STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Murphy, Cavanagh and Neff, JJ.

RICKY REED,
Plaintiff- Counter-Defendant-Appellee,

No. 126534

vs.

LINDA SUSAN YACKELL,
Defendant and Cross Defendant,

Court of Appeals
No. 236588

and

BUDDY LEE HADLEY, GERALD MICHAEL HERSKOVITZ and MR. FOOD, INC.
Defendants, Counterplaintiffs,
Cross-Plaintiffs-Appellants.

Wayne Circuit
No. 98-839576 NI
Hon. Wendy Baxter

After remand in
No. 123711

BRIEF ON APPEAL -- APPELLANTS

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BASIS OF APPELLATE JURISDICTION

This Court granted leave to appeal on January 13, 2005 (Apx p 105a).

QUESTIONS INVOLVED

I. WAS PLAINTIFF WORKING UNDER A "CONTRACT OF HIRE" WHERE THERE WAS A BARGAINED-FOR EXCHANGE OF PLAINTIFF'S LABOR FOR DEFENDANT'S CASH?

Plaintiff-Appellee says:	NO
Defendant-Appellant says:	YES
The Trial Court said:	NO
The Court of Appeals said:	NO

II. WAS PLAINTIFF AN INDEPENDENT CONTRACTOR IN RELATION TO THE LABOR HE PROVIDED TO DEFENDANT, WHERE

A. PLAINTIFF DID NOT MAINTAIN A SEPARATE DELIVERY BUSINESS,

B. PLAINTIFF DID NOT HOLD HIMSELF OUT TO OR RENDER DELIVERY SERVICE TO THE PUBLIC, AND

C. PLAINTIFF WAS NOT AN "EMPLOYER SUBJECT TO THIS ACT."

Plaintiff-Appellee says:	YES
Defendant-Appellant says:	NO
The Trial Court said:	YES
The Court of Appeals said:	YES

STATEMENT OF FACTS

I. ACCIDENT AND SUBSTANTIVE FACTS

The Accident

Plaintiff filed this action on December 10, 1998, alleging that he was injured in a collision on May 7, 1998. He alleged that he was riding in a vehicle owned by Mr. Food, Inc. and driven by Mr. Food's employee, Buddy Lee Hadley, to deliver food products for Mr. Food. Plaintiff testified that he was helping deliver the products at the request of Mr. Herskovitz, the owner of Mr. Food, Inc. and was paid by Mr. Food.

Plaintiff alleged that Defendant Linda Yackell failed to stop at a red light, and that Mr. Hadley failed to stop in time to avoid a collision.

The verdict for plaintiff was $1.2 million, allocating 60% fault to Yackell and 40% to appellants. Ms. Yackell did not appeal.

Plaintiff's Work for Mr. Food

A. PLAINTIFF'S OPENING STATEMENT

In his opening statement Plaintiff's counsel represented to the trial court that Mr. Reed was in Mr. Food's truck because he was assisting Mr. Hadley to deliver meat products for Defendant Mr. Food, and that he was paid for his work.

> MR. CARLISLE: On that day, Ricky Reed received a telephone call from Buddy Hadley, and asked him to work under-the-table for $40, as he had done several times since being let go from Mr. Food. And Mr. Herskovitz would pay him $40 to help Mr. Hadley deliver meat on his route in a big freezer truck.
>
> The evidence is going to show that not only had Mr. Herskovitz paid him in the past, but he as [sic: was] going to pay him to assist Mr. Hadley on this case."
> (Apx p 18a, Trial Transcript vol II p 24)

B. TESTIMONY OF HADLEY REGARDING PAYMENT FOR REED'S WORK

Mr. Hadley, who was called by Plaintiff as a witness, testified on behalf of Plaintiff that Reed had been a full time employee of Mr. Food and that after the full time employment ended, Mr. Food continued to use the services of Plaintiff to assist in the delivery of meat on an as-needed basis.

> Q. Okay. Well, let me ask you something. After Ricky Reed left Mr. Food as an employee, did Mr. Herskovitz sitting right here, did he ever ask you to get him and have him to work with you?
>
> A. Jerry [Herskovitz] is different than most people. He don't keep up with people's names and stuff. He would say, "Go get whatever." I know he was talking about Ricky when he said. And he never called Ricky's name specifically, but he called Ricky "Whatever," and I would go get him. Because he gave Ricky a job because I asked him, you know, there's a brother and I want you to give him a job.
>
> Q. Now this is after Ricky Reed was an employee of Mr. Food.
>
> A. Yeah; he was fired at that time.
>
> Q. Okay. And when Mr. Herskovitz would ask you to go get "Whatever," where would you get Ricky Reed at?
>
> A. At his auntie's house.
>
> (Apx p 27a, Trial Transcript vol II p 79)

Mr. Hadley testified that this happened "a few" times between December 1997 (when Reed's full time employment ended) and May 7, 1998, the date of the accident. "It happened a few times, but I can't say exactly. It could have been three; it could have been five." (Apx p 80a, Trial Transcript vol II p 80).

Mr. Hadley testified that Ricky Reed was paid for his work, sometimes directly by Mr. Herskovitz and sometimes through Hadley.

> Q. On these occasions, whether it's three, four or five times that Ricky Reed worked with you, do you know personally how he got paid?

A. Well, basically, I was like what they call the guy that leads the crew. I would go inside the office and sometimes I would get Jerry [Herskovitz] to pay him.

Q. And would Jerry pay him?

A. Um-hum.

Q. Jerry would pay him?

A. He would give the money to me and I would pay him.

Q. And how much money would he pay him for working on your truck after he was fired? How much would he get for a day?

A. It depends on how long I was – what we had to do. It could be anywhere from $35 to $40. It depends on what we have to do.

Q. $35 to $40?

A. It could have been, just like that. It depends on what you have to do that day.

Q. On May 7th of 1998, as an employee of Mr. Food, when you went and picked Ricky Reed up to work with you that day, was it your understanding from Mr. Herskovitz that Ricky Reed would be paid that day?

A. Yes.
(Apx pp 28a-29a, Trial Transcript vol II pp 80-81)

C. TESTIMONY OF PLAINTIFF RICKY REED REGARDING HIS RECEIPT OF PAYMENT FOR HIS WORK.

Ricky Reed also testified that he was working for Mr. Herskovitz and Mr. Food on the date of the accident and that he expected to be paid for his work.

Q. You remember your friend Buddy coming to pick you up that day?

A. Yes.

Q. Do you remember him telling you that Mr. Herskovitz wanted you to help him out?

A. Yes, because I went to the store with him.

Q. You remember him telling you that he was going to give you approximately $40 to help out that day?

A. No, I don't.

Q. You think you would have gone without making any money?

A. Excuse me?

Q. Do you think you would have gone with Mr. Hadley if you weren't going to make any money on that day?

A. No.
(Apx pp 32a-33a, Trial Transcript vol II pp 84-85)

Ricky Reed testified that although Mr. Food had ended his full-time employment, he continued to work for Mr. Food from time to time: "He let me go that time, but he didn't just say he didn't want me to work at Mr. Food anymore, because I got called in." (Apx p 45a, Trial Transcript vol III, p 102).

When Mr. Herskovitz was asked if he had hired Plaintiff for occasional deliveries, he answered "Not to my knowledge" (Apx p 19a, Trial Transcript vol II p 71).

Mr. Reed lived with his aunt. He testified that he sometimes painted houses for relatives. He spoke specifically of the five months between the end of his full time employment with Mr. Food and the accident:

Q. Between December and May – approximately five months – how were you supporting yourself?

A. I was painting. I was painting houses.

Q. You were painting houses?

A. Yes.

Q. Did you do that by yourself?

A. Mostly on the inside I would paint by myself, yeah.

Q. And how did you get that business going?

A. I always painted throughout my lifetime.

Q. How did you find people's homes to paint?

A. Mostly it would be relatives.

Q. I'm sorry. I didn't hear you.

A. It would be relatives.

Q. Relatives? And you actually supported yourself by painting so that you could make a living that way?

A. Somewhat.
(Apx pp 45a-46a, Trial Transcript vol III pp 102-103)

Plaintiff's counsel did not elicit testimony regarding how often he painted or how much he was paid. Plaintiff offered no evidence that Mr. Reed engaged in any activities to advise the general public that he was available for general labor.

II. PROCEDURAL FACTS

A. DEFENDANTS' MOTION FOR DIRECTED VERDICT

Based upon Plaintiff's representations and testimony concerning his employment relationship, Defendants Herskovitz, Hadley and Mr. Food moved for a directed verdict at the close of Plaintiff's proofs. One of the grounds was the exclusive remedy of the Worker Disability Compensation Act (WDCA). (Apx p 37a, Trial Transcript vol III p 55).

Plaintiff's counsel responded that Plaintiff was "a day laborer; he was not an employee" (Apx p 38a, Trial Transcript vol III p 56).

The trial court invoked the rule that "Motions for directed verdict are to be considered [in] the light most favorable to the non-movant." (Apx p 40a, Trial Transcript vol III p 57). The trial court went on to state that:

> With regard to Mr. Reed being an employee of Mr. Food, the testimony was that he had been let go and/or fired. That he went to work for Buddy Hadley, and that Buddy Hadley had received authority from Mr. Herskovitz to get whatever to help him with his delivery duties."
> (Apx p 40a, Trial Transcript vol III p 57)

B. MOTION FOR NEW TRIAL OR JNOV

Defendants moved for new trial or judgment notwithstanding the verdict on various grounds, including the employment relationship. The motion was heard on May 25, 2001 (Apx p 51a, Hearing Transcript). The trial court ruled in favor of Plaintiff on each issue raised in the motion.

On the issue of Plaintiff's status as an employee, the trial court ruled that Plaintiff was "just a general laborer," and therefore was holding himself out for service to the public and was not an employee (Apx pp 66a-67a, Hearing Transcript pp 17-18). The court also held that "[a]ll the factual recitations contraindicate that conclusion [that he was an employee]" (Apx p 67a, Hearing Transcript p 18). The court did not identify any of the "factual recitations" that it believed contraindicated Mr. Reed's status as an employee (*id.*).

C. FIRST APPEAL

Defendants timely filed an appeal, raising various issues. On the issue of Mr. Reed's status as an employee, the Court of Appeals rejected Defendant's argument that Mr. Reed was an employee of defendant, and held that he was actually an independent contractor who was in the business of doing common labor for "the public."

> Plaintiff held himself out to the public as one who could perform general labor in exchange for payment, as he had assisted Hadley delivering meat products [for Mr. Food] on a few occasions, and painted houses for his relatives.
> (Apx p 72a, first Court of Appeals opinion p 5.)

As in the trial court, the Court of Appeals opinion stated (Apx p 76a, first Court of Appeals opinion p 5) that Mr. Reed "held himself out to the public as one who could perform general labor," and "plaintiff was an independent contractor" of unskilled labor services. The first opinion states that the evidence that Mr. Reed "held himself out to and rendered service to the public" was "undisputed" (*id.*). The opinion does not identify any member of "the public" to which Mr. Reed held himself out except Defendant itself and a few relatives.

D. SUPREME COURT REMAND TO TRIAL COURT

Defendants applied for leave to appeal. In lieu of granting leave, this Court vacated the Court of Appeals opinion and remanded to the trial court for findings of fact (Apx p 81, order). The order of remand required findings of fact by December 22. The trial court issued an order requiring the parties to submit proposed findings of fact by December 17.

E. TRIAL COURT'S FINDINGS OF FACT

The trial court submitted its findings of fact, dated January 9, 2004 (Apx pp 82a-93a, Findings of Fact).

The trial court found (Apx p 83a, Findings p 2) that "Buddy Lee Hadley was given the authority to exercise his discretion to engage whoever and whatever help he needed to complete his delivery duties." Despite this, the trial court found that when Hadley engaged the services of Ricky Reed, Reed was not an employee of Mr. Food.

With respect to the finding that Hadley had authority to hire "whoever and whatever he needed," the trial court went on to find that " 'Whoever' Hadley got on any given day to help him in his employment with defendant was 'whatever' day laborer was available . . ." (Apx p 90a, Findings p 7). The record contains no evidence that Hadley was ever assisted by anyone other than

Reed. On the contrary, there was testimony – by Plaintiff's witness Buddy Hadley -- that when Mr. Herskovitz said "whatever," he specifically meant Mr. Reed.

> A. Jerry [Herskovitz] is different than most people. He don't keep up with people's names and stuff. He would say, "Go get whatever." I know he was talking about Ricky when he said. And he never called Ricky's name specifically, but he called Ricky "Whatever," and I would go get him. (Apx p 27a, Trial Transcript vol II p 79)

The trial court found (Apx p 90a, Findings of Fact p 7) that Mr. Reed held himself out "to the public" as a painter, throughout his lifetime. The trial court referred to the fact that Reed sometimes painted relatives' houses, but the record contains no testimony of any general "public" holding out of any kind.

The trial court did not find that Reed did any holding out to the public with respect to delivery services. That was done exclusively for Mr. Food.

The trial court found that when Buddy Hadley came to get him, Reed "would leave his painting jobs for the day" (Apx p 90a, Findings of Fact p 7). The testimony was that Hadley would pick up Ricky Reed "[a]t his auntie's house," (Apx p 27a, Trial Transcript vol II p 79). The record contains no evidence that Plaintiff ever left a painting job to do Mr. Food's work.

The trial court held that the parties "all agreed [sic], at time of trial, that plaintiff was not an employee of Mr. Food on the date of the accident" (Apx p 91a, Findings of Fact p 8). The record shows that at trial the Defendants moved for dismissal of directed verdict precisely on the ground that Plaintiff **was** an employee (Apx p 38a, Trial Transcript vol III p 55). Plaintiff's witness, Buddy Hadley, testified that Defendant "gave Ricky a job" (Apx p 27a, Trial Transcript vol II p 79). In addition, Plaintiff himself had testified that "He let me go that time, but he didn't just say he didn't want me to work at Mr. Food anymore, because I got called in." (Apx p 45a, Trial Transcript vol III p 102). In his opening statement, counsel for Mr. Reed stated:

> MR. CARLISLE: On that day, Ricky Reed received a telephone call from Buddy Hadley, and asked him to work under-the-table for $40, as he had done several times since being let go from Mr. Food. And Mr. Herskovitz would pay him $40 to help Mr. Hadley deliver meat on his route in a big freezer truck.
>
> The evidence is going to show that not only had Mr. Herskovitz paid him in the past, but he as [sic: was] going to pay him to assist Mr. Hadley on this case."
> (Apx p 18a, Trial Transcript vol II p 24)

The trial court found (Apx p 91a, Findings of Fact p 8) that "there is no evidence of tax withholding [by Mr. Food]." The court did not refer to the fact that the record contains no evidence of tax filings by Mr. Reed as an independent contractor, such as quarterly returns or a schedule C.

The trial court concluded (Apx p 92a, Findings of Fact p 9) by finding that for there to be any contract, express or implied, "both parties must be aware of and agree to the terms of the contract."

F. REMAND TO THE COURT OF APPEALS

After the trial court's findings of fact reached this Court, Defendants filed a supplemental brief. In lieu of granting leave, this Court remanded to the Court of Appeals "for reconsideration of whether Plaintiff was an employee within the meaning of MCL 418.161(1)(l) and (n) in light of the Wayne Circuit Court's findings of fact."

The opinion of the Court of Appeals on remand is essentially identical to the opinion that this Court vacated. The new text consists of an introductory paragraph on page 1, a single paragraph on page 3 referring in general to the trial court's findings of fact, a single sentence on page 4, and half a sentence at the top of page 6. A few footnotes were adjusted to address procedural points (Apx pp 95a-104a, second Court of Appeals opinion).

The Court of Appeals thus did not expand upon or change its analysis between the first and second opinions. The reasoning of the vacated opinion is repeated unchanged in the post-remand opinion.

The post-remand opinion also restates the Court of Appeals' rulings on evidentiary issues raised in the first appeal (Apx p 100a-104a, second Court of Appeals opinion pp 6-10), though the order remanding to the trial court had specifically denied leave as to those issues and they were not briefed. Those issues are not before this Court.

Defendants sought leave to appeal, which was granted on January 13, 2005 (Apx p 105a, order).

SUMMARY OF ARGUMENT

The controlling issue presented in this appeal is whether a person who is paid cash by an employer for common labor on an infrequent basis is the "employee" of the employer, for purposes of the Worker Disability Compensation Act, when the worker is injured in the course and scope of the work for which the worker was paid by the employer.

The worker under these facts, Plaintiff Reed in this case, was an "employee" of Defendant on the date of his injury, because he was paid in cash for his labor in a bargained-for exchange.

A bargained-for exchange of cash for labor is the essence of an employment relationship, *i.e.,* a "contract of hire." The rule that satisfies the language of the statute and of the cases that have interpreted it is as follows:

> There is a "contract of hire" when there is a bargained-for exchange in which the worker receives or expects to receive, and the employer agrees to give, something that has economic value to the worker, outside of the work itself. Cash in any amount, paid as a result of a bargained-for exchange, will always meet this criterion because it is the classic form of wages. Some non-cash receipts will also satisfy this criterion of value outside the work, such as where a worker receives something that has value in his or her education and future career.

A secondary issue is whether Plaintiff Reed qualifies as an independent contractor with respect to the delivery services he was providing to Defendant. On that issue, there is no factual basis for a finding that in relation to the delivery services, Plaintiff Reed maintained a separate business, held himself out to and rendered service to the public, or was himself an employer as defined in the WDCA.

ARGUMENT

I. PLAINTIFF WAS WORKING UNDER A "CONTRACT OF HIRE."

Standard of review. The existence of an employment relationship is a question of law. *Walker v DSS,* 428 Mich 389, 396; 410 NW2d 698 (1987), citing *Askew v Macomber,* 398 Mich 212, 217; 247 NW2d 288 (1976). Likewise, "[t]he interpretation of statutes is a question of law." *Hoste v Shanty Creek Management, Inc,* 459 Mich 561, 569; 592 NW2d 360 (1999). "This Court reviews questions of law de novo." *Id.*

A trial court's findings of fact are reviewed under a "clearly erroneous" standard. *Chapdelaine v Sochocki,* 247 Mich App 167, 169; 635 NW2d 339 (2001).

A. The Statutory Definitions.

The law that governs the analysis is well established. Two provisions in the Worker Disability Compensation Act provide the controlling criteria. MCL 418.161(l) defines an employee as

> Every person in the service of another, under any contract of hire, express or implied . . ..
> MCL 418.161(1)(l)

MCL 418.161(1)(n) builds upon the definition in subpart **l,** and then defines characteristics that will move the worker from the category of "employee" into that of "independent contractor."

> Every person [1] performing service in the [2] course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person [3] in relation to this service [a] does not maintain a separate business, [b] does not hold himself or herself out to and render service to the public, and [c] is not an employer subject to this act.
> (MCL 418.161(1)(**n**); bracketed numerals and letters added for reference)

Under *Hoste*, Plaintiff must meet the tests of both sections to be entitled to benefits under the WDCA. If Plaintiff meets the test of subsection **l**, then the analysis proceeds to subsection **n** to determine whether he was an employee (and within the act) or an independent contractor. To put it another way, subsection **l** answers the question whether the worker was employed, and subsection **n** answers the question whether he was employed as an employee or as an independent contractor, carving out, in a sense, an exclusion to the broad category of MCL 418.161(1)(l).

In applying subsection **l**, the phrase "of hire" must be analyzed separately from "contract." Virtually any exchange meets the test of a "contract," but the "of hire" component is the statutory expression that links the work done to the WDCA.

As *Hoste* observes, "[t]here is minimal Michigan authority on what is a contract of hire, as distinguished from a relationship that is contractual but not 'of hire.'" *Hoste* at 573. The cases interpreting these sections are few, but they do provide the outline of a workable rule.

B. *Higgins*: Bargained-For Exchange Is Essential, Amount of Compensation Is Irrelevant.

One such case is *Higgins v Monroe Evening News,* 404 Mich 1; 272 NW2d 537 (1978), in which the plaintiff, a young boy, was helping a substitute carrier deliver papers. The substitute was paid $1.50 and would often "buy [his helpers] pop, candy, or give them a dime." *Higgins* at 13. *Higgins* holds that the **amount** of compensation is irrelevant.

> Nor can the triviality of the consideration or remuneration to an employee be used as a barrier to receiving compensation. Neither the statutory provisions nor case law supports such a proposition. In fact, § 418.371 which specifically provides for calculation of wage loss compensation for part-time employees refutes any allegation that a minimum wage or number of hours worked per week are necessary in order to receive compensation. . . . Therefore, we specifically hold that the amount of employee remuneration alone cannot act as a bar to disability compensation payments. *Higgins* at 16.

In *Higgins,* the plurality ruled that the plaintiff was not employed under a contract of hire, but did so for reasons other than the amount of compensation. The substitute carrier would sometimes give the helper candy or pop or a dime, but not always. He testified that "the boys went along to deliver the papers because his mother wanted the children out of the house." *Id.* at 21. Therefore, the court concluded, there was no "bargained-for exchange" of services for payment, and no contract of hire:

> Thus, to reach the conclusion that a contract of hire existed, we must be able to state that each of the two parties, Handler [substitute carrier] and the plaintiff intended to suffer a detriment to receive a benefit, and that they agreed to exchange those detriments and benefits
> (*Higgins* at 21)

Higgins provides two principles. First, there must be a bargained-for exchange of payment for labor. Second, the amount of the compensation that was bargained for is irrelevant.

C. *Betts*: Non-Monetary Compensation Is Sufficient.

Another case, decided shortly before *Higgins*, is *Betts v Ann Arbor Public Schools,* 403 Mich 507; 271 NW2d 498 (1978). In *Betts*, the worker was a student teacher. He was a student majoring in physical education at the University of Michigan. One of the requirements for his degree was that he do some "student teaching" under the supervision of a certified teacher, which included teaching classes and grading papers. At the end of one of his student teaching classes at a junior high school, his students attempted to throw him in the pool, which was a tradition for the students but unknown to the student teacher, Mr. Betts. Betts resisted and was injured in the course of his struggle. This Court held that he qualified as an employee even though he received no cash payment. The court in *Betts* noted that Mr. Betts qualified as an employee under a

definition applicable to the public sector, but also went on to consider the "contract of hire" criterion. The Court said:

> Betts' relationship with the Ann Arbor Public Schools had the earmarks of a commercial relationship. Betts was not a volunteer, nor was the school district required to accept a student teacher. Those who perform services gratuitously are generally excluded from the definition of "employee," but the payment necessary to establish a contract of hire need not be in money

Note that *Betts*, like *Higgins*, applies the "bargained-for exchange" principle, though not in so many words. This is the import of the statement that Mr. Betts was not a volunteer and the school system was not required to accept him. Where *Betts* perhaps extends *Higgins* is in applying the principle to a non-cash exchange. "Perhaps" is an appropriate qualifier because the *Higgins* court did not appear to be concerned with whether the substitute carrier's payment for the helper was in cash or in kind. Instead, it was other factors that controlled the result in *Higgins*: payment was occasional and voluntary and a motivating factor was babysitting ("his mother wanted the children out of the house"). *Higgins* at 21. On *Betts*, though, the exchange was bargained-for and the benefit received by the worker was of substantial and lasting value: credit toward a degree and certification as a teacher.

D. *Hoste*: "Accommodations" Distinguished from Wages.

Hoste v Shanty Creek Management, Inc, 459 Mich 561; 592 NW2d 360 (1999) is the next and most recent application of the contract of hire requirement. In *Hoste*, the plaintiff was a weekend ski patroller. Shanty Creek had two categories of ski patrollers, "professional," who worked during the week and "volunteer," who worked on weekends.

> Although none of the members of the weekend patrol received wages, each was accorded other benefits in exchange for services. The benefits included not having to pay for lift tickets, skiing privileges for family members, free hot beverages, and reduced prices on certain meals and merchandise.
> *Hoste* at 565.

Hoste referred to *Higgins* for the importance of the "for hire" element and *Betts* for general principles, but did not criticize or reject the analysis of either.

Hoste contains some language that, taken out of context, could be interpreted as rejecting the *Higgins* principle that the amount of compensation is irrelevant. For example, *Hoste* describes the payment as "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 . . .." *Hoste* at 576. The opinion also states that the lift tickets and other benefits were "not substantial enough to induce a reasonable person to forfeit his common law rights . . .." *Id.* at 577.

Read in isolation, these can be read to suggest a variable quantitative measure based on the economic value received, and possibly a subjective test of what a "reasonable person" might think. At least that is what Plaintiff may argue. Note that if we were to interpret *Hoste* as applying a subjective test, then it is relevant that Plaintiff himself as well as his counsel, believed there to be an employment relationship until the implications of that fact were brought to their attention.

> MR. CARLISLE: On that day, Ricky Reed received a telephone call from Buddy Hadley, and asked him to work under-the-table for $40, as he had done several times since being let go from Mr. Food. And Mr. Herskovitz would pay him $40 to help Mr. Hadley deliver meat on his route in a big freezer truck.
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> The evidence is going to show that not only had Mr. Herskovitz paid him in the past, but he as [sic: was] going to pay him to assist Mr. Hadley on this case.
> (Apx p 18a, Trial Transcript vol II p 24)

Ricky Reed testified that although Mr. Food had ended his full-time employment, he continued to work for Mr. Food from time to time: "He let me go that time, but he didn't just say he didn't want me to work at Mr. Food anymore, because I got called in." (Apx p 45a, Trial Transcript vol III, p 102).

But *Hoste* did not adopt either a subjective or a quantitative test, and the parties opinions as to Plaintiff Reed's employment status are irrelevant. Instead, *Hoste* applied an objective test that focused on the qualitative nature of what was received.

> The privileges of free skiing, complimentary hot beverages, and meal discounts given to Plaintiff on the days he patrolled were an "accommodation" to plaintiff in his patrol services. To give Plaintiff free transport to the top of the slopes so as to allow him to begin his patrolling is not to benefit him, but rather to do the minimum that must be done if Shanty Creek's patrons are to receive the benefit of his safety services. In addition, offering free hot beverages and meal discounts to plaintiff after he had been outside patrolling merely shows that the resort accommodated the needs of cold patrollers, whom the resort wanted warmed and back on the hills as soon as possible. As to the family skiing privileges and discounts at the resort's stores plaintiff received, these were a "gratuity" – of nominal cost to the resort and nominal value to plaintiff, and in no sense represented a "regular income source" . . ..
> *Hoste* at 577.

Thus, *Hoste* was applying a **qualitative** test, looking at the **nature** of what was provided. This is made clear in footnote 11, where the majority replies to the dissent, saying "the overarching principle that the 'of hire' element requires that the payment have been intended as wages" (*Hoste* at 576, note 11). In *Hoste*, nothing that the plaintiff received was anything like wages. Wages, paid as cash, are transferable value. The cash can be used for any purpose. Discounts and lift tickets have value, to be sure, but they are not like wages because they are not transferable. Their value consists solely in the use of them by the recipient. This is why the *Hoste* opinion characterizes them as "accommodations."

E. A Contract of Hire Exists When there Is a Bargained-For Exchange of Labor for Cash or for Other Consideration that Is Transferable or Has Substantial Economic Value.

With *Higgins, Betts* and *Hoste* as background, it is possible to formulate a rule. These are the principles that can be extracted from the cases:

1. A bargained-for exchange is necessary. Where the benefit the worker hopes for remains in the discretion of the payor, there is no bargained-for exchange and no employee relationship (*Higgins*).

2. Where the exchange is bargained for, the amount is irrelevant (*Higgins*).

3. The benefit to the worker need not be cash, where it has other economic value separable from the work itself, such as furthering one's education or qualification in a profession (*Betts*).

4. Where the putative employer pays no cash but merely provides the means that make a volunteer's work possible (discounts on food, and lift tickets to a ski patrol member) or benefits that are incidental, non-transferable and limited in duration to the work itself (lift tickets for the family, and discounts at the ski shop) , there is no payment in the nature of wages and no contract of hire (*Hoste*).

Based on those principles and the statutory language, the rule can be formulated as follows:

1. There is a "contract" whenever there is an agreed exchange of work for something of value.

2. There is a "contract of hire" when there is a bargained-for exchange in which the worker receives something that has value outside of and beyond the work itself. In colloquial terms, there is a contract of hire when the worker expects to take something away after the work is done. Cash in any amount, the traditional form of wages, will always meet this criterion. Some non-cash receipts will also satisfy this criterion, such as the situation in *Betts*, where the worker received something that had value in his future career, and therefore beyond the duration of the work itself.

The lift tickets in *Hoste* had some value outside the work in that they could be used by Mr. Hoste's family, but they were personal to the ski patroller, non-transferable and of limited duration. It might be argued that the teaching degree and certification that was the ultimate benefit to be received by the student teacher in *Betts* was also personal and non-transferable, but unlike the limited life and utility of the lift tickets, the degree and certification had value that

both extended far beyond the duration of the student teaching contract, and would translate to substantial economic value.

1. The amount of payment is irrelevant.

Higgins holds explicitly that the amount of the compensation is irrelevant, and the worker compensation schedules also reflect this. The schedule published by the Worker Compensation Bureau starts at a wage of $1 per week (Apx p 106a, schedule of benefits).

If Plaintiff Reed is held to be an employee, he will be entitled to wage loss, a percentage of his average weekly wage. Moreover, if the disability continues for two years, the wage loss benefit can be raised to 50% of the State Average Weekly Wage. MCL 418.356(1). He will also be entitled to lifetime medical care.

As is noted above, there is language in *Hoste* that, read out of context, can be taken to suggest that there is some kind of quantitative measure, but that is a misreading of *Hoste*. Apart from its conflict with Higgins, the absence of any stated dollar amount in the WDCA, and the structure of worker compensation (Apx p 106a), it introduces an insoluble problem: how much is enough? Here the choice is between an artificial line and an unworkably vague one. It is possible to have a clear rule by relying on an artificial line such as, for example, whether the pay is above or below minimum wage, but apart from being artificial, the effect is to deny benefits, the only certain recovery for an injured worker, to the lowest paid. The other choice is the unworkably vague one, to draw the line based on some other standard, a subjective measure of how much is "enough." This would lead to endless disputes and appeals.

The trial court sought to apply a quantitative test and held that the compensation Plaintiff received was de minimis. The trial court did this by spreading the money he received when he worked over the periods when he did not work. Thus, in the findings of fact, the trial court

focused on the occasional nature of the work and the amount paid ($35-40 per day), conceding that this was "not de minimis" (Apx p 91a, Findings of Fact p 8). But then the trial court divided the total compensation by the number of days worked over the entire period of time, thus arriving at an assumed "wage" of "less than $1 per day over the entire period" (Apx p 92a, Findings of Fact p 9). The trial court held that this amount "can under no circumstances, in modern times, sustain any factual finding of substantial" (*id.*).

This conflicts with the *Higgins* principle (and the Bureau's standards – Apx p 106a) that the amount is irrelevant. Beyond that, it introduces its own artificiality – by ignoring the specific transaction and hypothesizing some derived amount based on events outside the actual relationship. It also leaves the parties in a future case to try to prove how much is "enough" income to entitle a worker to benefits. Since the existence of an employment relationship is a threshold question that must be resolved to determine whether the court has subject-matter jurisdiction over the tort claim, *Harris v Vernier,* 242 Mich App 306; 617 NW2d 764 (2000), this is an invitation to interlocutory appeals. It also puts any part time or occasional worker in jeopardy as it relates to receiving benefits.

At this point it is important to look beyond this case. Plaintiff Reed chose to ignore his worker compensation remedy and try a tort recovery. This was not his choice to make under Michigan's WDCA. But the rule he advocates, if adopted, would place many beyond the protection of the act. In this case, Plaintiff could maintain a tort claim based on his employer's liability as owner of the vehicle and as employer of Buddy Hadley. But had he just hurt his back carrying a heavy load, he would be without a remedy. The issue for Plaintiff Reed is which form of compensation he receives, but for others there will be no remedy. The purpose of the WDCA is to avoid exactly that situation. That is why the rule must be based on neutral principles.

2. There was a bargained-for exchange of labor for cash.

Here, there was a bargained-for exchange. Plaintiff Reed testified that if he had not been paid, he would not have done the work:

> Q. Do you think you would have gone with Mr. Hadley if you weren't going to make any money on that day?
>
> A. No.
> (Apx p 32a-33a, Trial Transcript vol II pp 84-85)

Plaintiff's friend, Buddy Hadley, testified that the employer, Jerry Herskovitz, principal of Mr. Food, expected to pay and Buddy was the conduit for that payment.

> Q. Jerry would pay him?
>
> A. He would give the money to me and I would pay him.
>
> Q. And how much money would he pay him for working on your truck after he was fired? How much would he get for a day?
>
> A. It depends on how long I was – what we had to do. It could be anywhere from $35 to $40. It depends on what we have to do.
>
> Q. $35 to $40?
>
> A. It could have been, just like that. It depends on what you have to do that day.
> (Apx pp 28a-29a, Trial Transcript vol II, pp 80-81)

Although the amount of payment is not relevant under *Higgins*, it may be worth noting that the wage paid here was approximately $5.00 per hour, roughly equivalent to the minimum wage of $5.15.

II. PLAINTIFF WAS NOT AN INDEPENDENT CONTRACTOR "IN RELATION TO" HIS SERVICE FOR DEFENDANT.

Standard of review. As is stated above, the standard of review is de novo.

In this case the dispositive issue is the first one – whether Plaintiff was working for Mr. Food under a "contract of hire, express or implied." Although the lower courts did elect to treat Plaintiff as an independent contractor, there was actually no evidence at all that he was an independent contractor, either in general or more specifically as to the work he did for Mr. Food.

As is noted above, the majority in *Hoste* holds that a person seeking the status of employee must meet both the criteria on MCL 418.161(1)(l) – "contract of hire" – and also the criteria of MCL 418.161(1)(n), which distinguishes employees from independent contractors.

The majority and dissent in *Hoste* saw the relationship between the two subsections differently. The dissent treats **n** as a separate and distinct path to qualifying as an employee, rather than solely an "independent contractor" exclusion. For purposes of this case, the result is the same, because Plaintiff meets the contract of hire requirement and does not meet the independent contractor exceptions. Still, it is worth observing that the dissent's interpretation is supported by the fact that the two requirements are stated separately in the statute, and neither refers to the other. Had the legislature intended to combine them it could have done so by the simple expedient of blending them, in this way.

> Every person in the service of another, under any contract of hire, express or implied, ~~Every person~~ <u>and</u> 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.

Instead, the legislature chose separate sections and the choice of separate sections implies separate criteria. The difficulty with that analysis is that it suggests that a person could meet the

contract of hire requirement in subsection **l** and be classified as an employee even if he or she was also an independent contractor under subsection **n**. The only way to resolve that difficulty is to import, into the "of hire" language in subsection **l,** the negating criteria of subsection **n**, holding that someone who qualifies as an independent contractor under the criteria of subsection **n** is thereby held to be employed under a "contract," but not a "contract of hire." That is the result the majority reaches in its analysis when it links the two, though it expresses it in different terms (*Hoste* at 573).

In any event, the significance of subsection **n**, on either view, is that it defines the criteria that will move a worker from the category of employee into that of independent contractor. The criteria of MCL 418.161(1)(n), again, are:

> Every person [1] performing service in the [2] course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person [3] in relation to this service [a] does not maintain a separate business, [b] does not hold himself or herself out to and render service to the public, and [c] is not an employer subject to this act.
> (MCL 418.161(**n**); bracketed numerals and letters added for reference)

Under these criteria, Plaintiff Reed cannot be an independent contractor.

Plaintiff was "performing service" because he was carrying Defendant's products from the truck to a customer. He was performing this service "in the course of the trade, business, profession or occupation of an employer at the time of the injury," because the products he was delivering were the products that Mr. Food sold to its customers. The business of Mr. Food was selling food products and Plaintiff Reed was delivering those products. Plaintiff did not maintain a separate delivery business or hold himself out to the public as available to provide delivery services. He worked when Buddy Hadley told him Mr. Food would pay him for his help.

The third phrase, "in relation to this service," is important because it limits the scope of the three criteria that follow to the specific work at issue. In this case, the trial court made findings of fact that Mr. Reed was an independent contractor when he painted houses "mostly for relatives." The trial court, and then the Court of Appeals, used that finding to classify Plaintiff as an independent contractor for **all** purposes. Under that analysis, someone who is even a full-time bookkeeper for ABC Company, but also does handyman work on the weekends with his or her own materials and equipment, is not an employee of ABC Company. That would have a devastating effect on the availability of worker compensation benefits, as well as ignoring the plain language of the statute.

A. Plaintiff Did Not Maintain a Separate Delivery Business.

The work that Plaintiff was doing when he was injured was delivering products to customers. There was no evidence at all in the record that Plaintiff ever delivered any products for anyone besides Mr. Food, let alone that he maintained a separate delivery business. He had no truck or any other equipment for such a business. The trial court and the Court of Appeals erred when they held that Plaintiff Reed's occasional painting for relatives qualified him as an independent contractor, because they ignored the language of the statute that any separate business must be in "relation to **this** service," *i.e.,* the work he was doing for Defendant.

B. Plaintiff Did Not Hold Himself Out to or Render Delivery Service to the Public.

Again, the service at issue is delivery service. Just as Plaintiff Reed did not maintain a separate delivery service, neither did he hold himself out to the public as available to provide delivery services. He did not canvass businesses, post fliers or take out advertisements. The trial court and Court of Appeals erred when they aggregated his painting for relatives and his work

for Mr. Food into a "holding out" to the general public. In actuality, there was no evidence of any holding out by Plaintiff even to his relatives, but if there were, it would not matter. The only evidence relating to delivery was that from time to time he would be asked by Mr. Food, through Buddy Hadley, to help with deliveries. In short, he did this work for one person only. If working for one employer could satisfy the "holding out" requirement, then no worker would ever qualify as an employee.

C. Plaintiff Was Not an "Employer Subject to This Act."

Plaintiff does not claim that he met the criteria of being an "employer subject to" the WDCA, and no evidence would support such a claim. MCL 418.151(b) defines this term. Apart from governmental agencies, the term is defined as:

> (b) Every person, firm, limited liability company, limited liability partnership, and private corporation, including any public service corporation, who has any person in service under a contract of hire . . .

Mr. Food qualifies because it had employees, one of whom was Buddy Hadley. But Plaintiff Reed does not.

In short, Plaintiff Reed met none of the criteria which would have moved him from the category of employee of Defendant into that of independent contractor to Defendant.

Summary

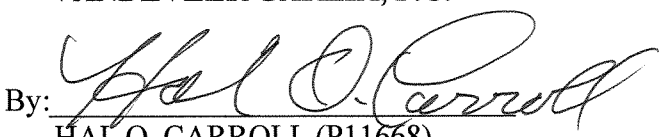
Plaintiff Reed worked for wages. He and Defendant, with Buddy Hadley (Defendant's acknowledged employee) as intermediary, agreed to an exchange of labor for cash. This is the purest form of a contract of hire, and qualifies him as an employee of defendant, entitled to worker compensation benefits but barred from suing in tort.

RELIEF REQUESTED

Defendants-Appellants request that this Court reverse the opinion of the Court of Appeals and remand this case to the trial court with instructions to dismiss the claim against Defendants-Appellants with prejudice.

Respectfully submitted,

VANDEVEER GARZIA, P.C.

By: 

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