STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

JESS KINSEL,

Plaintiff/Counter-Defendant,

and

MICHIGAN DEPARTMENT OF COMMUNITY HEALTH,

Intervenor,

v

File No. 02-7817-NO
HON. PHILIP E. RODGERS, JR.

BARRY L. COLE (in his capacity as Court Appointed Receiver), SKM DRILLING SERVICES, INC., SKM ENVIRONMENTAL SERVICES, INC., and SANDRA MYERS,

Defendants,

and

ANTONY SCHULTZ,

Defendant/Counter-Plaintiff/
Third-Party Plaintiff,

v

MARTY GRIFFORE,

Third-Party Defendant.
_____/

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DECISION AND ORDER
GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION

This is a personal injury action. Plaintiff Jess Kinsel was injured while working on a water well drilling rig owned by SKM Drilling Services, Inc. The Plaintiff filed a Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(10) seeking a finding that at the time of his injury, he was an employee of SKM Drilling Services, Inc. and, therefore, entitled to benefits under the Worker's Disability Compensation Act. Defendants SKM Environmental Services, Inc. and Receiver Barry Cole filed a Motion for Partial Summary Disposition seeking a finding that, at the time of Kinsel's injury, Kinsel was not an employee of either SKM Environmental or the Receiver.[1] The Motions were heard on August 19, 2002 and taken under advisement. Counsel was provided with an opportunity to file supplemental briefs. All briefs and supporting depositions and affidavits having now been filed, the Court issues this written Decision and Order and, for the reasons stated herein, grants the Plaintiff's Motion.[2]

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine

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[1]These motions also involve the question of whether Marty Griffore who was operating the drilling rig at the time of Kinsel's injury was an employee of SKM.

[2]The delay in the publication of this Decision and Order was due to the automatic stay in bankruptcy associated with the involuntary bankruptcy petition of SKM Drilling filed on or about September 5, 2002.

issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

> This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):
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> > In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> > In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

FACTUAL BACKGROUND

Prior to June 4, 2001, Defendant Sandra Myers ("Myers") and Defendant/Counter-Plaintiff/Third-Party Plaintiff, Antony Schultz ("Schultz") had an intimate relationship and were in business together. They had two business entities, SKM Drilling Services, Inc. and SKM

Environmental Services, Inc. ("SKM"). On June 4, 2001, Myers terminated their relationship and, as the sole shareholder in both companies, precluded Schultz from continued involvement in the businesses.

Schultz filed an action against Myers claiming an interest in the businesses and the residence. That action is entitled *Antony Schultz v Sandra Myers and SKM Drilling Services, Inc. and SKM Environmental Services, Inc. (Necessary Parties) and Jess Kinsel, Limited Intervenor*, Case No. 01-7769, in the Circuit Court for Antrim County. By its June 11, 2001Temporary Restraining Order, July 16, 2001 bench Order and August 13, 2001 Preliminary Injunction, the Court allowed Myers to continue the day-to-day operations of the businesses and ordered her to lawfully operate SKM during the pendency of the litigation.

Initially Myers operated SKM without a licensed well driller and without purchasing worker's compensation insurance, as required by MCL § 418.611 and 418.641.

On July 10, 2001, Myers entered into an agreement with Jess Kinsel ("Kinsel") for his services as a licensed well driller. On August 10, 2001, Kinsel was injured while he was working on the drilling rig that was being operated by Marty Griffore ("Griffore"). Because SKM did not have worker's compensation insurance, Kinsel filed this suit seeking compensation for his injuries.

The question presented by Kinsel's Motion for Partial Summary Disposition is whether Kinsel and Griffore were employees of SKM on the date that Kinsel was injured so that Kinsel is entitled to recover damages from SKM because his injury arose out of and in the course of his employment, pursuant to MCL § 418.641(2).

APPLICABLE LAW

Michigan's Worker's Disability Compensation Act requires that employers provide compensation to employees for injuries suffered in the course of the employee's employment, regardless of who is at fault. MCL § 418.301. In return for this almost automatic liability, employees are limited in the amount of compensation they may collect, and, except in limited circumstances, may not bring a tort action against the employer. See MCL § 418.131; Welch, Worker's Compensation in Michigan: Law & Practice (3d ed), § 1.2, pp 1-2 to 1-3. The statute also

defines who is an "employee" in § 161, and by doing so determines which individuals have essentially traded the right to bring a tort action for the right to benefits.

"Employee" is defined, in pertinent part, as follows:

> (l) Every person in the service of another, under any contract of hire, express or implied. . .
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> * * *
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

In *McCaul v Modern Tile and Carpet, Inc*, 248 Mich App 610; 640 NW2d 589 (2002), the Court of Appeals recently addressed the issue of when an individual is an employee under § 161. The Court said:

> Whether an individual is an employee as defined by the WDCA presents a question of law subject to review de novo. *Oxley v Dep't of Military Affairs*, 460 Mich 536, 540; 597 NW2d 89 (1999).
>
> * * *
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> All three conditions of subsection 161(1)(d) [now 161(1)(n)] must be met in order to find that an individual is an employee. *Luster v Five Star Carpet Installations, Inc*, 239 Mich App 719, 725, 609 NW2d 859 (2000); *Amerisure Ins Cos v Time Auto Transportation, Inc*, 196 Mich App 569, 574; 493 NW2d 482 (1992). As the *Luster* Court opined:
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> > [A] person is not an employee (but is an independent contractor) under subsection 161(1)(d) if any one or more of the following applies: (1) the person maintains a separate business in relation to the service, (2) the person holds himself out to and renders service to the public in relation to the service, or (3) the person is an employer subject to the worker's compensation statute in relation to the service. [*Luster, supra* at 725; 609 NW2d 859.]
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> > In *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 572; 592 NW2d 360 (1999), our Supreme Court concluded that the Legislature, by amending § 161 of the WDCA in 1985 to add subsection d [now subsection n], manifested its intention that the

> statutory provision define the term "employee." Consequently, the new language of the statute effectively superseded several factors comprising the economic realities test.

McCaul, supra at 616.

The parties agree that § 161 is the applicable statutory provision, at least as to Kinsel. Schultz argues, however, that the Worker's Disability Compensation Act does not apply to Griffore as he is not seeking worker's compensation benefits. The parties agree that Kinsel had a contract of hire, although Schultz argues that his contract was with Defendant Myers and not with SKM. All of the parties agree that Kinsel was not an employer to whom the Worker's Disability Compensation Act applies.

The primary disagreement arises from each party's distinct view of whether the facts support a finding that Kinsel maintained a separate business and held himself out and rendered service to the public. §418.161(1)(n).

THE UNDISPUTED FACTS

Kinsel was individually licensed by the State of Michigan as a well driller before going to work for SKM. Myers hired Kinsel because he was a licensed well driller and SKM had to have a licensed well driller in order to lawfully drill wells. It is undisputed that, at Myers' request, Kinsel applied for an assumed name certificate in the name of SKM Drilling Services and opened a bank account in the name of SKM Drilling Services. Kinsel deposited his paychecks from which standard payroll deductions had not been taken and used the money to pay his living expenses. Whenever Kinsel drilled a well, he signed well logs and checked the "subcontractor" box on the well log form. Kinsel worked exclusively for SKM. His boss or supervisor was Myers. All of the people for whom he drilled wells were customers of SKM. He did not have a separate business address or phone listing. He did not have separate business cards or a business logo. He did not advertise his services. He did not own the necessary equipment, materials and supplies to drill wells on his own. He did not have any of the ordinary indicia of a separate business.[3]

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[3]The undisputed facts regarding Griffore are virtually identical. He applied for an assumed name at Schultz' request and Schultz was his boss or supervisor. He had no other indicia of a separate business.

ANALYSIS

Schultz and Cole rely on the fact that Kinsel had an assumed name and a bank account in that name, signed well logs and checked the "subcontractor" box, and had an individual well driller license to support their position that Kinsel was an independent contractor. These, however, are only a limited number of the facts that must be considered. In *Domanski v Hopper*, 1997 Mich ACO 371; 10 MIWCLR 1309 (1997), these same facts alone were held to be insufficient to establish that Domanski operated a separate business.

In the instant case, the only reason Kinsel (and Griffore and the other employees of SKM) filed assumed name certificates and opened bank accounts in those names was because Schultz or Myers instructed them to do so. It was obvious from the deposition testimony, as well as the affidavits, that, in the case of Kinsel, Myers was following a practice that had long existed at SKM - set the employees up to look like independent contractors so SKM does not have to purchase worker's compensation insurance. In reality, however, they were all employees. None of them had a separate business or held themselves out and provided services to the public. They were all told what job to go to and what work to do by Schultz or Myers. (Pecar deposition at p 27; Pecar affidavit at paragraphs 9 and 10; Griffore deposition at p 62; Griffore affidavit at paragraph 35; Kinsel affidavit at paragraph 17).

Schultz argues that, if Kinsel was an employee, he was an employee of Myers and not SKM. The basis for this argument is that Myers allegedly committed an intentional tort outside the scope of her employment when she hired Kinsel and failed to purchase worker's compensation insurance. Schultz argues that SKM cannot be held liable for such conduct on the part of one of its principals.

Accepting Schultz' argument would render the Worker's Disability Compensation Act a nullity. If it were the case that a corporation could not be held responsible for an employee failing to purchase worker's compensation insurance, no corporation would ever purchase insurance. The purpose for the statute would be completely defeated.

Schultz also argues that SKM was nothing more than a de facto partnership at the time of Kinsel's injury that was dissolved as a matter of law when the working relationship between Myers and Schultz was terminated. Myers could, therefore, do nothing but wind up the business and affairs of SKM. This argument ignores the corporate form of SKM, as well as the Court's order that clearly

contemplates continuation of the business of SKM in the hands of Myers. Any Court Order relating to dissolution and liquidation of assets was not entered until well after Kinsel was injured.

Finally, Schultz argues that Kinsel should be estopped from claiming he was an employee of SKM because of his unclean hands arising from his active participation in the SKM scam to avoid purchasing worker's compensation insurance. In other words, because SKM employees established assumed names upon the request of Schultz and Myers so that SKM would not have to provide worker's compensation insurance, Kinsel should be penalized and not afforded the protections of the Worker's Compensation Disability Act. This argument is absurd. Such an arrangement obviously does not benefit the employees and it is not an arrangement an employee would willingly choose if he truly understood the ramifications. It was clear from Kinsel's deposition and trial testimony that he only established an assumed name because he was requested to do so and he did not understand the ramifications of SKM categorizing him as an independent contractor versus an employee.

WHETHER THE WDCA APPLIES TO GRIFFORE

Under the Worker's Disability Compensation Act Kinsel and Griffore were employees of SKM. Schultz argues, however, that whether Griffore was an employee of SKM on the date that Kinsel was injured must be determined by resort to common law and not the Worker's Disability Compensation Act because Griffore is not seeking worker's compensation benefits. Under common law, whether there was an employee-employer relationship was determined by reference to the economic realities test. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561; 592 NW2d 360 (1999).

The economic-reality test involves four basic factors: (1) control of the worker's duties, (2) payment of wages, (3) the right to hire, fire and discipline, and (4) performance of the duties toward the accomplishment of a common goal. *Amerisure Ins Cos v Time Auto Transportation, Inc*, 196 Mich App 569, 573; 493 NW2d 482 (1992). Under this test, Griffore was an employee of SKM. According to his deposition testimony and affidavit, Griffore was hired by Schultz. He established an assumed name at Schultz' request. His supervisor or boss was Schultz or Myers. If he "messed up," Schultz would call him on it. He worked exclusively for SKM. All equipment, materials and supplies needed to drill wells was supplied by SKM. Griffore was paid by SKM and used his

income to pay his living expenses. He was reimbursed for his health insurance. He did not hire, fire or discipline other employees. The performance of his duties was to accomplish a common goal of drilling water wells with other employees of SKM for SKM customers.

CONCLUSION

SKM was obviously determined to treat Kinsel, Griffore and its other employees as independent contractors as evidenced by its requirement that they take out assumed names and its tax treatment of their compensation by reporting their income on IRS form 1099. On the other hand, it is evident that the employees accepted the "program" imposed upon them by SKM as a way of obtaining gainful employment. None of SKM's employees operated as a separate business entity while performing their work assignments. They did not use their assumed names to solicit business with the public. They performed their job duties as employees, under the direction and control of Schultz or Myers. Therefore, under the Worker's Disability Compensation Act, Jess Kinsel was an employee of SKM on the date of his injury and he is entitled to recover damages from SKM because his injury arose out of and in the course of his employment, pursuant to MCL § 418.641(2). Under either the Worker's Disability Compensation Act definition of an "employee" or the common law economic realities test, Marty Griffore was also an employee of SKM on the date that Jess Kinsel was injured while working on the SKM drilling rig that Griffore was operating. The Plaintiff's Motion for Partial Summary Disposition is granted. Claims against the Receivership Estate for past medical expenses and past wages should be promptly submitted with appropriate documentation.

IT IS SO ORDERED.

This Decision and Order does not resolve the last pending claim nor close the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 12/17/02