S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

MARCIA VAN TIL, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 10, 2005
v	No. 250539 Ottawa Circuit Court
ENVIRONMENTAL RESOURCES MANAGEMENT, INC., Defendant-Appellee/Cross-Appellant.	LC No. 02-042717-NO

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals and defendant cross-appeals an order granting summary disposition in favor of defendant. We affirm.

I

On February 3, 2001, plaintiff helped her husband, Byron Van Til, who was employed by defendant Environmental Resources Management, Inc. (ERM), remove the wax from the mailroom floor. According to plaintiff, Byron put a solution on the floor and ran a machine to loosen the wax. Plaintiff then took a "putty" knife and went along the edge of the floor to remove the wax. A few hours later, plaintiff went into the bathroom to change clothes. According to plaintiff, when she removed her pants, her legs were black. She thought it was dirty wax on her legs, but later learned it was dead skin.

Plaintiff brought a negligence suit alleging that defendant owed a duty to warn her of the danger posed by the hazardous chemicals. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4). Defendant asserted that the undisputed evidence demonstrated that plaintiff was defendant's employee. Therefore, it was defendant's position that plaintiff's claim was barred because plaintiff's exclusive remedy for her injuries was under the Worker's Disability Compensation Act (WDCA), MCL 418.131 *et seq.* Plaintiff responded, contrary to defendant's position, that she was a volunteer. Plaintiff requested that the trial court deny defendant's motion for summary disposition and grant her cross-motion for summary disposition.

The trial court denied defendant's motion for summary disposition and granted summary disposition in favor of plaintiff. The trial court reasoned that plaintiff was not an employee of defendant, but rather a gratuitous worker. Defendant moved for reconsideration pursuant to MCR 2.119(F), arguing that the trial court erred in finding that plaintiff was a gratuitous worker and in failing to address the "statutory employer" issue. The trial court granted defendant's motion for reconsideration. While the trial court again found that plaintiff was a gratuitous worker, it also found that the "statutory employer" doctrine applied. The trial court agreed with defendant's contention that ERM was the principal and Byron was the contractor. The trial court further stated that Byron arranged, with defendant's knowledge and consent, for plaintiff to perform a "contract of work" for defendant, i.e., Byron arranged for plaintiff to help with stripping the wax from the mailroom floor. Thus, the trial court granted defendant's motion for summary disposition and denied plaintiff's motion for summary disposition.

II

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). "When reviewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact." *Bock v General Motors Corp,* 247 Mich App 705, 710; 637 NW2d 825 (2001). Further, it is well settled that we will not reverse when the lower court reaches the right result, albeit for the wrong reason. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 190; 600 NW2d 129 (1999).

III

Defendant argues on cross appeal that the trial court erred in ruling that plaintiff was not an employee of defendant. The WDCA, MCL 418.131(1), provides that employee compensation is the exclusive remedy for a personal injury, except for an injury caused by an intentional tort. MCL 418.161(1)(*l*) defines employee as "[e]very person in the service of another, under any contract of hire, express or implied . . . ." It is defendant's position that, because plaintiff was under a contract of hire, express or implied, the instant action is barred by the WDCA. We agree with defendant's argument on cross-appeal.

The phrase "contract of hire" was first construed in *Higgins v Monroe Evening News,* 404 Mich 1; 272 NW2d 537 (1978).[1] In *Higgins,* the plaintiff, a five-year-old child, was injured while accompanying a substitute carrier on a newspaper route. *Id.* at 12. The dispositive issue

[1] *Higgins* was a plurality decision in which our Supreme Court affirmed the holding of this Court that a child who was assisting a substitute newspaper carrier when struck by a car was not an employee of the newspaper. The lead opinion by Justice Moody was joined by two other justices. Justice Ryan concurred in the result on the basis that there was no evidence in the record to sustain the legal conclusion that the plaintiff was "in the service of another, under any contract of hire, express or implied." *Higgins, supra* at 22-23.

was whether the plaintiff was acting under a contract of hire with the substitute newspaper carrier and, thus, was an employee for purposes of the WDCA. *Id.* at 17-18. Justice Moody stated that, to reach the conclusion that a "contract of hire" existed, the Court must be able to state that each of the two parties, the plaintiff and the substitute newspaper carrier, intended to suffer a detriment to receive a benefit, and that they agreed to exchange those detriments and benefits. *Id.* at 21. After reviewing all the testimony, Justice Moody concluded that no "contract of hire" existed. *Id.* Justice Moody stated that the substitute newspaper carrier's testimony illustrated a social relationship – wherein he gratuitously promised to give the plaintiff a dime, bottle of pop, or candy if he helped the carrier deliver the papers. *Id.*

In *Hoste v Shanty Creek Mgt, Inc,* 459 Mich 561, 564; 592 NW2d 360 (1999), the plaintiff was employed as a full-time journeyman by Hoste Brothers, Inc. and, on the weekends in the winter, as a ski patroller at the Schuss Mountain Resort of Shanty Creek. As a "volunteer" ski patroller, the plaintiff did not receive wages, but rather free lift tickets, skiing privileges for family members, free hot beverages, and reduced prices on meals. *Id.* at 565. The plaintiff was injured as he was checking the course before a race. *Id.* In addressing the question whether plaintiff was an employee under the WDCA, our Supreme Court stated that the test was whether the plaintiff was an employee under subsection 161(1)(b), and, if he or she was, then the plaintiff must also pass muster under subsection 161(1)(d). *Id.* at 573.[2] The *Hoste* Court then examined the phrase "of hire" contained in 161(1)(b) and its meaning under the WDCA, stating:

> These basic precepts of worker's compensation show that in order to receive benefits under the WDCA, it is not enough for an individual to be employed pursuant to a "contract"; rather, the individual must be employed pursuant to a contract "of hire," where the benefit received by the individual is payment intended as wages. In other words, worker's compensation provides benefits to those who have lost a source of income; it does not provide benefits to those who can no longer take advantage of a gratuity or privilege that serves merely as an accommodation. [*Id.* at 575.]

Thus, in order to satisfy the "of hire" requirement, "compensation must be payment intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer." *Id.* at 576.

The *Hoste* Court found that, under the circumstances, the "of hire" element required by the WDCA did not exist. *Id.* at 579. The Court reasoned that the privileges the plaintiff received for patrolling were not a payment intended as wages because they were not substantial enough to induce a reasonable person to forfeit his common-law rights against Shanty Creek; rather, plaintiff was a "gratuitous worker" – an individual assisting another with a view toward furthering his own interests. *Id.* at 577-578.

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[2] As a result of legislative revisions in 1996, subsections 161(1)(b) and (1)(d) have been redesignated as 161(1)(*l*) and (1)(n), respectively.

In the present case, plaintiff argues that, as in *Higgins* and *Hoste,* there is no evidence that she intended to suffer a detriment to receive a benefit. We disagree. Plaintiff testified at her deposition that, with her consent, her husband "volunteered" her help with the mailroom floor, and that her husband stated that defendant did not want to formally hire her because of the paperwork that had to be filled out. Plaintiff was asked:

> *Q*. Did you say am I supposed to go in and give my time to them?
>
> *A*. Byron told me that he was going to get money for my coming in.
>
> *Q*. So it was your understanding before you showed up at the facility on February 3, 2001, that Byron's paycheck would be reflective of the time that you spent there that day.
>
> *A*. Yes.

Byron testified that prior to his wife helping him with the floors, he asked his supervisor, Steve Koster, if it would be all right for plaintiff to help. When asked what Koster stated, Byron responded:

> That [it] would be okay [if] she helped me. He said to me, "How long will it take to do this job?" "Oh, about five or six hours." "That's a lot of paperwork to hire her for five or six hours." I said, "Steve, you don't have to do that. Just pay me double and I'll give half of it to my wife." Because it sounded like five or six hours of trouble for all that paperwork for – it's just not the best.

Koster acknowledged that Byron had requested that his wife help him with the floors. Koster further stated:

> And we discussed how she could be paid for that service. And I believe that he suggested that we could pay her through – by adding to his hours. And I agreed with that. And that was the arrangement.

We agree with defendant that the undisputed evidence establishes that there was a "contract of hire" between plaintiff and defendant. See *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651; 658 NW2d 510 (2003). Moreover, MCL 418.161(1)(*l*) does not require an actual explicit contract. Rather, subsection 161(1)(*l*) requires "*any* contract of hire, express or *implied* . . . ." MCL 418.161(1)(*l*) (emphasis added). In this regard, our Court has stated that a contract implied in fact arises "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *In re McKim Estate,* 238 Mich App 453, 458; 606 NW2d 30 (1999), quoting with approval *In re Lewis Estate*, 168 Mich App 70, 75; 423 NW2d 600 (1988). Here, the evidence demonstrates that defendant expected to pay for plaintiff's services, while plaintiff's testimony reveals that she expected compensation in return for these services. Although plaintiff stated in her affidavit that she did not receive a paycheck or money from defendant, she also testified that her husband put her hours on his timesheet and got paid by defendant for those hours, pursuant to the agreed upon "arrangement." Thus, the trial court erred in ruling that plaintiff was not an employee of defendant. *Sanchez, supra*.

In view of our disposition, the remaining issues raised on appeal are dismissed as moot. *Smith v Kowalski*, 223 Mich App 610, 619; 567 NW2d 463 (1997).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello