

STATE OF MICHIGAN
COURT OF APPEALS

CELINA MUTUAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

LAKE STATES INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

March 23, 1995

No. 170289

LC No. 91-074806-CK

Before: Sawyer, P.J., and Bandstra and R.B. Burns, * JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's November 1, 1993 order granting defendant's motion for summary disposition, awarding it a judgment against plaintiff of \$20,523.11, plus interest and costs of \$1,534.86, and dismissing with prejudice plaintiff's complaint against defendant. We reverse and remand.

This is a priority dispute among no-fault insurers arising out of a July 27, 1990 motor vehicle accident in which Robert Rood sustained personal injuries. It is undisputed that at the time of the mishap Rood was the self-employed owner of Rood's Wrecker & Mobile Home Service, a sole proprietorship, that he owned the business vehicle involved and was operating it within the scope of his responsibilities for Rood's Wrecker, that the vehicle was titled in his name, and that it was insured by plaintiff in Rood's name and not in the name of Robert Rood, d/b/a Rood's Wrecker & Mobile Home Service. At the time of the accident, defendant insured three personal vehicles jointly owned by Rood and his wife.

Pursuant to its commercial insurance policy covering the involved vehicle, plaintiff paid Rood no-fault benefits and subsequently requested and obtained partial reimbursement of \$20,523.11 from defendant. Plaintiff then sued defendant for recoupment of all benefits paid Rood, and defendant counterclaimed for return of the \$20,523.11 it had paid plaintiff.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), claiming that MCL 500.3114(3); MSA 24.13114(3) rendered plaintiff solely responsible for Rood's no-fault benefits. MCL 500.3114(3); MSA 24.13114(3) provides, in pertinent part, that an "employee . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle." The trial court granted the motion, finding that Rood was an "employee" of Rood's Wrecker & Mobile Home Service and suffered injuries while an occupant of a motor vehicle owned or registered by his employer.

The question presented by this appeal is whether, under the facts of this case, Rood's Wrecker & Mobile Home Service was Rood's "employer" and Rood its "employee" for purposes of § 3114(3). Because the no-fault act does not define these terms, we must necessarily consult other authority to resolve this inquiry.

Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Black's Law Dictionary (5th ed), p 471, defines "employee" as "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." It defines "employer" as "[o]ne who employs the services of others; one for whom employees work and who pays their wages or salaries." Implicit in these definitions is the assumption that the existence of an employer-employee relationship requires more than one individual or entity, and it follows that a sole proprietor like Rood cannot be an employee of his proprietorship. See 18A Am Jur 2d, Corporations, § 166, p 100, indicating that a proprietorship is not regarded as a distinct legal entity separate and apart from its proprietor.

Our conclusion that Rood was not an employee of his proprietorship for purposes of § 3114(3) is bolstered by reference to decisions of this Court addressing the issue of whether a sole proprietor is an employee for purposes of the Worker's Disability Compensation Act. In White v Searls & White Tree Service, 60 Mich App 714, 716-718; 231 NW2d 522 (1975), this Court upheld a Workmen's Compensation Appeal Board decision holding that, as a sole proprietor, the deceased was not an employee of the proprietorship within the meaning of the worker's compensation act. In Lee v J H Lee & Son, 72 Mich App 257, 261-265; 249 NW2d 380 (1976), this Court held that a sole proprietor was incapable of being an employee of the proprietorship under a contract of hire and therefore did not qualify for worker's compensation benefits under the act. See also anno: Ownership interest in employer business as affecting status as employee for workers' compensation purposes, 78 ALR4th 973, collecting decisions expressing the view that a sole proprietor cannot be an employee of the proprietorship within the meaning of state worker's compensation statutes. Although these cases are not controlling of the issue presented in this appeal, they do support by analogy our conclusion that Rood was not an employee of his proprietorship for purposes of § 3114(3).

In support of its argument, defendant cites Davidson v Wayne County Bd of Rd Comm'rs, 86 Mich App 592, 599; 272 NW2d 740 (1978), where this Court stated, "Plaintiffs are self-employed; they are both employer and employee." When analyzed in the context of the entire opinion, however, it is clear that this statement constitutes dictum extraneous to the holding that independent taxi owner-drivers were not employees of contractors or subcontractors, but were themselves contractors or subcontractors for purposes of the WDCA. Defendant's reliance upon Davidson is therefore misplaced.

In concluding that Rood was not an employee of the proprietorship pursuant to § 3114(3), we concur with this Court's comment in Lee, supra at 263, that "we cannot read into the act what is not there, nor read out what is there." Any amendment of § 3114(3) to include the proprietor of a sole proprietorship as an employee of the proprietorship is a legislative function, not a judicial one.

Reversed and remanded for further proceedings consistent with this opinion. No costs, the construction of a statute being involved.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns