

STATE OF MICHIGAN
COURT OF APPEALS

ARTHUR R. GAREAU,

Plaintiff-Appellant,

v

BADALAMENT, INC.,

Defendant-Appellee.

UNPUBLISHED

October 23, 2007

No. 256209

Wayne Circuit Court

LC No. 03-337879-NO

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) on the basis that plaintiff's claim was barred by the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1). We reverse. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is a family-owned Michigan corporation in the business of purchasing and distributing produce. Defendant's shareholders and officers are three brothers, Mark, Mike, and Tom Badalament. T.R. Logistics, L.L.C., was formed to be defendant's "transportation arm." Defendant and T.R. Logistics each had a Client Services Agreement with Spectrum HR, L.L.C. Spectrum HR supplied employees to defendant and T.R. Logistics; the individuals working at defendant and T.R. Logistics are employees of Spectrum HR. Spectrum HR also provided defendant and T.R. Logistics with its human resource needs, including payroll, health care coverage, tax records, and worker's compensation insurance coverage.

Plaintiff was employed as a truck driver by Spectrum HR. According to plaintiff, T.R. Logistics "is a transport company that supplied the trucks I drove while employed at Spectrum."

Plaintiff's complaint alleged that on April 9, 2001, while he was attempting to open the rear door of a tractor-trailer, the door unexpectedly opened with dangerous force and speed and struck him. He alleged that the incident occurred because defendant's agents and employees negligently loaded and packed the tractor-trailer. Plaintiff received worker's compensation benefits from an insurance policy procured by Spectrum HR.

Defendant asserted that plaintiff's action against it was barred by the exclusive remedy provision of the WDCA because defendant was plaintiff's employer for purposes of this provision. The trial court agreed and granted defendant's motion for summary disposition.

This Court reviews a trial court ruling on a motion for summary disposition de novo. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 686; 594 NW2d 447 (1999). “[W]hether a particular business entity is a particular worker’s ‘employer,’ as that term is used in the WDCA, is a question of law for the courts to decide if the evidence is reasonably susceptible of but a single inference. Only where evidence of a putative employer’s status is disputed, or where conflicting inferences may reasonably be drawn from the known facts, is the issue one for the trier of fact to decide.” *Id.*, pp 693-694 (citations omitted).

The exclusive remedy provision of the WDCA, MCL 418.131(1), limits the liability of an individual’s “employer,” but that term is not defined for purposes of the statute, except to specifically include certain entities that are not pertinent here. *Clark, supra*, p 687. The test for determining whether an entity is an “employer” for purposes of applying the exclusive remedy provision is the “economic realities test.” *Id.*

Although the totality of the circumstances is considered, in applying the economic realities test, the courts generally consider the following four factors “(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.” No one factor is controlling. [*Id.*, pp 688-689 (citations omitted).]

Case law applying the economic realities test may be broadly divided into two categories. *Id.*, p 689. The first concerns dual employer or coemployer cases in which “the employee typically has a ‘legal’ or ‘actual’ employer against whom there is no question that a tort suit is barred . . . and the dispositive question is whether, under the economic realities test, a second entity can also be classified as an employer for purposes of the [exclusive remedy] provision.” *Id.* The dual employer category of cases “involve essentially a horizontal relationship between two business entities who, if so warranted by the application of the economic realities test, can both claim employer status . . . [I]n these cases, the separate existence of each entity is respected.” *Id.*, p 690. This category includes cases involving an individual supplied by a labor broker to its customer. *Id.*, p 689, citing *Kidder v Miller-Davis Co*, 455 Mich 25; 564 NW2d 872 (1997). It also includes cases involving sister corporations. *Clark, supra* at 689, citing *Howard v Dundee Mfg Co, Inc*, 196 Mich App 38, 41; 492 NW2d 478 (1992). And it includes where an individual works in two businesses, a corporation and a sole proprietorship, where the owners of the latter are also the sole shareholders of the corporation. *Clark, supra*, pp 683-684, 693.

The second category involves cases concerning parent and subsidiary corporations. *Id.*, p 689. In this scenario, “an essentially vertical relationship exists between two business entities who, if warranted by the application of the economic realities test and the equities of the case, will be treated as essentially one entity for the purposes of the exclusive remedy provision. Thus, in these cases, if warranted, the separate existence of the two entities is disregarded.” *Id.*, p 691 (citations omitted).

One obstacle to a proper analysis of this case concerns conflicting information concerning the ownership of T.R. Logistics. Mark Badalament stated in his affidavit and his deposition that T.R. Logistics is a “wholly owned subsidiary” of defendant, which would indicate that the sole shareholder of T.R. Logistics is defendant. If this characterization is accurate, the analysis whether defendant was plaintiff’s employer by virtue of his work for T.R. Logistics would implicate principles developed in the second category of cases identified in *Clark*. But Mark Badalament also indicated that the shareholders of T.R. Logistics are he and his brothers, “exactly the same” as the shareholders of defendant. If both corporations have the same shareholders, that duplication of ownership does not make one a wholly owned subsidiary of the other. Rather, each is a “sister corporation” to the other. See Black’s Law Dictionary (7th ed) p 345, defining a “sister corporation” as “[o]ne of two or more corporations controlled by the same, or substantially the same, owners.” If the two entities have the same ownership, rather than one owning the other, then the case is similar to *Clark, supra*, pp 683-684, 693, which according to the Court there, belonged in the “dual employer,” not the “parent-subsidiary,” category of cases. *Id.*, p 693.

In any event, the evidence was insufficient to establish that defendant is plaintiff’s employer for purposes of the exclusive remedy provision of the WDCA.

With respect to the first factor of the economic realities test, “the control of a worker’s duties,” plaintiff’s affidavit states that “Badalament did not direct my work, in any way, while I was employed at Spectrum HR, even when I transported Badalament stock.” Defendant’s and T.R. Logistics’s agreements with Spectrum HR indicate that the “CLIENT” “shall supervise and determine the procedures to be followed in the CLIENT’s business by covered employees regarding time, location, and performance of duties.” Defendant did not present any other evidence concerning whether or how individuals working for defendant or T.R. Logistics controlled plaintiff’s duties or supervised him.

Regarding the second factor, the payment of wages, plaintiff’s affidavit states that defendant did not pay his wages. Defendant presented evidence that Spectrum HR provided, through separate contracts, both defendant and T.R. Logistics with services including “payroll.” Defendant’s and T.R. Logistics’s agreements with Spectrum HR provide that Spectrum will bill the “CLIENT” “on a WEEKLY basis, as required for the timely payment of the CLIENT’s payroll.” In this regard, this case may be compared to *Howard, supra*, wherein sister corporations maintained a central accounting office and contracted with an outside company to perform payroll services, for which it billed the two entities separately. “[W]hile Dundee and Ladapa maintained a central accounting office and hired Time Share, plaintiff was paid from the general account of Ladapa, thereby creating a question of fact regarding who actually paid plaintiff’s wages.” *Id.*, p 42. In the present case, no evidence was presented regarding whether defendant and T.R. Logistics have a central accounting office, whether the two entities have separate accounts with Spectrum HR, and whether plaintiff was paid from an account funded by defendant. But the fact that the two entities have separate contracts with Spectrum HR suggests that the parties to those contracts intended that the two entities would remain distinct.

With regard to third factor, the right to hire, fire, and discipline, plaintiff’s affidavit states that defendant did not hire him, it had no authority for any disciplinary action, and it had no authority to fire him. Defendant’s and T.R. Logistics’s agreements with Spectrum HR indicate that Spectrum HR (“the EMPLOYER”) essentially had the authority but assigned it to the

“Employer’s Designated Agent.” The Employer’s Designated Agent for both agreements was Mark Badalament. With respect to hiring, Mark Badalament testified about the joint involvement as follows:

Q. [D]oes Spectrum provide employees for both Badalament and T.R. Logistics?

A. Yes.

Q. And what – who interviews perspective [sic] employees for T.R. Logistics and Badalament?

A. We would both do that.

Q. Okay. Truck drivers, for example.

A. I could call them up, or we could interview a perspective person internally.

Q. Well, if someone applies for a truck driving job with T.R. Logistics, does Spectrum interview that individual and hire them or are you, or someone from Badalament also at the interview? Tell me how it works.

A. It could work both ways. We have that – as a co-employer, have that option.

Q. And is that option exercised consistently?

A. I would say yes.

Mark Badalament did not know if he or anyone at defendant interviewed plaintiff.

The fourth factor involves “the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.” *Clark, supra*, p 688. This Court and our Supreme Court have analyzed this factor by considering the evidence of the interrelatedness of the entities at issue. For example, in *Howard supra*, p 42, this Court explained:

Finally, concerning whether plaintiff's duties were an integral part of Dundee's business toward the accomplishment of a common goal, we believe that questions of fact exist. While Dundee and Ladapa share the same owner, plant manager, plant supervisor, plant engineer, die setters, and production and control supervisor, they also filed separate federal income taxes in 1986, 1987, and 1988, maintained separate checking accounts, billed separately, issued separate purchase orders, were incorporated separately, maintained separate ownership of furniture, fixtures, and machines, and maintained separate telephone numbers and listings.

In *Clark, supra*, pp 694-696, the Court addressed the parties’ contentions regarding this factor as follows:

Finally, plaintiff contends that his work for Grand Haven was in no sense integral to the business of Lincoln or toward the accomplishment of a common

goal of Lincoln and Grand Haven, and vice versa. Plaintiff claims, and has offered evidence raising the inference, that Grand Haven and Lincoln are totally separate companies using separate equipment, processes, and employees in distinct buildings to make different parts for different customers. Plaintiff contends that Grand Haven's declaration on the official injury report that he was Grand Haven's employee confirms the inference that Grand Haven and Lincoln were separate businesses and that plaintiff was Grand Haven's employee.

* * *

Finally, defendants contend that plaintiff's work at both Lincoln and Grand Haven was integral to the goal of successfully operating the two interrelated tooling businesses. As indicative of this interrelatedness, defendants have proffered evidence indicating that both companies maintain equipment and certain operations in both buildings and that they share certain office expenses, such as a single fax line and telephone system. Defendants note that there is no written lease between Grand Haven and Lincoln or defendants, and that Grand Haven pays a nominal rent that is unilaterally determined by Kenneth Herzhaft. Finally, defendants note that Kenneth Herzhaft purchased a single worker's compensation policy to cover both companies. [*Clark, supra*, pp 694-695, 695-696.]

In the present case, very little evidence was presented concerning the interrelatedness of defendant and T.R. Logistics. There is evidence of common ownership and common officers. However, common ownership is not controlling. See *Clark, supra*, and *Howard, supra*. Plaintiff's affidavit states that defendant was a "customer of T.R. Logistics" and that while employed by Spectrum as a truck driver, he drove trucks hauling other companies' stock as well as defendant's. Mark Badalament characterized T.R. Logistics as defendant's "transportation arm." Defendant's brief states that T.R. Logistics "exclusively serves as the distribution arm for Appellee's produce business." The evidence cited for that assertion, however, Mark Badalament's affidavit, does not refer to or imply that T.R. Logistics served defendant exclusively. Moreover, Mark Badalament's deposition suggests that he drew a distinction between individuals working for defendant and those working for T.R. Logistics when he referred to the dockworkers responsible for loading, packing, and sealing the truck as "essentially all employees of Spectrum HR, but under the Badalament wing" and agreed that the individuals under the "T.R. Logistics umbrella or wing" would not have been the ones who packed, loaded, or sealed the truck.

The trial court in this matter reasoned:

[T]he defense to a common law action for tort has got to be precisely congruent with . . . the obligation to pay workers compensation benefits. . . .

* * *

The Badalament brothers are paying out of their pocket the workers compensation premium for Mr. Gareau. If this action is allowed to go ahead and Mr. Gareau wins, they will, in addition to the workers compensation payments, have to pay him tort damages. It can't be that way.

The trial court also stated that because defendant and T.R. Logistics are “one organization,” “one economic entity,” “one functioning whole,” it would be unfair to make the Badalament brothers pay for workers compensation premiums for plaintiff and still remain liable for tort damages. The court adopted by reference its opinion in *Brailer v Ryder System, Inc*, Wayne Circuit Court No. 93-319879-NP.

The court’s reasoning is flawed. First, there is insufficient evidence that defendant and T.R. Logistics were one organization. To decide otherwise would be inconsistent with *Clark, supra*, and *Howard, supra*. Despite common ownership of the two entities at issue in each of those cases, the reviewing courts concluded that the determination of the plaintiff’s employer was for the trier of fact. Second, the analysis in the *Brailer* case that the court adopted is not compatible with *Clark*. The *Brailer* decision states that “there is no longer even ostensibly a 4-part test,” and that the concept is embraced by the fourth factor. *Clark* indicates that the four-part economic realities test is viable for the purposes of determining an individual’s employer. *Id.*, p 687. Moreover, *Brailer* involved a parent corporation and a subsidiary. As previously indicated, it is not clear whether T.R. Logistics is defendant’s sister corporation or its wholly owned subsidiary.

In light of the evidence presented, we conclude, as did the Court in *Clark, supra*, p 696, that there are conflicting inferences that may reasonably drawn, and the trial court should not have decided the issue whether defendant was a coemployer of plaintiff for purposes of the exclusive remedy provision as a matter of law.

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

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood