STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
No. 236588

Wayne County Circuit Court
No. 98-839576 NI
Hon. Wendy M. Baxter

RICKY REED,

Plaintiff-Counter-Defendant-Appellee, Docket No. 126534

vs.

LINDA SUSAN YACKELL,

Defendant and Cross Defendant,

and

BUDDY LEE HADLEY, GERALD MICHAEL HERSKOVITZ and MR. FOOD, INC.,

Defendants, Counter-Plaintiffs,
Cross-Plaintiffs-Appellants.

BRIEF ON APPEAL—APPELLEE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF QUESTION PRESENTED

I

WAS PLAINTIFF AN EMPLOYEE OF DEFENDANT MR. FOOD, INC., AT THE TIME HE WAS INJURED, SO THAT HIS CLAIM IS BARRED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKER'S DISABILITY COMPENSATION ACT?

The trial court answered . . . . . "No"

The Court of Appeals answered . . . . . "No"

Defendant-Appellants claim the answer is . . . . . "Yes"

Plaintiff-Appellee states the answer is . . . . . "No"

COUNTER-STATEMENT OF FACTS

This action involves a catastrophic traumatic brain injury ("TBI") to Plaintiff Ricky Reed, arising out of an auto accident which occurred on May 7, 1998. Mr. Reed was a passenger in a cargo van owned by Defendant Gerald Michael Herskovitz and being driven by Defendant Buddy Lee Hadley, while Hadley was in the course and scope of his employment with Defendant Mr. Food, Inc., which was owned by Herskovitz (Apx pp 15b-19b, 22b, 10/25/00 Trans., test. of G. Herskovitz).

Defendant Linda Susan Yackell was driving her 1989 Cougar westbound on McClellan, traveling towards the freeway service drive from Gratiot on the date of the accident. She candidly acknowledged that her brakes had been making noises, which she recognized as a warning that they were failing even before that day. She had no money, however, and couldn't afford to have the brakes repaired. When she approached the intersection of McClellan and Harper, the traffic light was red for her and she tried to stop her vehicle. She pumped her brakes, but they failed and Yackell entered the intersection on the red light. Her car then stalled and did not go all the way through the intersection. Ms. Yackell tried to make a "hard right" turn as her Cougar coasted into the intersection against the light, but the steering wheel had locked and she could not turn it. Yackell at this point had no control over her vehicle at all. She believes that she saw the cargo van being driven by Mr. Hadley approaching the intersection on Harper, coming through on a green light and threw herself across the front seat to try and avoid serious injury from the impact she thought was imminent (Apx pp 2b-10b, 10/25/00 Trans., test. L. Yackell).

Unfortunately, Defendant Hadley was paying no attention whatsoever to what was happening around him on the road as he proceeded northbound on Harper that day. As Hadley approached the intersection of Harper and McClellan, the light turned green for northbound Harper traffic. He saw the Yackell vehicle approaching the intersection from his right, but it was moving slowly and Hadley thought she was going to stop for the red light. At that moment, Buddy Lee Hadley pulled the paperwork relating to upcoming deliveries out of his pocket and began to examine them, becoming completely oblivious to all other traffic around him. Hadley didn't know how to read and admitted he was trying to identify the bills with regard to the deliveries by another means. He acknowledged that this required him to take more time to sort through them than it would have taken someone who could read. Hadley's objective was to have the paperwork in order before he got to the next delivery stop and thereby minimize the time spent at each stop. Interestingly, it was not at all unusual for this Defendant to be looking down at paperwork rather than observing other traffic while he was driving and in the process of delivering meat. Instead, this was the regular method he employed as he drove to organize deliveries and their related documentation. Mr. Hadley only became aware that Yackell's automobile had entered the intersection after Plaintiff had shouted, "Look out!" three times. By the time he did look up from the paperwork in his lap, Hadley was right on top of the other vehicle (Apx pp 30b-31b, 34b-37b, 38b, 46b-49b, 50b-52b, 10/25/00 Trans., test. of B.L. Hadley).

Yackell's vehicle was totaled in the collision that followed and Hadley was afraid he might have killed her, in light of the extensive damage to her car. The cargo van was undriveable until a wrecker pulled the front bumper/fender back off the tires. Ricky Reed

struck his head on the windshield with the impact and lost consciousness. Reed was slumped forward after the accident until Hadley reached over and pulled him back. During the period of time Hadley was driving him to the Detroit Receiving Hospital Emergency Room, Plaintiff, even though he had regained consciousness, just "sat there like he was a zombie" without saying anything. Ricky Reed's head was bandaged when he was released and Buddy Lee Hadley drove him home (Apx pp 39b-43b, 10/25/00 Trans., test. of B.L. Hadley; Apx p 7b, test of L. Yackell; Apx pp 66b-67b, 10/26/00 Trans., test. of Plaintiff).

At trial, Hadley admitted his actions contributed to the accident, as he couldn't stop in time because he was looking down at the bills relating to his deliveries rather than at the road. His conduct in this regard was crucial, as the cargo van, being heavily loaded at the time, required an even greater distance to stop (Apx pp 46b-49b, 10/25/00 Trans., test. of B.L. Hadley).

Twelve days after the accident, on May 19, 1998, Plaintiff was seen by Ram Gunabalan, M.D. Dr. Gunabalan is board-certified in nuclear medicine and board-eligible in internal medicine. Nuclear medicine is a specialty involving the diagnosis of a variety of disorders, including those of the brain, through special technology. The diagnostic process is accomplished by injecting radioactive materials into the patient, which are allowed to concentrate in a specific organ. Specialized instruments are then used to obtain an image of the organ being scrutinized. At the time of his 10/17/00 deposition in this cause, Gunabalan was the CEO of Madison Community Hospital and had run the hospital in that capacity since April, 1999. Prior to that time, however, Dr. Gunabalan was the director of a clinic called "Preferred Medicine" and supervised all of

the operations there. It was in that capacity that he examined Ricky Reed (Apx pp 111b-116b, 10/17/00 Dep. of Dr. Gunabalan, read into the record but not transcribed).

On May 19, 1998, Ricky Reed complained to Dr. Gunabalan of being confused, dazed and disoriented, headaches accompanied by blurred vision in his right eye, memory loss, dizziness, speech problems, changes in his sense of taste and smell and sleep disturbances. Dr. Gunabalan explained that those complaints were very typical of a closed-head injury sustained in an accident, as the brain was basically a mass of tissue floating on a cushion of cerebral spinal fluid within the skull. The sudden, violent motion of a motor vehicle accident jars and squeezes the brain against the skull, a process which can rupture the brain's fibers and thereby cause actual physical damage to the brain itself. Loss of cerebral function follows, the specifics of which depend on which fibers were compromised. Those that Plaintiff complained of where highly suggestive of a closed-head injury. A mini-mental test Gunabalan performed on Reed, involving such tasks as counting backwards from 100 by subtracting sevens or naming the last five presidents was also positive (Apx pp 116b-121b, 10/17/00 dep. of Dr. Gunabalan, Apx p 150b, 03/29/00 video dep. of Dr. Bradley Sewick, shown to the jury but not transcribed in the trial record).

Accordingly, Dr. Gunabalan diagnosed a closed-head injury, recommended a consultation with neurologist Dr. Lee Silverman, referred Mr. Reed to neuropsychologist Dr. Brad Sewick, scheduled a SPECT scan of the brain and recommended a neuropsychiatric evaluation. Dr. Silverman evaluated Plaintiff and concurred with the diagnosis of a closed-head injury. Neuropsychologist Dr. Bradley Sewick evaluated Reed and administered a battery of neuropsychological tests on July 3, 1998. Dr.

Gunabalan explained that a neuropsychologist is trained to test a variety of cerebral functions in detail, using numerous tests performed over an extended period of a day or two. Such a neuropsychological evaluation is a very definitive test of a traumatic brain injury ("TBI"). In Gunabalan's regular practice as a medical doctor, he would rely on the results of such evaluations. Dr. Sewick reported to Gunabalan that the results of Plaintiff's evaluation indicated Reed had cerebral impairment in the areas of smell, attention capacity, complex information processing, novel problem solving and emotional functions. Sewick also found Ricky Reed to be depressed, defensive, suffering from personality changes and chronic fatigue. He concurred with Dr. Gunabalan that Plaintiff had sustained a closed-head injury involving an actual impairment of brain functioning. Gunabalan felt that there was no doubt at all that Reed had suffered a TBI (Apx pp 122b-128b, 10/17/00 dep. of Dr. Gunabalan).

D.O. Dr. Bradley Klein conducted the neuropsychiatric examination of Ricky Reed which Dr. Gunabalan requested. He also diagnosed a TBI secondary to the auto accident of May 7, 1998. Every test Gunabalan has had Plaintiff undergo has come back with that very same conclusion, with no inconsistencies whatsoever, including the SPECT scan that was ordered (Apx pp 129b-130b, 134b-135b, 10/17/00 dep. of Dr. Gunabalan).

A SPECT scan (single proton emission computerized tomography) is a nuclear medicine procedure involving the injection of radioactive material into the patient's body which selectively concentrates in the brain. An image is then obtained and areas of the brain which do not concentrate or absorb the material properly indicate deficits within the brain and areas of dysfunction. In a normal individual, the radioactive material is

absorbed/concentrated uniformly. A SPECT scan for a TBI is one of the more definitive tests in imaging. M.D. Peter Nefcy, who is board-certified in nuclear medicine and radiology, performed a SPECT scan on Mr. Reed on August 28,1998. Plaintiff's resulting images showed multiple areas of deficits/lack of concentration of the radioactive substance completely consistent with a TBI. More specifically, Dr. Nefcy found multiple small areas of diminished activity present in the cortices, reflecting multiple injuries to the brain/dysfunction consistent with a closed head injury. The multiple deficits reflected in the SPECT scan relate to the same episode of trauma, rather than different incidents or accidents (Apx pp 130b-133b, 10/17/00 dep. of Dr. Gunabalan).

Dr. Gunabalan explained that as a result of the injury to his brain, Plaintiff is unable to maintain his concentration. He may be unable to remember things that happened only an hour earlier. Consequently, he can't be given a job or task with any real expectation that he will complete it. His dizziness, loss of memory capacity and confusion are directly related to the auto accident. These areas of brain dysfunction are highly significant and permanent in nature. Consequently, Ricky Reed will never be able to perform tasks or resume activities he was capable of before the accident occurred (Apx pp 135b-141b, 10/17/00 dep. of Dr. Gunabalan).

As noted above, Dr. Bradley G. Sewick conducted a complete Halstead-Reitan neuropsychological examination of the Plaintiff for purposes of facilitating treatment in July, 1998. Sewick is a clinical neuropsychologist with a doctoral degree in clinical psychology, with specialization in neuropsychology. He is not only board-certified in neuropsychology, but also holds a seat on the board itself as one of the examining board

members. Mr. Reed was referred to Dr. Sewick by neurologist Dr. Lee Silverman. Sewick explained to the jury that a neuropsychological examination is really a survey of the patient's different mental functions, including the ability to concentrate, remember, solve problems and emotional functioning. A SPECT scan, in contrast, is useful for clinical correlation of the patient's diagnosis and to objectively demonstrate what areas of the brain were damaged, but does not indicate how such damage will affect a patient's behavior or ability to function in daily life. The neuropsychological test battery usually takes about 12 hours to administer and has various validity indicators designed into it to determine whether a patient is giving his best effort. Plantiff's test results generated a deficit scale score of 46, indicating moderate brain damage and impairment. Dr. Sewick testified that the test results have a very high degree of statistical certainty in pinpointing the presence of significant brain damage. More specifically, Reed's results revealed deficits in the areas of his sense of smell, attention capacity, ability to maintain focus or concentration, switching focus or concentration from one area to another and then back again and speed of information processing. He also demonstrated symptoms of depression, fatigue and complained of personality changes and sleep disturbance. All of these are extremely typical of a TBI (Apx pp 143b-149b, 151b-154b, 156b-159b, 167b-168b, 03/29/00 dep. of Dr. Sewick).

The test battery results reflected multiple areas of brain damage, which is usually the case with a TBI. While it relates to a single accident, it is referred to as multi-episodic when the injury is manifested in different brain regions. TBI also produces a "patchy-type of impairment pattern -- such patients may look, walk and talk in an apparently normal fashion, but they are far from normal. Both the neuro-psychological

test battery and Plaintiff's SPECT scan were consistent in this respect. Plaintiff's particular deficits would manifest themselves in an inability to direct and guide his behavior, he would be less spontaneous, less driven, less able to follow through on plans on even a very simple basis, difficulty in maintaining employment, in solving even simple but new problems during work, and in maintaining his attention. He would also experience changes in his personality, a reduced efficiency in living, a diminished capacity to be productive in life and even to enjoy life itself. Dr. Sewick explained with regard to the latter that the ability to enjoy life is primarily determined by the nature of a person's relationships with people and the activities one can engage in and perform. An inablility to participate in both the way one did previously results in reduced enjoyment of life. It is quite clear that Ricky Reed suffered a TBI in the 05/07/98 auto accident and all of these problems will be permanent. (Apx pp 155b, 159b-166b, 169b, 03/29/00 dep. of Dr. Sewick).

While Philip C. Liethen, Ph.D. conducted a defense evaluation of Plaintiff and administered the same neuropsychological test battery in August, 1999, the testimony of this non-board-certified neuropsychologist was simply incredible at best and reflective of gross fabrication at its worst. This witness admitted that the cumulative index of Ricky Reed's scores on the test Liethen administered was consistent with Sewick's results and fell well within the impaired range, which would be consistent with a brain injury. Liethen felt no obligation to limit himself to or abide by the objective test scores however, and claimed that Reed's impaired performance simply reflected the fact that he had less fundamental ability in the impaired areas than other people had to start with. According to this witness, Ricky Reed's performance only meant that he was "just less

good at stuff" than other people were. In coming to this conclusion, Liethen placed considerable emphasis on his claim that Reed had told him that he felt he had no problems, did not report any cognitive difficulties and that he remained able to "get himself from point A to point B and do things largely [as well as he ever did?] in his life." It should be noted that this witness didn't even remember actually meeting with Ricky Reed (Apx pp 171b-181b, 186b-188b, 191b-196b, 201b-203b, 04/28/00 video dep. of Philip C. Liethen, PhD, played to the jury but not transcribed into the trial record).

Plaintiff's own responses to a questionnaire given him by Liethen, his responses to numerous questions on the MMPI2 (personality test) portion of the test battery and the testimony of lay witnesses concerning the drastic change in Plaintiff's behavior and abilities before and after the auto accident clearly belied Liethen's claims, however. Liethen, on the date of the defense evaluation, gave Plaintiff an intake form. The first seven questions of this questionnaire dealt with the person's own perception of their abilities in such areas as concentration, memory, speech, vocabulary, clarity in thinking and the like. Liethen acknowledged that people are given this form to give them an opportunity to identify problems they are experiencing, with numbers from one to five to be circled. Ricky Reed gave himself low numerical scores in all of those areas (Apx pp 182b-186b, 189b-190b, 04/28/00 dep. of Liethen).

Liethen was also forced to admit that on the MMPI 2 portion of the test battery, a tape recording of various questions was played to Plaintiff and that in response to question 75, he responded that he did <u>not</u> usually feel that life was worthwhile; in answer to #92, Reed indicated he did not seem to care what happened to him; he responded that he certainly felt useless at times to #130; that he wished he was dead most of the time in

answer to #303; that he had recently considered killing himself in response to #506; that he had thought a lot about killing himself lately in answer to #520; that there was something wrong with his mind in response to #180; that he was unable to keep his mind on one thing in answer to #299; that he had strange and peculiar thoughts in response to #316 and that he felt he had greater difficulty in concentrating on things than others seemed to have in answer to #325 (Apx pp 197b-200b, 04/28/00 dep. of Liethen).

Any remaining credibility regarding Liethen's claim that Reed's impaired score on the test battery simply meant that he was less well-endowed in certain areas than others to begin with was shattered by the testimony of lay witnesses who had noted drastic changes in Ricky Reed after the accident.

Defendant Buddy Lee Hadley had known Plaintiff for ten or eleven years by the time of trial and they had both worked and socialized together. Before the accident, Hadley described Reed as a "regular guy", one who was outgoing and physically active in recreational or casual sports, would tell funny stories and had a good sense of humor. Since this auto accident, however, Ricky Reed tends to babble on and on about trivial things at times; is generally unable to carry on a meaningful conversation, instead making inappropriate responses to things that were said, is no longer outgoing and seems to have lost his sense of humor entirely (Apx pp 25b-29b, 44b-45b, 10/25/00 Trans., test. of B.L. Hadley).

Alan Coker is Ricky Reed's cousin and has known the Plaintiff all of his life. He testified that Reed used to be very outgoing and bright. Plaintiff is a high school graduate and went on to serve in the military service for six years as a radar and missile mechanic. Before the 05/07/98 accident, Ricky Reed was always self-sufficient, well able to take

care of himself. Since that auto accident, Plaintiff is unable to even maintain a simple conversation -- his mind just cannot focus on a given topic. If a question is posed to Ricky Reed, his answer may or may not be responsive. Consequently, Reed has retreated inwards, staying mostly to himself now. Plaintiff lives with Mr. Coker at present and the latter has to take care of him, since Reed does very few things on his own now. Ricky Reed has to be told to get dressed, to get out of bed in the morning, to maintain his personal hygiene, to be taken to work (at McDonalds doing janitorial work) and generally must be treated as a child. He is not responsible and is no longer capable of taking care of himself without assistance (Apx pp 54b-64b, 10/26/00 Trans., test. of A. Coker; Apx pp 68b-70b, 74b, 78b, test. of Plaintiff).

Plaintiff himself testified that while he is able to remember facts and events preceding the 05/07/98 accident well, he has great difficulty remembering new things. Various personnel at the Rehabilitation Centers of Michigan, where he treated, explained to Mr. Reed that a TBI would leave those earlier memories reflecting information that had already been stored in his brain unimpaired, but leave him with significant difficulty in retaining new information. Since the accident, he has no sense of smell and also has blurred vision in his right eye. Mentally, Ricky Reed is able to tell for himself that he is not the way he was. Previously very social, he knows he is now withdrawn. It is also hard for him to concentrate since the auto accident. Demonstrating the depth of his memory impairment is that he can read something now and be completely unable to recall what he read just a few moments later. His cousin, Alan Coker, has to wake him up to send him off to work at McDonalds because, although he has an alarm clock, he

can't remember to set it (Apx pp 65b, 70b-73b, 75b-77b, 10/26/00 Trans., test. of Plaintiff).

As noted above, Ricky Reed was referred to Rehabilitation Centers of Michigan for head injury evaluation and was treated for a TBI as a patient there for six months. Dr. John Blase is one of the consultants utilized by this institution to conduct patient evaluations. Dr. Blase has a PhD in clinical psychology and is board-certified as a neuropsychologist. In addition to being board-certified, Blase is also an unelected member of the Executive Board itself and is chairperson of the Admissions Program and the Oral Examination Program, thus chairing two of the three different steps in the process of board-certification. Dr. Blase evaluated Ricky Reed at the request of the Rehabilitation Centers of Michigan and Dr. Avery Silverstein, who is the director of clinical services there. Plaintiff's family members had contacted Silverstein, reported that Plaintiff was still having problems and wanted to know if he would benefit from further treatment. Blase gave Reed the standardized Halstead-Reitan neuropsychological test battery on 10/11/00, a series of tests designed to yield certain patterns. Dr. Blase found that there was no question that Plaintiff had suffered a TBI in this accident, as his test scores were quite similar to those Sewick had obtained and fell clearly within the moderate impairment range. All of the testing done on Plaintiff was very consistent in terms of the results that were obtained. Reed's condition is now permanent, as additional treatment will <u>not</u> yield any additional improvement. A TBI patient realizes most of his improvement in the first 18-24 months following the injury (Apx pp 81b-82b, 10/26/00 Trans., test of Dr. Silverstein; Apx pp 83b-90b, 92b-95b, 101b-109b, test. of Dr. Blase).

Dealing with Reed's specific problems, Dr. Blase explained, as the Rehab Centers had to Plaintiff, that a TBI doesn't effect long-term memory -- the information already stored in the brain remains retrievable. What the injury interferes with is the accumulation and storage of new information. A TBI damages the storage mechanism and bits of information are not stored or important parts are missed. The impairment to Ricky Reed's cerebral functioning will be demonstrated also in certain aspects of his personality. In addition to the actual physical damage to the brain, such patients get frustrated and angry when they're unable to work or do many of the tings they did before the injury. Reed isolated himself, got mean at times, was irritable and cranky and the quality of his relationships with others suffered. He was no longer himself (Apx pp 90b-91b, 96b-100b, 10/26/00 Trans., test. of Dr. Blase).

Blase also commented on Liethen's conclusions, stating that the computer program which reviews the test scores places a pound sign next to a score that falls within the impaired range. Fourteen of the scores on the first sheet alone of the tests administered by Liethen were within the impaired range and marked accordingly. At least half of the scores on the second sheet were in the impaired range as well. The overall scoring index Liethen achieved regarding the tests he administered to Plaintiff was solidly within the moderate range of impairment. Dr. Blase testified that there was no question at all that the results of the tests administered by Liethen reflected a TBI (Apx pp 85b, 96b, 103b, 10/26/00 Trans., test. of Dr. Blase).

It should be noted that while counsel for Defendant-Appellants contended that Ricky Reed was an employee of Mr. Food, Inc. within the meaning of the Worker's Compensation Disability Act ("WCDA") at the time of the 05/07/98 accident, the actual

proofs were to the contrary. Defendant Herskovitz, owner of Mr. Food, Inc., had fired Reed in December, 1997, five months before the accident, because he felt Plaintiff's work performance was unsatisfactory after employing Reed for just a few months. Herskovitz never subsequently consented to having Ricky Reed work as a day laborer. Buddy Lee Hadley testified that Herskovitz would say, "Go get whatever," when Hadley advised him that he needed help making deliveries from the company's cargo van and Hadley, in his own mind, thought that "whatever" was Herskovitz's reference to Plaintiff. Hadley admitted, however, that Defendant Herskovitz never actually requested that Hadley use Reed for this task after Plaintiff was fired. Herskovitz himself stated very clearly that he addressed and referred to Plaintiff by his first name "Ricky" at all times and never referred to Plaintiff as "whatever". In reality, Hadley understood that whoever he got to work with him on any given day would be paid in cash that day and he simply took it upon himself to use the Plaintiff. Indeed, Hadley only procured Reed's services as a day laborer in this manner three to five times between December, 1997, when Ricky Reed was fired, and May 7, 1998, when the accident occurred. While Hadley, as the crew leader, would go into the office at the end of the day to get cash from Herskovitz to pay Plaintiff on these occasions, there is no indication in the record below that Herskovitz was ever actually aware that Ricky Reed was the person Hadley had used on those few occasions to assist him. On the day of the accident, Herskovitz didn't even know Reed had been in the van until he was informed of that fact after the accident had occurred. After his 12/97 discharge from Mr. Food, Inc., Ricky Reed was not in anyone's service as a regular employee and had instead chosen to hold his labor out for hire, as an independent contractor, supporting himself through such tasks as painting houses (Apx

pp 11b-14b, 19b-24b, 10/25/00 Trans., test. of G. Herskovitz; Apx pp 31b-33b, test. of B.L. Hadley; Apx pp 66b, 79b-80b, 10/26/00 Trans., test. of Plaintiff).

It should be superfluous to note that Herskovitz, Hadley and Plaintiff's relatives, as well as anyone else for whom he may have exchanged general labor for monetary compensation, are all members of the "public" within the meaning of MCL 418.161 (1)(n). **There is no evidence that Ricky Reed ever turned anyone down who wanted to hire him as a day laborer.**

This matter was tried before a jury in Wayne County Circuit Court from October 24, 2000 through October 30, 2000. On the latter date, the jury returned a verdict in Plaintiff's favor, finding that Defendant Yackell was 60 percent at fault and Defendant Hadley (and Herskovitz and Mr. Food vicariously) 40 percent at fault in the accident and assessing damages in Plaintiff's favor in the total amount of $1,256,320.00. The verdict was unanimous.

Judgments were thereafter entered against Defendants Hadley, Herskovitz and Mr. Food, Inc. in the amount of $502,528.00 and against Defendant Yackell in the amount of $753,792.00 on January 12, 2001 by the Honorable Wendy M. Baxter.

On February 14, 2003, the Court of Appeals affirmed the circuit court judgment in an unpublished opinion. With respect to the issues raised by Defendant-Appellants in the instant application, the Court of Appeals ruled the Plaintiff Ricky Reed was not an employee of Defendant Mr. Food, Inc., or its owner, Gerald Michael Herskovitz for the reasons that Mr. Reed was paid separately each of the three to five times he assisted Defendant Hadley over a five-month period, received no fringe benefits, was paid in cash and taxes were not withheld from the payments. Plaintiff assisted Hadley only when he

was available to do so and each time made a separate agreement with Hadley, was paid separately and always retained the option of accepting or rejecting the offer to assist, citing Luster v. Five Star Carpet Installations, Inc., 239 Mich App 719, 725; 609 NW2d 859 (2000) and McKissic v. Bodine, 42 Mich App 203; 201 NW2d 333 (1972). The lower appellate court further ruled that Plaintiff's assistance could not be viewed as an integral part of Mr. Food's business in light of the fact that Reed's services were rendered so infrequently; that as Plaintiff only received $35.00 - $40.00 each time he assisted Hadley, he could not have depended upon such infrequent service to make his living; and the undisputed evidence established that Plaintiff held himself out to the public as one who could perform general labor for payment. Therefore, the Court of Appeals concluded, Plaintiff was not Mr. Food's employee at the time of the accident and the WCDA was not Plaintiff's exclusive remedy (Apx pp 75a-76a, 2/14/03 Opinion of the Court of Appeals).

Defendant's thereafter sought leave to appeal. On November 17, 2003, the Supreme Court issued to its order vacating the February 14, 2003 judgment of the Court of Appeals and remanding this cause to the Wayne Circuit Court to determine whether Plaintiff was an employee within the meaning of MCL 418.161 (1)(l) and (n). Under § 161 (1)(l), the trial court was to determine whether Plaintiff was an employee in the service of Defendants under any contract for hire, express or implied. Under § 161 (1)(n) the circuit court was to determine whether Plaintiff maintained a separate business as a day-laborer and whether Plaintiff held himself out to the public as a day-laborer. The trial court was to submit its findings to the Supreme Court Clerk within 35 days. In all other

respects, Defendant's application for leave to appeal was denied with the Supreme Court retaining jurisdiction of this matter.

On December 22, 2003, the Wayne Circuit Court made its findings of fact based on the existing record and the trial judge's opportunity to observe the demeanor of the witnesses. The circuit court's findings were completely consistent with and based upon the same factual testimony set forth by Plaintiff-Appellee above. The trial court found it especially significant that Defendant Herskovitz, Defendant Hadley and Plaintiff all agreed at the time of trial that Plaintiff was not an employee of Mr. Food on the date of the accident. Per Judge Baxter, "No facts or even legitimate inferences are in dispute. There is no evidence of tax withholding or reporting to support any fact finding to the contrary. There is no evidence that Plaintiff ever claimed employee status at the time of the injury. There is no evidence that Plaintiff sought worker's compensation benefits" (Apx p 91a, 12/22/03 Findings of Fact).

The Circuit Court also found that the monies paid to Plaintiff by Mr. Food on the 3 to 5 occasions he assisted Hadley as a day-laborer taking odd jobs did not come close to measuring up to the standard set in Hoste v. Shanty Creek Mgmt, Inc., 459 Mich 561, 576; 592 NW2d 360, 366 (1999): "Once an individual is classified as an employee under the WDCA, the individual receives only limited benefits and forfeits the right to exercise valuable tort rights. Accordingly, 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." The circuit court determined that the total compensation Plaintiff

received from Mr. Food over the 5-6 month period between the time-he was fired by Defendant and the time of the accident would be only $120.00, or less than $1.00 per day over that entire period. Judge Baxter also found that, in light of the fact that Mr. Food did not contemplate actually hiring anyone, it could not have been understood by that Defendant that any person was giving up a tort action in exchange for employment. The trial court record, the circuit court stated, "is devoid of evidence that Defendants assumed an automatic liability in exchange for a waiver of right to bring a tort action" (Apx pp 91a-93a, 12/22/03 Findings of Fact).

Consequently, the circuit court found that Plaintiff Ricky Reed was not an employee of Defendants within the meaning of MCL 418.161 (1)(l) and (n); that Plaintiff was not an employee in the service of Defendants under any contract for hire, express or implied; and that Plaintiff maintained a separate business as a day-laborer and held himself out as such to the public (Apx pp 82a-83a, 1/9/04 Order).

After having received the 1/9/04 Order and Findings of Fact by the circuit court, the Supreme Court, in lieu of granting leave to appeal to Defendants remanded this action by its order of 4/23/04 to the Court of Appeals for reconsideration of whether Plaintiff was an employee within the meaning of MCL 418.161 (1)(l) and (n). The Supreme Court did not retain jurisdiction.

On June 8, 2004, the Court of Appeals on remand once more affirmed the judgment of the Wayne Circuit Court. The lower appellate court noted that the issue of Plaintiff's claimed status as an employee of Mr. Food was not raised by Defendants until their motion for a directed verdict was made. In fact, Defendant Herskovitz was not questioned at all at trial about the claimed employment status of Plaintiff at the time of

the accident. Per the Court of Appeals, the trial examination of Plaintiff and Hadley regarding this issue was quite brief and argument thereon in this course of the directed verdict motion was merely perfunctory, with minimal discussion of the facts in support of Defendants' claim and no citation to authority. The court further noted that Plaintiff's testimony that he was painting houses to support himself at the time of the accident went unrebutted (Apx pp 96a-97a, 6/8/04 Opinion of the Court of Appeals).

In part pertinent to the instant application for leave to appeal, the Court of Appeals held that there was an implied contract between Plaintiff and Herskovitz/Mr. Food, but for Ricky Reed's services as an independent contractor and not as an employee of the Defendants. The lower appellate court determined that MCL 418.161 (1)(l) and (n) were to be read together as separate and necessary qualifications in establishing employee status, per Hoste, supra, at 459 Mich 573. The court found that an examination of Plaintiff's employment status under subsection (n) in conjunction with the relevant economic realities test factors indicated that Plaintiff was not an employee for the purpose of the exclusive remedy provision for the following reasons: (a) Plaintiff was paid in cash for each of the 3 to 5 times he assisted with deliveries over a five-month period, received no fringe benefits and taxes were not withheld from his compensation. Plaintiff assisted Hadley only when he was available to do so, was paid separately on each occasion pursuant to a separate agreement and always retained the option of accepting or rejecting the offer to assist; (b) Plaintiff's assistance on three to five occasions over a five-month period could not be viewed as an integral part of Mr. Food's business and the compensation Plaintiff received in turn was such that Reed could not have primarily depended upon it for a living; and (c) Plaintiff, in assisting Hadley on

deliveries occasionally, as well as painting houses, indisputably held himself out to the public as an independent contractor who would perform general labor in exchange for payment. Therefore, the trial court properly concluded that Plaintiff was not Mr. Food's employee at the time of the accident and that the WDCA was not Plaintiff's exclusive remedy (Apx pp 98a-100a, 6/8/04 Opinion of the Court of Appeals).

Defendants filed their renewed Application for Leave to Appeal to this Honorable Court on or about July 13, 2004. Said Application once more presented only the following issue for review, pursuant to the terms of this court's 11/13/03 Order: Whether Plaintiff Ricky Reed was an employee of Defendant for purposes of the WDCA at the time he was injured. Leave to appeal was granted on January 13, 2005, limited to the issue of whether Plaintiff was an employee within t he meaning of MCL 418.161(1)(l) and (n) (Apx p 105a).

ARGUMENT

PLAINTIFF WAS NOT AN EMPLOYEE OF MR. FOOD AT THE TIME HE WAS INJURED AND HIS CLAIM IS NOT BARRED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKER'S DISABILITY COMPENSATION ACT

A. STANDARD OF REVIEW

Plaintiff-Appellee respectfully submits here, as he did in the Court of Appeals, that review of the above-stated issue here is inappropriate because Defendant-Appellants have failed to properly preserve the issue for appeal. Whether a company is a particular worker's employer within the meaning of the Worker's Disability Compensation Act ("WDCA") is only a question of law for the courts to decide if the evidence on the matter is reasonably susceptible of but a single inference. Where the evidence bearing on such status is disputed or where conflicting inferences may reasonable be drawn from the known facts, the issue is for the jury to decide. James v. Commercial Carriers, 230 Mich App 533; 583 NW2d 913, 915 (1998); Clark v. United Technologies Automotive, 459 Mich 681; 594 NW2d 447, 453 (1999); Nichol v. Billot, 406 Mich 284, 279 NW2d 761 (1979); Howard v. Dundee Mfg. Co., Inc., 196 Mich App 38, 40; 492 NW2d 478 (1992); Derigiotis v. J.M. Feighery Co., 185 Mich App 90; 460 NW2d 235 (1990). If the question in this case was one of law for the courts, the matter would be reviewed de novo. Christiansen v. Gerish Tp., 239 Mich App 380; 608 NW2d 83 (2000). However, insofar as Defendants' interests are concerned, the evidence was at best conflicting here or susceptible of conflicting inferences, relegating resolution of the issue to the jury. Since Defendants failed to request appropriate jury instructions to submit the matter to

the jury (See 10/30/00 Trans., pp 42-46 and 65-83), this issue has been waived. Winchester v. Meads, 372 Mich 593,599; 127 NW2d 337 (1964), citing 88 CJS, Trial §220, p 506; Setterington v. Pontiac General Hospital, 223 Mich App 594; 568 NW2d 93, 100 (1997).

B. THE TRIAL COURT HAD JURISDICTION TO DECIDE THE ISSUE OF WHETHER PLAINTIFF WAS AN EMPLOYEE OF DEFENDANT MR. FOOD, INC.

Contrary to Defendant-Appellant's statement at page 20 of their Brief on Appeal, claiming that Ricky Reed somehow acted improperly in choosing "to ignore his worker compensation remedy and try a tort recovery," it has long been established that the fundamental issue of the existence or non-existence of an employment relationship within the meaning of the WDCA is within the circuit court's jurisdiction and is not subject to the exclusive jurisdiction of the Worker's Compensation Bureau. In Sewell v. Clearing Machine Corp., 419 Mich 56, 62; 347 NW2d 447 (1984), the Court ruled that

> "Properly stated, the Szydlowski [Szydlowski v. General Motors Corp., 397 Mich 356; 245 NW2d 26 (1976)] principle is that the bureau has exclusive jurisdiction to decide whether injuries suffered by an employee were in the course of employment. The courts, however, retain the power to decide the more fundamental issue whether the Plaintiff is an employee (or fellow employee) of the Defendant."

In accord, Amerisure v. Time Auto, 196 Mich App 569; 493 NW2d 482, 484 (1992); Northern v. Fedrigo, 115 Mich App 239, 241; 320 NW2d 230 (1982). There can thus be no legitimate contention that Mr. Reed's action was properly brought in the Wayne County Circuit Court.

C. PLAINTIFF WAS NOT AN EMPLOYEE OF DEFENDANT MR. FOOD, INC.

The provisions of MCL 418.161(1) now set forth in Sections (l) and (n) are to be read together as separate and necessary qualifications in establishing employee status. By the use of the phrase "every person" rendering service, every individual whose employment status is at issue under subsection (l) must also be examined under what is now subsection (n). Once an association with a private employer is found under §161(1)(l), the characteristics of that association must meet the criteria found in §161(1)(n). Hoste v. Shanty Creek Management, Inc., 459 Mich 561; 592 NW2d 360, 365 (1999).

MCL 418.161, in defining the term "employee" for purposes of the WDCA, provides in pertinent part as follows:

> "(1) As used in this act, 'employee' means:
>
> (l) Every person in the service of another, under any contract of hire, express or implied . . .
>
> (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 out to and render service to the public, and is not an employer subject to this act" (emphasis added).

Note that current MCL 418.161(1)(n) was formerly MCL 418.161 (1)(d), Luster v. Five Star Carpet, 239 Mich App 719; 609 NW2d 859, 862 (2000).

While Ricky Reed was certainly hired to assist Hadley on the date of this accident, the issue in this action is the capacity in which he was hired. §161(1)(n) is here determinative of the fact that Plaintiff was an independent contractor.

All three conditions of subsection 161(1)(n) must be met in order to find that an individual is an employee. Conversely, a person is not an employee, but is instead an independent contractor under this section if any one or more of the following applies:

> (1) the person maintains a separate business in relation to the service provided;
>
> (2) the person holds himself out to and renders service to the public in relation to the service provided; or
>
> (3) the person is an employer subject to the worker's compensation statute in relations to the service.

Luster v. Five Star Carpet, supra, at 609 NW2d 862-863; Amerisure v. Time Auto, supra, at 493 NW2d 485-486.

The language of §161, as amended by the legislature in 1985, superceded the old economic realities test as the standard to be used to determine whether an individual was an employee or an independent contractor. Some, but not all of the factors of the old test were incorporated into the statute. Accordingly, while the common law regarding the economic realities test cannot be used to supercede the statute by adding factors outside the legislative formulation, those factors included within the statute may be construed by reference to the case law development of those same factors. Hoste v. Shanty Creek Management, Inc., 459 Mich 561; 592 NW2d 360, 364-365 (1999); Luster v. Five Star Carpet, supra, at 609 NW2d 863. The legislature is also assumed to be aware of the state of the existing law at the time of enacting or amending a statute, Nation v. W.D.E. Elec. Co., 454 Mich 489; 563 NW2d 233, 236 (1997); Ray v. Transamerica Ins. Co., 46 Mich App 647, 652-653; 208 NW2d 610 (1973); Bahr v. Bahr, 60 Mich App 354; 230 NW2d 430 (1975); Broadwell v. Secretary of State, 158 Mich App 681; 405 NW2d 120 (1987); People v. Buckley, 302 Mich 12; 4 NW2d 448 (1942).

In that regard, MCL 418.161 (1)(n) could have been drafted with McKissic v. Bodine, 42 Mich App 203; 201 NW2d 333 (1972) in its collective mind. As in McKissic, the "service" being provided here was simply basic labor used to perform odd-jobs or handy-man type work. McKissic ruled that a person holding himself out as a part-time handyman, working such times as he would be available at such activities as odd-jobs, repairs, general maintenance, painting, electrical wiring and general handy work, retaining the option of accepting or rejecting any offer of pay for his services, is an independent contractor of those he provides his services to and not an employee. A better description of Plaintiff Ricky Reed's occupational status would indeed be hard to find. For the next five months after Mr. Food FIRED Reed because Defendant Herskovitz found his work performance unsatisfactory, Plaintiff chose to hold his labor out for hire, performing odd jobs (including assisting Buddy Lee Hadley, at Hadley's request) and painting houses and had not entered anyone's service as a regular employee (Apx pp 79b-80b, 10/26/00 Trans., test of Plaintiff; Apx pp 31b-32b, 10/25/00 Trans., test. of B.L. Hadley).

Defendants Herskovitz and Mr. Food certainly didn't treat Reed as anything but an independent contractor, hired by the day to assist on odd jobs on quite infrequent occasions. Mr. Hadley only procured Plaintiff's services as such a day laborer three to five times from December 1997 until May 7, 1998. On those days that a non-employee would be hired to assist for the day, that person was always paid in cash (Apx pp 31b-33b, 10/25/00 Trans., test of B.L. Hadley). One of the significant factors to be considered in making the determination required by MCL 418.161 (n) is whether the person was paid like an employee, i.e., with withholdings made for taxes, or with no

withholdings (in cash), as one would pay an independent contractor. Luster, supra, at 609 NW2d 863; McCaul v. Modern Tile and Carpet, 248 Mich App 610; 640 NW2d 589, 594 (2001).

It would certainly be ludicrous to suggest that Herskovitz/ Mr. Food intended Ricky Reed to be an employee, as the record is absolutely to the contrary. What is clear is that Herskovitz had no intention of ever employing Plaintiff again. Herskovitz testified in no uncertain terms that he found Reed's work performance to be unsatisfactory after employing Plaintiff for a few months and fired him in December, 1997, five months before the accident. Herskovitz, owner of Mr. Food, never called Plaintiff in or consented to having Ricky Reed work as a day laborer thereafter. There is no indication in the record that Herskovitz was ever even aware that Hadley was using Reed to assist him in these odd jobs until after the accident occurred and Hadley had to inform him Plaintiff had been injured while he was a passenger in the company's cargo van (Apx pp 11b-14b, 19b-24b, 10/25/00 Trans., test. of G. Herskovitz; Apx pp 31b-33b, test. of B.L. Hadley).

The above facts are highly significant, because one who is engaged merely to render service in a particular transaction is generally not an employee, City of Pontiac v. Ducharme, 278 Mich 474, 484; 270 NW 754 (1936). Mr. Reed's participation in three to five isolated instances over five months certainly gives him no such status here. A contract of employment cannot arise against the will or without the consent of an alleged party thereto, as Defendants are necessarily contending in the case at bar. Instead, a contract of employment must always be a voluntary act on the part of the employer, coinciding in a common understanding. Like every other contract, a contract of

employment arises out of a meeting of the minds of the parties with an offer on the part of one and an acceptance on the part of the other. Michigan Law and Practice Encyclopedia, Volume 10, § 3, p 493, McDonald v. Boeing, 43 Mich 394; 5 NW 439 (1880). Similarly stated, where no express agreement has been reached between the parties as to an employment contract, there must be some manifestation of mutual assent thereto by words or deed by which an agreement may be implied, Erickson v. Goodell Oil Co., 15 Mich App 398; 166 NW2d 648 (1968); rev'd on other grounds, 384 Mich 207; 180 NW2d 798, which, considering the above testimony, was completely absent here. The quid pro quo nature of Reed's relationship with Mr. Food – cash payment for labor on isolated occasions – cannot elevate him to the status of an employee in the absence of any agreement by both parties to that effect. Indeed, Mr. Food's preference to fill the need for someone to only occasionally assist Hadley in making deliveries with an independent contractor who would be hired for that day only and always paid in cash is highly significant. One of the primary factors enunciated in McKissic v. Bodine, supra, for determining whether the worker at issue is an employee or an independent contractor is:

> "Sixth, is the work or the undertaking in question customarily performed by an individual as an independent contractor?" (at 42 Mich App 208).

See also Hoste, supra, at 592 NW2d 363, fn 6.

It should also be noted that no extensive holding out of one's services to the public is required to achieve independent contractor status. See Blanzy v. Brigadier, 240 Mich App 632; 613 NW2d 391 (2000) (where Plaintiff performed service for at least one other entity than his alleged employer, he was held to be an independent contractor) and

McCaul v. Modern Tile and Carpet, Inc., 248 Mich App 610; 640 NW2d 589 (2001) (Plaintiff's holding himself out to provide services to the public and actually performing such services on "several occasions" supported the conclusion that he was an independent contractor).

More recent and controlling law only reinforces the conclusion that Ricky Reed was not an employee of Mr. Food. In Hoste v. Shanty Creek Mgmt., Inc., 459 Mich 561; 592 NW2d 360 (1999), this court ruled that the basic precepts of workers compensation show that

> ". . . [I]n order to receive benefits under the WDCA [and achieve employee status], 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 . . .
>
> The repercussions of classifying an individual as an employee for purposes of the WDCA make clear the type of the compensation needed to satisfy the 'of hire' requirement. Once an individual is classified as an employee under the WDCA, the individual receives only limited benefits and forfeits the right to exercise valuable tort rights. Accordingly, 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"** (at 592 NW2d 366; emphasis added).

As noted by both the trial court and the Court of Appeals, the amount of compensation received by Reed for assisting Hadley on three to five occasions was minimal, and certainly was not such a "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." Judge Baxter further noted that the total compensation received by Reed from Mr. Food would have come to less than $1.00 per day over the relevant time periods could not conceivably be considered substantial in this context.

Defendant's reliance upon Higgins v. Monroe Evening News, 404 Mich 1; 272 NW2d 537 (1978) and Betts v. Ann Arbor Public Schools, 403 Mich 507; 271 NW2d 498 (1978) is misplaced. If Higgins' reasoning were to be analyzed in the context of the current sections of MCL 418.16(1)(l) and (n), it would be found to deal only with the first hurdle presented by §161(1)(l), i.e., whether a contract for hire existed, which is not at issue here, rather than the type of relationship formed under §161(1)(n), which controls the resolution of the question in the instant action. In any event, Higgins also reinforces the ruling of Hoste, supra, that any compensation received must have been intended by both parties as wages paid to an employment relationship before employee status will be found. See Higgins at 404 Mich 20-21.

While Betts determined that an employment relationship did in fact exist where the Plaintiff had served as a student teacher with the Defendant on a daily basis for four months, its reasoning was based heavily on the fact that the Plaintiff's work was

> "an integral cog in Defendant's business of education. His teaching was part of the larger task of educating the young people of Ann Arbor. The fact that the pay for this service was not in the coin of the realm but was in the form of training and qualification for a professional goal does not disqualify Plaintiff from the designation of employee. He was helping to furnish the product of education" (at 403 Mich 515).

It may also be readily presumed that the fact that the nature of Plaintiff Betts' association with the Ann Arbor Public Schools System required him to act in all respects

as if he was an employee day after day for four months also weighed heavily in Betts' determination that the Plaintiff was to be considered an employee. Blust v. Sisters of Mercy, 256 Mich 1; 239 NW 401 (1931), was cited by both parties and the court in Betts. Justice Potter's dissenting opinion noted with respect to the above working conditions that where a claimant has placed his time and service at the call of a superior for an extended daily period of time and was expected to render any service called for within the range prescribed by propriety and custom, the claimant was to be considered an employee "by every test of permanence of duty, of intimacy of contract and of fullness of subjection" (at 256 Mich 9). Needless to say, nothing remotely similar to working conditions of this kind were present in this case.

Betts is also noteworthy with respect to its citation of Larson's treatise on Workmen's Compensation Law for the proposition clearly stated in Hoste: an employment relationship is a mutual arrangement arrived at between employer and employee under which both [knowingly] give up and gain certain things (at 403 Mich 515). While interesting in its own context, Betts is simply inapposite here.

In the case at bar, absolutely no one considered Mr. Reed to be receiving wages as an employee of Mr. Food at the time of his injury. This fact controls the result here under this court's analysis in Hoste.

With regard to Defendants' argument regarding the public policy considerations underlying the WDCA, it is interesting to note that the conclusion reached by the Court of Appeals here is hardly novel in any respect. In 1915, for example, section 7, part 1 of the Workmen's Compensation Act specifically excluded persons "whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of

his employer" (2 Comp Laws 1915, § 5429). Under that statute, Cousineau v. Black, 206 Mich 479; 173 NW 203 (1919) held that a Plaintiff who had been hired by Defendant's agent for the day solely for the task of assisting Defendant's agent in moving and setting up a cemetery monument and who suffered the traumatic amputation of a finger in attempting to unload the monument from a wagon was merely a casual employee who was not entitled to workmen's compensation benefits for his injury:

> " It would be difficult to conceive of employment more nearly casual in every respect than was that of the employee in the case at bar.
>
> Claimant if employed by Defendant was employed only to assist in moving and erecting the monument, which work actually consumed less than two days" (at 206 Mich 482).

Defendants' argument is stunningly devoid of support in the law itself, as may he seen by Defendants' attorney's failure to cite even a single case standing for the proposition that a day laborer such as Ricky Reed, who performed general labor on an extremely limited and infrequent basis for the Defendant, among other persons at the same point in time, is to be considered an employee for purposes of the exclusive remedy provision. Defendants have attempted to fill this void by offering a crafty, albeit specious interpretation of the language of MCL 418.161(1)(n), contending that Ricky Reed was not an independent contractor because, while he performed "delivery service" for Mr. Food, he did not maintain a separate delivery service or hold himself out to render delivery service to the public. According to Defendants, Reed therefore cannot qualify as an independent contractor under §161(1)(n) and had to have been Mr. Food's employee (Defendants' Brief on Appeal, pp 22-25). This argument is fatally flawed, however, as it is based on an entirely false premise and deliberate distortion of the statutory language

and constitutes a textbook example of a red herring thrown across the trail to lead the hunters far afield from their quarry.

Contrary to Defendants' assertions, the language of §161(1)(n) links "service" to the character of the efforts exerted by the worker at issue and does not define that service by the nature of the would-be employer's "trade, business, profession or occupation" as Defendants contend. The statute only requires that the worker's own service be performed in the course of that trade or business. The difference is quite significant, as here, Ricky Reed did not provide, maintain or render his own delivery service to either Mr. Food or the general public. Instead, Mr. Food provided, maintained and operated the delivery service at issue for the benefit of its customers, as shown by the fact that the delivery vehicle, routes, destinations and products all belonged to Mr. Food, not Plaintiff. Reed was merely hired by Mr. Food to assist Buddy Lee Hadley in operating Mr. Food's delivery service. The service Reed performed in doing so was precisely the same service he held himself out to the public to perform: rather basic, unskilled manual labor in whatever form the particular odd-job or enterprise he was involved in that day might require. As this court has stated,

> "The focus of statutory interpretation must be on the language used by the Legislature. The courts are not free to manipulate interpretations of statutes to accommodate their own views of the overall purpose of legislation," Twichel v. MIC General Ins. Corp., 469 Mich 524; 676 NW2d 616, 620 (2004).

Where the statutory language is clear, no further construction is necessary or allowed to expand what the legislature clearly intended to cover. People v. Koonce, 466 Mich 515; 648 NW2d 153 (2002); Miller v. Mercy Memorial Hosp. Corp., 466 Mich

196; 644 NW2d 730 (2002). The Supreme Court will not read words into a statute, or rewrite or embellish a statute, Byker v. Mannes, 465 Mich 637; 647 NW2d 210, 215 (2002); Omelenchuk v. City of Warren, 461 Mich 567, 575; 609 NW2d 177 (2000), as Defendants would have the court do here.

Further, even when statutory construction is called for, the legislature is assumed in the course of such construction to have been aware of the state of the existing law at the time of enacting or amending a statute, Nation v. W.D.E. Elec. Co., supra, and if an ambiguity exists in the statute, its language must be read in light of the previously established rules of the common law, Nummer v. Dept. of Treasury, 448 Mich 534, 544; 533 NW2d 250, 254 (1995); Lewis v. LeGrow, 258 Mich App 175; 670 NW2d 675, 683 (2003). The law as it existed at the time §161(1)(n) was enacted clearly held that an individual holding himself out to perform odd-jobs or handy-man type work was an independent contractor of those he provided his services to, and not an employee. McKissic v. Bodine, 42 Mich App 203; 201 NW2d 333 (1972). While statutes can abrogate common-law rules, such rules may not be eliminated by implication and statues in derogation of the common law must be strictly construed. Smith v. YMCA of Benton Harbor/Saint Joseph, 216 Mich App 552; 550 NW2d 262 (1996), lv den 454 Mich 863; 558 NW2d 733. Stated otherwise, a legislative amendment of the common law is not lightly presumed, nor will statutes be extended by implication to abrogate established rules of common law, Hasty v. Broughton, 133 Mich App 107; 348 NW2d 299 (1984). Indeed, statues are to be interpreted with reference to the common law and where there is no indication to the contrary, given their common-law meaning. Mayhall v. A.H. Pond Co., Inc. 129 Mich App 178; 341 NW2d 268 (1983).

In addition, the ramifications of Defendants' proposed construction of MCL 418.161(1)(n) must be considered. Construing the statute in the manner suggested by Defendants would require that each and every person or company for whom a day laborer such as Mr. Reed performs service or odd-jobs would be required to purchase and maintain workers compensation insurance to cover him in the event of an on-the-job injury except where the "employer" could be absolutely certain that its day laborer held himself out to render a service completely identical to the service it received to the general public. For example, if such a handy-man performed window-washing at the office of the undersigned, courier service for another law firm and served process for a third, he would be an employee for each of the three firms, rather than a independent contractor, pursuant to Defendants' analysis. Had the legislature intended to transform handy-men into employees with multiple employers for purposes of the worker's compensation laws, it surely would have done so in far more certain terms than the language used in §161(1)(n).

Finally, to the best of the undersigned's knowledge, Defendants have never previously raised the issue of the construction they now urge should be placed upon the language of §161(1)(n). Issues raised for the first time on appeal are not ordinarily subject to review. Booth Newspapers, Inc. v. Bd. Of Regents, 444 Mich 211; 507 NW2d 422 (1993); Swickard v. Wayne County Medical Examiner, 438 Mich 536; 475 NW2d 304 (1991); Village of St. Clair Shores v. Village of Grosse Pointe Woods, 319 Mich 372; 29 NW2d 860 (1947).

D. DEFENDANT-APPELLANTS HAVE WAIVED THE ISSUE OF WHETHER PLAINTIFF WAS AN EMPLOYEE OF DEFENDANT MR. FOOD WHOSE RIGHT TO RECOVER TORT DAMAGES WAS FORECLOSED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WDCA

It should be abundantly clear from the above discussion that at a minimum, and giving Defendants the benefit of every conceivable doubt, that conflicting inferences may reasonably be drawn from the testimony as to whether Ricky Reed was an employee of Defendant Mr. Food, Inc. within the meaning of the WDCA. The question was therefore required to be resolved by the jury, Clark v. United Technologies Automotive, 459 Mich. 681; 594 NW2d 447, 453 (1999); Nichol v. Billot, 406 Mich 284, 302-303, 306 (1979); James v. Commercial Carriers, 230 Mich App 533; 583 NW2d 913, 915 (1998); Howard v. Dundee Mfg. Co., Inc., 196 Mich App 38, 40; 492 NW2d 478 (1992); Derigiotis v. J.M. Feighery Co., 185 Mich App 90; 460 NW2d 235 (1990).

In Brown v. Standard Oil Co., 309 Mich 101; 14 NW2d 797 (1944), the Court was also confronted with the question of whether the Plaintiff's decedent was an employee or an independent contractor and conflicting inferences that could be drawn from the evidence. While the facts leading up to the fatal injury upon which the action was based are not relevant for our purposes, the debate which arose from the evidence as to the decedent's status is. Defendant Jones, for example, contended that Plaintiff's decedent was not his employee, as he did not pay him wages, but instead permitted him to work around the gasoline service station Jones leased and operated doing odd jobs as an independent contractor. Plaintiff, on the other hand, contended that his decedent was paid weekly wages by Jones, who controlled and directed his work at the station and that the decedent was therefore Jones' employee. Noting that the testimony presented a

conflict as to the arrangement with Defendant Jones under which the decedent was working, the Supreme Court ruled that:

> "The above-quoted and other testimony clearly presented a question of fact for jury determination as to whether Plaintiff's decedent was an employee of Jones or was merely permitted to work at the station as an independent contractor" (at 309 Mich 109).

The issue was similarly for the jury in the case at bar. However, Defendant-Appellants failed to request an appropriate jury instruction to submit the question for the jury's resolution. Consequently, the issue has been waived and may not properly be reviewed by this Honorable Court. Winchester v. Meads, 372 Mich 593, 599; 127 NW2d 337 (1964); Setterington v. Pontiac General Hospital, 223 Mich App 594: 568 NW2d 93 (1997). Winchester, citing 88 CJS, Trial, §220, p 506, noted that

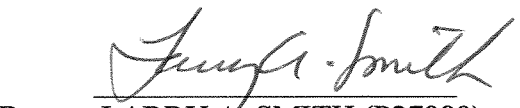
> "As a general rule, a party's failure to request the submission of a particular issue to the jury constitutes a waiver of the issue..."

RELIEF

WHEREFORE, Plaintiff-Appellee prays this Honorable Court enter its Order affirming the judgment of the Circuit Court and Court of Appeals and awarding Plaintiff the reasonable and necessary costs and attorney fees incurred in opposing same.

Respectfully submitted,

LAW OFFICES OF LARRY A. SMITH



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