

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WESTPORT INSURANCE COMPANY,

Plaintiff-Appellant,

v

TONY KASSEM, f/k/a HASSAN KASSEM,  
NADIM HASSAN, and DODSON GROUP,

Defendants-Appellees.

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UNPUBLISHED

April 18, 2006

No. 258355

Wayne Circuit Court

LC No. 03-337078-CK

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NADIM HASSAN,

Plaintiff-Appellee,

v

HASSAN JAWAD,

Defendant,

and

TONY KASSEM, f/k/a HASSAN KASSEM

Defendant-Appellant.

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No. 260818

Wayne Circuit Court

LC No. 01-141378-NO

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

These consolidated appeals arise from injuries sustained by Nadim Hassan, who was severely burned in a fire while working at Tony's Auto Service, which is owned by defendant Tony Kassem. Kassem was leasing and purchasing the property from defendant Hassan Jawad at the time of the fire. The fire erupted in the garage area, purportedly because a gas-fired water heater on the premises ignited gasoline vapors. Hassan collected workers' disability compensation benefits for his injuries, and brought a separate premises liability action against Kassem seeking damages for his injuries. In Docket No. 258355, plaintiff Westport Insurance Company appeals as of right from the trial court's order declaring that it was estopped from

refusing to defend or indemnify Kassem under a “garage policy” issued to Kassem that excluded coverage for claims involving bodily injury to an employee. In Docket No. 260818, Kassem appeals as of right from a judgment entered in favor of Hassan after a jury trial. In the latter appeal, Kassem challenges the trial court’s determination that Hassan’s action was not barred by the exclusive remedy provision of the Workers’ Disability Compensation Act (WDCA), MCL 418.101 *et seq.* We affirm the trial court’s decision in Docket No. 258355, but reverse the judgment in favor of Hassan in Docket No. 260818.

#### I. Docket No. 258355

Westport argues that the trial court’s finding that Westport was estopped from denying insurance coverage for defendant Kassem is contrary to the plain and unambiguous terms of its garage policy. A trial court’s equitable decisions are reviewed *de novo*, but the underlying findings of fact are reviewed for clear error. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004).

“The principle of estoppel is an equitable defense that prevents one party to a contract from enforcing a specific provision contained in the contract.” *Morales v Auto-Owners Ins Co*, 458 Mich 288, 295; 582 NW2d 776 (1998). For equitable estoppel to apply, Kassem was required to establish (1) that Westport’s acts or representations induced him to believe that the policy exclusions would not be enforced and that coverage would be provided, (2) that he justifiably relied on this belief, and (3) that he was prejudiced as a result of his reliance on the belief that the exclusion would not be enforced and coverage would be provided. *City of Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

Westport provided one attorney to represent both Jawad and Kassem, although their interests conflicted in some respects. “When a conflict of interest—even a mere possibility thereof—arises, the law suggests (if it does not require) that the insurer act promptly and openly, on peril of estoppel . . . .” *Meirthew v Last*, 376 Mich 33, 38; 135 NW2d 353 (1965). In this case, Westport did not advise Kassem of its reservation of rights until after the trial court had already decided, consistent with the arguments of the Westport-provided attorney who was jointly representing Kassem and Jawad, that liability could not be imposed on Jawad, because only Kassem was in control and possession of the premises. The trial court found that Westport’s attempted reservation of rights came too late to protect Kassem’s rights.

“[W]hen an insurance company undertakes the defense of its insured, it has a duty to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability.” *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 593-594; 592 NW2d 707 (1999). “[I]n situations in which the insurance company has misrepresented the terms of the policy to the insured or defended the insured without reserving the right to deny coverage, courts have extended coverage beyond the terms of the policy when the inequity to the insured as a result of the broadened coverage is outweighed by the inequity suffered by the insured.” *Id.* at 594-595.

Because of the exclusions in Westport’s “garage policy,” Kassem may ordinarily have had no reason to expect that Westport would provide a defense. However, once Westport appointed counsel and undertook Kassem’s defense without reserving the right to deny coverage, counsel was required to act with the “utmost loyalty” to Kassem. *Meirthew, supra* at 38.

Additionally, once a defense was provided without a reservation of rights, it was justifiable for Kassem to rely on it. Instead, the attorney appointed to represent both Kassem and Jawad presented arguments that were more favorable to Jawad and Westport than Kassem. It was only after the trial court determined that Jawad was not liable that Westport sent Kassem its reservation of rights. Under these circumstances, estoppel was appropriate, and the trial court did not err in finding that Westport was estopped from denying coverage.

## II. Docket No. 260818

Kassem argues that the trial court erroneously determined that Hassan's tort action was not barred by the exclusive remedy provision of the WDCA, MCL 418.131(1). We agree. A "party's assertion of the exclusive remedy provision of the WDCA is a direct challenge to the trial court's subject-matter jurisdiction" and cannot be waived. *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000). Whether the trial court had subject-matter jurisdiction is an issue of law that we review de novo. *Id.*

The WDCA limits an employee's right to take action against his employer or a coemployee for injury in the course of his employment. MCL 418.131(1) provides that the right to recover workers' compensation benefits "shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." It is undisputed that Hassan collected workers' disability benefits as a result of his injuries.

The trial court primarily relied on *Bitar v Wakim*, 456 Mich 428; 572 NW2d 191 (1998), to conclude that Kassem could be individually liable as a premises owner, and not protected by the WDCA for Hassan's injuries at his wholly owned business. However, there was no majority with respect to the reasoning in *Bitar* and our Supreme Court has since recognized that *Bitar* is "hard to reconcile" with Michigan law on this issue. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 691-692; 594 NW2d 447 (1999). In *Clark*, the Court observed that Michigan courts "have regularly applied the 'economic realities test' to determine whether an employment relationship exists for purposes of the exclusive remedy provision, and thus whether an individual or entity is the 'employer' of a given employee." *Id.* at 687 (citations omitted). The economic realities test "looks to the employment situation in relation to the statutory scheme of workers' compensation law with the goal of preserving and securing the rights and privileges of all parties." *Id.*

In addition, the "dual persona" doctrine, as it is referred to in *Howard v White*, 447 Mich 395, 399-400; 523 NW2d 220 (1994), permits a tort suit in addition to workers' compensation "only in those situations in which the 'employer has a second identity which is completely distinct and removed from his status as employer.'" *Id.* (citations omitted). "The exception exists only where the employer-employee relationship is entirely unrelated or only incidentally involved with the cause of action." *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 243; 608 NW2d 487 (2000).

Here, it was undisputed that Kassem hired Hassan, that Kassem controlled Hassan's duties, and that Hassan was performing his duties in accord with Kassem's and Tony's Auto Service's common goal. *Clark, supra* at 688. It is also undisputed that both Hassan and Kassem were injured while working, side-by-side, on the same job. Thus, Hassan's injury occurred within the "course and scope of his employment" and his "claim amounts to an assertion that he

was provided an unsafe environment in which to work.” *Herbolsheimer, supra* at 243. “The purpose of the WDCA is to “substitute[] statutory compensation for ‘common-law tort liability founded upon an employer’s negligence in failing to maintain a safe working environment.’” *Id.* (citations omitted). Furthermore, Hassan’s injury does not present the type of “exceptional situation” that would justify an exception to the exclusive remedy provision of the WDCA. *Id.* Under these circumstances, Hassan’s tort action against Kassem was barred by the exclusive remedy provision of the WDCA. Accordingly, the judgment in favor of Hassan is reversed.

Affirmed in Docket No. 258355, reversed in Docket No. 260818.

/s/ Jessica R. Cooper  
/s/ Mark J. Cavanagh  
/s/ E. Thomas Fitzgerald