

STATE OF MICHIGAN  
COURT OF APPEALS

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CHRISTINE LAWLER and MARK LAWLER,

Plaintiffs-Appellants,

v

PENSKE LOGISTICS, INC. and AUTOMOTIVE  
COMPONENT CARRIER, INC.,

Defendants-Appellees,

and

CHRIS REED and GENERAL MOTORS  
CORPORATION,

Defendants.

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UNPUBLISHED

October 25, 2005

No. 254706

Genesee Circuit Court

LC No. 01-072207-NI

Before: Fort Hood, P.J., and White and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants Automotive Component Carrier, Inc. (ACC) and Chris Reed. On appeal, plaintiffs primarily challenge the trial court's earlier order denying their motion to file a second amended complaint to add theories of liability against defendant Penske Logistics, Inc. (Penske). We affirm.

Plaintiffs assert that the counts alleged against Penske in their proposed second amended complaint were legally sufficient on their face, and that the trial court erred in denying their motion to amend because it improperly made factual determinations, in essence reviewing their motion under a standard applicable to a motion for summary disposition.

We review a trial court's denial of a motion for leave to amend pleadings for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Ordinarily, leave to amend should be freely given when justice so requires. MCR 2.118(A)(2). However, leave to amend may be denied when the proposed amendment would be futile. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari, supra* (citation omitted).

In denying plaintiffs' motion to amend, the trial court relied on this Court's decision in *Maki v Copper Range Co*, 121 Mich App 518; 328 NW2d 430 (1982). In *Maki*, the plaintiffs were injured during the course of their employment with the White Pine Copper Company, a wholly-owned subsidiary of the defendant. *Id.* at 521. The plaintiffs sued the defendant in tort for the defendant's failure to implement safety programs and insist upon reasonable safety precautions. *Id.* The plaintiffs' negligence claim was based on a theory of retained control. The plaintiffs asserted that the defendant owed them a duty because the defendant "retained control over the on-the-job safety and working conditions of the employees." *Id.* at 523. The defendant moved for summary disposition based on the absence of a genuine issue of material fact, and argued that it was not liable for the torts of its wholly-owned subsidiary, but even if it was, it was immune from the plaintiffs' claims under the exclusive remedy provision of the Worker's Disability Compensation Act (WDCA), MCL 418.131. *Id.* at 521-522.

With regard to the retained control doctrine, the Court stated:

Retained control is a term used by Michigan courts to describe conduct which may subject a landowner or general contractor to liability for injuries to employees of an independent contractor or subcontractor on a construction project.

"Ordinarily a landowner is not responsible for injuries caused by a carefully selected contractor to whom he has delegated the task of erecting a structure. Most every rule has its exceptions. This rule is distinguished by the variety of its exceptions.

"An owner is responsible if he does not truly delegate--if he retains 'control' of the work--or if, by rule of law or statute, the duty to guard against the risk is made 'nondelegable'."

Plaintiffs cite no cases applying this doctrine to a parent corporation's control over the activities of its subsidiary, and we decline to do so. To hold a parent corporation responsible for injuries to employees of the subsidiary merely because of the control inherent in the parent-subsidiary relationship would destroy the long established protection afforded shareholders by incorporation. The parent-subsidiary relationship, by definition, includes the same elements which plaintiffs argue show "retained control" by the parent. In such relationship, the parent, as owner of all or most of the subsidiary's stock, is able to exert control over the subsidiary. To protect its investment and control of the subsidiary, the parent and subsidiary frequently share directors or officers and the parent may monitor the subsidiary's fiscal activities and dealings.

For these reasons, courts have recognized that majority stock ownership and common directors and officers, alone, will not provide a sufficient basis for disregarding the fiction of these corporations' separate existence. A subsidiary corporation must become a "mere instrumentality" of the parent before its corporate entity will be disregarded. [*Id.* at 523-524 (citations omitted).]

Accordingly, the Court concluded that the trial court properly found that the doctrine was inapplicable to the facts of the case. *Id.* at 523.

We agree that *Maki* is controlling here. The pertinent “facts of the case” that *Maki* referred to were that the defendant was the parent company of its wholly-owned subsidiary where the injured plaintiffs were employed, and that the plaintiffs were attempting to hold the parent company liable for negligence under a theory of retained control over the subsidiary’s safety operations. This is precisely the situation here. That *Maki* involved the defendant’s motion for summary disposition under the predecessor to MCR 2.116(C)(10) is irrelevant. Under *Maki*, where the parent company and its subsidiary are two distinct corporations, even where the parent company exerts some amount of control over its subsidiary, the parent company cannot be held liable for the torts of its wholly-owned subsidiary under the retained control doctrine. This rule of law prevents plaintiffs in this case from imposing a duty on Penske. Accordingly, the trial court did not abuse its discretion by denying the motion to file a second amended complaint to add claims against Penske. *Hakari, supra.*<sup>1</sup>

Plaintiffs incorrectly assert that *Maki* is not applicable because the plaintiffs in that case alleged that the defendant had control over all of its subsidiary’s operation, not just safety. The *Maki* Court recognized that the plaintiffs simultaneously argued that the defendant and its subsidiary had such a closeness of identity that the defendant owed a duty to provide safe working conditions, but also asserted that the defendant and its subsidiary were separate entities such that the defendant was not protected by the immunity provisions of the WDCA. *Id.* at 525. The Court resolved these competing arguments by holding that where the parent company and its subsidiary are two distinct corporations, a parent company cannot be held liable for the torts of its wholly-owned subsidiary under the retained control doctrine. *Id.* at 524. The Court’s rule was not contingent on the amount of alleged control of the parent company. The Court continued and held that where such closeness of identity can be proven such that the parent company and the subsidiary are considered one and the same, i.e., the corporate veil is pierced, then the parent company would be considered their employer for immunity purposes of the WDCA. *Id.* at 525-526.<sup>2</sup>

Plaintiffs also argue that because the trial court erred in not allowing them to add claims against Penske, it erred in dismissing their action in its entirety. After the trial court denied plaintiffs’ motion to amend, the only remaining claims were for intentional tort against ACC (count I) and Reed (count II). The trial court’s decision not to allow plaintiffs to amend their complaint with respect to Penske had no bearing on the court’s subsequent decision granting summary disposition to defendants ACC and Reed. Plaintiffs make no argument directly relating

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<sup>1</sup> We note that plaintiff did not allege that ACC was merely a shell corporation of Penske and did not seek to pierce the corporate veil. See *Maki, supra.*

<sup>2</sup> Plaintiffs cite several cases that they assert support its position that Penske can be held liable under a retained control theory, but provide no analysis of those decisions. Furthermore, the cases are inapplicable because they are from foreign jurisdictions and are based on the particular law developed in their respective jurisdictions.

to defendants ACC's and Reed's motions for summary disposition and, accordingly, have abandoned review of this issue. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Helene N. White  
/s/ Peter D. O'Connell