discipline." 375 Mich at 293 n 2. Accord: *Stoddard v Cooper-Widenmann Construction Co*, 220 Mich 643; 190 NW 693 (1922). Summary disposition was therefore improperly granted in favor of defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Edward A. Quinnell