WORKERS' DISABILITY COMPENSATION

MARTIN L. CRITCHELL†

I. INTRODUCTION

There are five exceptions to the law establishing the Workers' Disability Compensation Act (WDCA)[1] as the only law to apply to an employer when an employee is injured at work.[2] Three of the exceptions expand the law's application. The WDCA and all other laws can apply to

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† Shareholder, Conklin Benham, P.C. B.A., 1973, Western Michigan University; J.D., 1976, Wayne State University. The author is a member of the Supreme Court Historical Society, the Advocates Guild of the Supreme Court Historical Society, the American Society of Writers on Legal Subjects (The Scribes) and the Federalist Society for Law and Public Policy Studies. He is also a contributing author of EMPLOYMENT LAW IN MICHIGAN (AN EMPLOYER'S GUIDE), INSTITUTE OF CONTINUING LEGAL EDUCATION (2008), and MICHIGAN INSURANCE LAW AND PRACTICE, INSTITUTE OF CONTINUING EDUCATION (2002).

1. MICH. COMP. LAWS ANN. §§ 418.101-.941 (West 1999).

2. MICH. COMP. LAWS ANN. § 418.131(1) ("The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease.").

an employer that intentionally injures an employee,[3] deliberately has an employee pose as a contractor to avoid the WDCA,[4] or who fails to have insurance for workers' compensation.[5] The other two exceptions displace the WDCA with other law. Only the law other than the WDCA may apply to an employer when an employee is injured during recreational activity[6] or outside of Michigan unless particular circumstances are demonstrated.[7]

All of the decisions by the courts during the *Survey* period between August 1, 2009, and July 31, 2010, involved one or another of these five exceptions or a claim that another law was a sixth exception. The precision of these decisions was highly variable.

II. *FRIES V. MAVRICK METAL STAMPING, INC.*, AND *JOHNSON V. DETROIT EDISON CO.*: INFERRING AN INTENTIONAL TORT

The statute that allows both the WDCA and the common law to apply to the employer who intentionally injures an employee also establishes that intent may be implied by saying:

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge

3. *Id.* ("The only exception to this exclusive remedy is an intentional tort.").

4. MICH. COMP. LAWS ANN. § 418.171(4) ("Principals willfully acting to circumvent the provisions of this section or section 611 by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees . . . to pose as contractors for the purpose of evading this section or the requirements of section 611 shall be liable subject to the provisions of section 641.").

5. MICH. COMP. LAWS ANN. § 418.641(2) ("The employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131.").

6. MICH. COMP. LAWS ANN. § 418.301(3) ("Notwithstanding this presumption, an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act. Any cause of action brought for such an injury is not subject to section 131.").

7. MICH. COMP. LAWS ANN. § 418.845 ("The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state.").

that an injury was certain to occur and willfully disregarded that knowledge.[8]

In *Travis v. Dreis & Krump Manufacturing Co.*[9]—the first case decided pursuant to the second sentence of section 131(1)—the Michigan Supreme Court anticipated claims under section 131(1) would become the most common type of claim against an employer. During the *Survey* period, two Michigan Court of Appeals cases—*Fries v. Mavrick Metal Stamping Co.*,[10] and *Johnson v. Detroit Edison Co.*[11]—exemplify this. Each case involved a lawsuit by employees for damages from the employer after an injury at work in which the intention to injure had to be implied under the second sentence of section 131(1).[12]

In both of these two decisions the Michigan Court of Appeals found that there was enough evidence from which a jury could conclude that the employer had intended the injuries.[13] In *Fries*, Kristi Fries was injured when her loose clothing activated a stamping press that she was using for the first time.[14] Officials at Mavrick Metal had known that loose clothing could activate the light sensors of the press; however, no changes were made to the press such as a guard on the sensor or a device to pull back the hands of an operator, nor did they warn the novice Fries of the danger.[15] The court of appeals concluded that from the evidence, a jury could infer that the employer intended to cause Fries' injuries.[16] The court of appeals said that, "every encounter between a loosely clothed press operator and the [specific press model] inherently embodied the potential for serious injury, particularly in light of Mavrick's failure to guard the control buttons or incorporate pull-backs. . . ."[17]

The decision represents the first real application of the idea expressed by the supreme court in the leading case of *Travis* that "concealing a known danger from an employee who has no independent knowledge of the danger may be evidence of an intent to injure."[18] While the idea had been expressed when the court decided *Travis*, it ultimately

8. MICH. COMP. LAWS ANN. § 418.131(1).
9. 453 Mich. 149, 180 n.14 (1996) (Boyle, J.).
10. 285 Mich. App. 706 (2009).
11. 288 Mich. App. 688 (2010).
12. *Id.* at *11-13; *Fries*, 285 Mich. App. at 713-14.
13. *Johnson*, 288 Mich. App. at 704-05; *Fries*, 285 Mich. App. at 718.
14. *Fries*, 285 Mich. App. at 708.
15. *Id.* at 709.
16. *Id.* at 717-18.
17. *Id.* at 718.
18. *Id.*

held for the employer because the malfunctioning press was adjusted and the supervisor was satisfied enough to personally operate it.[19]

In *Johnson*, the court of appeals found that the employer had concealed the danger.[20] In that case, Sandra Johnson had the job of emptying unburned coal from a boiler.[21] For several months prior to the accident, Johnson knew that the ash had been accumulating and was capable of exploding.[22] Explosions linked to the accumulation of ash had injured other workers.[23] There had been safety measures implemented prior to Johnson's injuries; Johnson had safety glasses, a hard hat, heavy gloves, and trousers.[24]

Despite the circumstances, the court of appeals said without any citation or explanation that "an employee's knowledge of a danger, whether gained through information by the employer or otherwise, does not preclude invocation of the intentional tort exception . . . ."[25] The court of appeals stated that intent to injure under the second sentence of section 131(1) could be established when, "[T]he employer knows that its employees were taking insufficient precautions to protect themselves against [an] inherent danger, and that the employer took no action to remedy the situation . . . ."[26]

The *Johnson* and *Fries* decisions are important. First, both are controlling precedent under the doctrine of *stare decisis*, having been published by the court of appeals.[27] Second, the two decisions express alternative standards for implying intent to injure when an employee is either ignorant or aware of a danger at work. *Fries* provides the standard in a situation where the employee is quite ignorant of a danger that the employer knows exists. *Johnson* provides the standard when an employee is actually aware of the danger and the officials at work have taken some precautions to avoid an injury. These cases may promote the expansion of the intentional tort exception because employees may sue for damages in addition to receiving workers' compensation, with claims that an employer had actually concealed a known danger in the workplace or failed to take every available action to avoid an injury.

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19. *Id.* at 182-83.
20. *Johnson*, 288 Mich. App. at 688.
21. *Id.* at 690.
22. *Id.* at 691.
23. *Id.*
24. *Id.* at 690.
25. *Id.* at 703.
26. *Johnson*, 288 Mich. App. at 703.
27. MICH. CT. R. 7.215(C)(1).

III. *RAINER V. TRI COUNTIES MULTI TRADE CENTER*: A JURY DECIDING BOTH WORKERS' COMPENSATION AND DAMAGES

MCLA section 418.641(2) allows an employee to claim workers' compensation and sue for damages from an injury at work when the employer has either deliberately had the employee pose as a contractor to avoid the WDCA under the first sentence of MCLA section 418.171(4), or has failed to have insurance for workers' compensation under MCLA section 418.611(1)(a) or (b).[28] MCLA section 641(2) states, "The employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131."[29]

During the *Survey* period, the court of appeals decided *Rainer v. Tri Counties Multi Trade Center*.[30] In that case, section 641(2) applied to allow Keith Rainer to claim workers' compensation and sue his employer, Tri Counties Multi Trade Center for workers' compensation and tort damages after sustaining an injury at work resulting from a fall.[31] At the time of the injury, Tri Counties had not been approved to self-insure the liability for workers' compensation by the director of the workers' compensation agency under MCLA section 611(1)(a), and did not have workers' compensation insurance under section 611(1)(b).[32] The problem in the *Rainer* case concerned whether the circuit court had the authority to allow both compensation and damages.[33] When the circuit court dismissed the lawsuit for damages under the common law of premises liability, Rainer argued that the circuit court should have allowed a claim for workers' compensation.[34] The court of appeals agreed. The court of appeals explained that a circuit court has the authority to hear and decide both a claim for workers' compensation and the lawsuit for damages against an employer that does not have workers' compensation insurance.[35]

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28. *See* MICH. COMP. LAWS ANN. § 418.641(2).
29. *Id.*
30. No. 289050, 2010 Mich. App. LEXIS 234 (Mich. Ct. App. Feb. 2, 2010).
31. *Id.*
32. *Id.* at *1.
33. *Id.*
34. *Id.*
35. *Id.* The court stated:

> [W]hen an injured plaintiff brings a civil action against his uninsured employer, seeking both common-law tort damages *and* statutory benefits under the WDCA, both claims must be considered and adjudicated by the court. Here, the circuit court granted summary disposition with respect to plaintiff's common-

The *Rainer* court stated, "[T]his Court has also implicitly held that an injured employee's claims against his uninsured employer—whether for common-law tort damages or statutory benefits under the WDCA—must be pursued in a civil action rather than before a workers' compensation magistrate."[36] There was no mention of the statute in the WDCA that assigns subject-matter jurisdiction to decide any question about workers' compensation to the workers' compensation agency, rather than a circuit court.[37]

Although not released for publication and not controlling precedent under the doctrine of *stare decisis*, the decision by the court of appeals in the case of *Rainer* is important because it is the only decision that discusses whether a circuit court has the authority to decide whether an employee can bring both a claim to workers' compensation and a lawsuit for damages against an employer simultaneously[38] when the employer was not insured for workers' compensation. The supreme court has not decided such a case. Further, the court of appeals in *McCaul* did not directly address the subject of the authority of a circuit court to decide a claim to workers' compensation.[39]

Rainer is also important because its reach may extend to an employer that deliberately had an employee pose as a contractor to avoid the WDCA in violation of section 171(4).[40] Section 641(2) applies to both that employer and an employer having no insurance for workers' compensation under section 611(1)(a) or (b).[41]

While important, the *Rainer* decision is also problematic. First, the ruling that the court of appeals cited—*McCaul*—did not imply that a circuit court has subject-matter jurisdiction to decide both a claim for workers' compensation and damages against an employer for violations persuant to section 171(4). In *McCaul*, the court of appeals said that Michael McCaul could sue Modern Tile for damages because Modern

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law negligence claim. However, the circuit court did not specifically separately consider whether plaintiff was entitled to statutory benefits under the WDCA. Accordingly, we must remand to the circuit court for plenary consideration of plaintiff's claim for statutory benefits.

Id. at *3.

36. *Rainer*, 2010 Mich. App. LEXIS 234, at *1 (citing *McCaul v Modern Tile & Carpet, Inc.*, 248 Mich. App 610, 623 (2001)).

37. MICH. COMP. LAWS ANN. § 418.841(1) ("Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable.").

38. *See Rainer*, 2010 Mich. App. LEXIS 234.

39. *See McCaul*, 248 Mich. App. 610.

40. *See Rainer*, 2010 Mich. App. LEXIS 234.

41. MICH. COMP. LAWS ANN. § 418.641(2).

Tile had allegedly made McCaul pose as a contractor to avoid the WDCA in violation of section 171(4), which could not be considered by the workers' compensation agency.[42] The court of appeals could not have implied that the circuit court could also decide a claim to workers' compensation by Michael McCaul because he had already prosecuted a claim to workers' compensation from Modern Tile in the workers' compensation board of magistrates and appealed to the workers' compensation appellate commission.[43] Indeed, the court of appeals holding in *McCaul* contradicts *Rainer* by ruling that the appellate commission was correct in deciding the claim to workers' compensation and avoiding the damages claim. The decision by the court of appeals in *Rainer* is in direct conflict with the first sentence of section 418(1), which assigns subject-matter jurisdiction on claims for workers' compensation to the workers' compensation agency.[44] The Michigan Supreme Court has held that the statute precludes any authority of a circuit court to decide a question about workers' compensation eligibility, except for deciding whether someone is an employee.[45]

IV. *BUITENDORP V. SWISS VALLEY, INC.*: SOCIAL AND RECREATIONAL ACTIVITY

During the *Survey* period, the Michigan Supreme Court decided the case of *Buitendorp v. Swiss Valley, Inc.*,[46] involving MCLA section 301(3), which replaces the WDCA with other law when an employee is injured during social or recreational activity.[47]

In *Buitendorp*, the court held that the immediate activity of the employee established the character as social or recreational, not the general activity the day of the injury.[48] The court said, "Under MCL 418.301(3) and *Eversman v. Concrete Cutting & Breaking*, 463 Mich. 86 (2000), the major purpose of [Buitendorp's] activity *at the time of injury* determines whether the social or recreational bar [to workers'

42. *McCaul*, 248 Mich. App at 623 ("[W]e agree with the [workers' compensation appellate commission's] interpretation of subsection 171(4) and subsection 641(2). Because [McCaul] has alleged that [Modern Tile] violated subsection 171(4) of the WDCA by failing to secure insurance liability coverage pursuant to § 611, the plain language of both § 171 and § 641 require plaintiff to pursue his claim in a civil action.").

43. *Id.* at 613-14.

44. *See* MICH. COMP. LAWS ANN. § 418.841(1).

45. *Sewell v. Clearing Machine Corp.*, 419 Mich. 56, 62 (1984).

46. 485 Mich. 879 (2009).

47. MICH. COMP. LAWS ANN. § 418.301(3)(d) (West 1999).

48. *Buitendorp*, 485 Mich. at 879-80.

compensation] applies."[49] The court reproved the idea of considering the activity of the employee over any period of time by saying that, "The board and the [appellate commission] employed an improper legal framework in analyzing the facts of this case by assessing the major purpose of [Buitendorp's] *overall* activities were work related."[50] *Buitendorp*. Although involving an order that peremptorily disposed of an application for leave to appeal, *Buitendorp* is controlling precedent under *People v. Crall*.[51]

The *Buitendorp* decision reaffirms the ruling in the leading case of *Eversman v. Concrete Cutting & Breaking*.[52] In *Eversman*, the supreme court established that the immediate activity that causes the employee's injury determines if the exclusion for social or recreational activity applies, and not the activity during the entire day or the general context.[53]

The case of *Buitendorp* demonstrates why employees avoid the exception to the WDCA under the second and third sentences of MCLA section 301(3), while actively pursuing the exceptions under the second sentence of section 131(1) for intentional tort and section 641(2) for not having workers' compensation insurance. Most employees have no recourse under any law other than the WDCA. Buitendorp, after giving a group ski lesson, was injured when proceeding over a ski jump to provide a coworker with a photo opportunity for a school project.[54] There would be no recourse for Buitendorp under the ski area safety act.[55] Similarly, other employees face standards that may bar or substantially limit the liability of an employer.

Buitendorp exemplifies a separate problem for injured employees. The time for filing a lawsuit for damages from an employer under other law may expire while pursuing a claim to workers' compensation. That is, an employee injured at work during activity that the employer argues is barred under the second sentence of section 301(3) should file a claim for workers' compensation from the employer and simultaneously make a claim for damages as allowed by other law.

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49. *Id.* at 880.

50. *Id.* at 879-80.

51. 444 Mich. 463, 464 n.8 (1993).

52. 463 Mich. 86 (2000).

53. *Id.* at 95 ("[I]n applying the social or recreational test of subsection 301(3), the Court does not need to examine the purpose of the special mission, the work-day's activities, or the out-of-town trip, but rather must consider the major purpose of the activity in which the plaintiff was engaged at the time of the injury.").

54. Buitendorp v. Swiss Valley, Inc., 2009 Mich. ACO 3, at 1-2 (Grit, Comm'r, dissenting).

55. *See* MICH. COMP. LAWS ANN. § 408.321. *See also*, Anderson v. Pine Knob Ski Resort, Inc., 469 Mich. 20 (2003).

V. *BREWER V. A.D. TRANSPORT EXPRESS, INC.* AND *BEZEAU V. PALACE SPORTS & ENTERTAINMENT*

During the *Survey* period, the supreme court decided two cases concerning the statute that replaces the WDCA with the law of another state when an employee is injured working outside of Michigan. The first case was *Brewer v. A.D. Transport Express, Inc.*[56] The second was *Bezeau v. Palace Sports & Entertainment, Inc.*[57] *Brewer* involved choosing between the WDCA provision as it existed at the time of plaintiff's injury in 2003 or after the provision was amended.[58] The statute–as understood by the supreme court when Brewer was injured in 2003–displaced the WDCA when an employee was injured outside of Michigan, unless the employer had hired the employee here.[59] The amendment, first effective after the injury–January 13, 2009–displaced the WDCA when the employee was injured outside of Michigan, unless the employer had hired the employee in Michigan or the employee was a resident in Michigan at the time of injury.[60] The court held that the law at the time Brewer had been injured–the statute as understood by the supreme court in 2003–applied, not the later amendment. The amendment can only apply to a claim for workers' compensation when an employee was injured while working outside of Michigan after it was effective on January 13, 2009. The decision is entirely consistent with the established rule that the statute in effect when an employee sustains an injury applies. A subsequent amendment can apply only when the amendment includes some other condition than injury or when the amendment concerns procedure pursuant to *Nicholson v. Lansing Board of Ed.*[61] and *Hurd v. Ford Motor Co.*[62] The court aptly noted that the amendment did not describe any condition for it to apply other than an

56. 486 Mich. 50 (2010).

57. 487 Mich. 457 (2010). The author was counsel for defendant-appellee in *Bezeau*.

58. *See Brewer*, 486 Mich. at 51.

59. *Id.* The additional condition to avoid displacing the WDCA, residency in Michigan when the employee was injured, was expunged from the statute by the Michigan Supreme Court in the case of *Roberts v. I.X.L. Glass Corp.*, 259 Mich. 644 (1932), and continued by the Court in *Boyd v. W.G. Wade Shows*, 443 Mich. 515 (1993). *Id.* at 54.

60. MICH. COMP. LAWS ANN. § 418.845. ("The worker's compensation agency shall have jurisdiction over all controversies arising out of injuries suffered outside this state if the injured employee is employed by an employer subject to this act and if either the employee is a resident of this state at the time of injury or the contract of hire was made in this state. The employee or his or her dependents shall be entitled to the compensation and other benefits provided by this act.").

61. 423 Mich. 89, 93 (1985).

62. 423 Mich. 531, 533 (1985).

injury outside of Michigan and recognized that the amendment was about subject-matter jurisdiction–displacing the WDCA–and not procedure such as venue.[63]

Brewer is important for two reasons. First, the ruling establishes the law to apply in current and future claims. Most of the claims to workers' compensation that are now pending are for injuries that occurred after January 13, 2009, and subject to the amendment under *Brewer*. Consequently, future claims to workers' compensation based on an injury before *Brewer* may be time-barred.[64] The decision is also important because it recognizes a problem with the amendment. The court observed that the amendment extends the WDCA to an employer in another state that hires and employs people within that state, by allowing a claim when the injured employee was residing in Michigan but was injured in the employer's state.[65] It is important to note that the extension applies not only to workers' compensation.[66] A resident employee can claim workers' compensation from an employer in another state when injured in the employer's state under the amendment[67] and then sue for damages under section 641(2) should the employer not have insurance for workers' compensation as required under section 611(1)(a) or (b).[68] For example, a resident employee can claim workers' compensation and sue an Ohio employer for damages for an injury sustained while working in Ohio because an Ohio employer does not have insurance for workers' compensation. Unlike Michigan, Ohio does not require an employer to have insurance.[69] Ohio is a "fund" state, which pays claims and then assesses the employer.[70] Similarly, a resident employee can claim workers' compensation and sue a Wisconsin employer for damages from an injury in Wisconsin should Wisconsin's workers' compensation policy not include the special endorsement for claims in any state or issued by a carrier not licensed in Michigan. In these two situations, the amendment would allow section 641(2) to apply to allow a resident

63. *Brewer*, 486 Mich. at 57.

64. MICH. COMP. LAWS ANN. § 418.381(1) ("A proceeding for compensation for an injury under this act shall not be maintained unless a claim for compensation for the injury, which claim may be either oral or in writing, has been made to the employer or a written claim has been made to the bureau on forms prescribed by the director, within 2 years after the occurrence of the injury. In case of the death of the employee, the claim shall be made within 2 years after death.").

65. *Brewer*, 486 Mich. at 57.

66. *See id.* at 58.

67. *Id.*

68. MICH. COMP. LAWS ANN. § 418.641(1).

69. *See* OHIO REV. CODE ANN. § 4123.024 (West 2010).

70. *Id.*

employee both workers' compensation and damages from the employer in another state that does not have insurance. There can be no doubt that this problem will soon emerge.

There *were* two different understandings of what the statute required to displace the WDCA when an employee was injured while working outside of Michigan. Before the supreme court decided the case of *Karaczewski v. Farbman Stein & Co.*,[71] the court interpreted the statute as displacing the WDCA when an employee was injured while working outside of Michigan unless the employee had been hired in Michigan.[72] Afterwards, the statute was understood to displace the WDCA unless the employee had been hired in Michigan and also was a resident of Michigan when injured outside of Michigan.[73] The court said that the first understanding no longer applied, and that the second interpretation applied and could be applied retroactively.[74] While there was little disagreement with the precision of the second understanding only Justice Kelly and Justice Cavanagh thought that the first should be preserved—there was substantial division about when to apply it.[75]

In *Bezeau* the supreme court decided that *Karaczewski* was correct about the understanding of the statute, but that it applied only to a claim for workers' compensation because of an injury sustained by an employee after *Karaczewski* was announced on May 23, 2007.[76]

The court's decision resulted in two different understandings of the statute before its amendment. The WDCA applies to an employer when an employee is injured while working outside of Michigan before May 23, 2007 (when *Karaczewski* was announced) only if having been hired in Michigan.[77] However, the WDCA applies to an employer when an employee is injured in another state after May 23, 2007, but only if having been hired in Michigan and also residing in Michigan when hurt.[78]

The law is prolix when the decision by the court in *Bezeau* is considered with *Brewer*. The WDCA applies to an employer if an employee was injured while working outside of Michigan: before May 23, 2007, only if having been hired in Michigan (residency in Michigan

71. 478 Mich. 28 (2007).

72. *Id.* at 37-38.

73. *Id.* at 44.

74. *Id.* at 44 n.15.

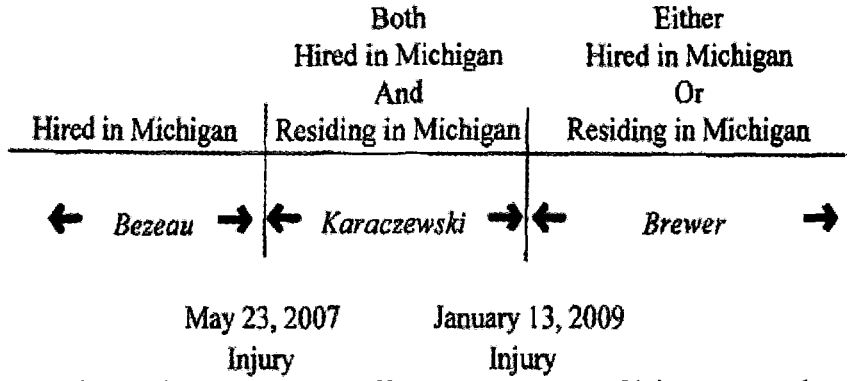
75. While Justice Weaver agreed with the majority understanding of the statute, she felt the decision should not apply retroactively. *Id.* at 45 (Weaver, J., concurring in part and dissenting in part). Justice Kelly agreed. *Id.* at 61.

76. *Bezeau*, 487 Mich. at 465.

77. *Id.* at 469.

78. *Id.*

does not matter); between May 23, 2007, and the time that the amendment was effective on January 12, 2009, only if having been hired in Michigan and also having been a Michigan resident when injured; and after January 13, 2007, if hired in Michigan or, alternatively, a Michigan resident when injured. This complexity may be quickly appreciated from the following timeline:



This prolixity may not affect many cases. Claims to workers' compensation for an injury sustained by an employee outside of Michigan before May 23, 2007, that have already been decided cannot be re-filed under *Bezeau*. Cases that have already been decided are exempt from *Bezeau*.[79] Additionally, a claim for workers' compensation for an injury sustained before May 23, 2007, which has not already been decided may be time barred by the statute that requires a claim be filed with the workers' compensation agency within two years of an injury, or death, with few exceptions.[80] It is most disconcerting that employees who were injured while working outside of Michigan before *Karaczewski* was decided on May 23, 2007, would not have filed a claim because the ruling required both hiring and residency in Michigan, only to find that ruling did not apply after the *Bezeau* decision only to be barred under section 381(1). It may be that Andre Bezeau is the only employee who can apply the WDCA now to a claim for an injury sustained before May 23, 2007.

79. *Id.* at 466-68 ("Our holding affects claims based on injuries that occurred on or before the date this Court decided *Karaczewski,* as long as the claim has not already reached final resolution in the court system.").

80. MICH. COMP. LAWS ANN. § 418.381(1).

VI. *JACKSON V. SEDGWICK CLAIMS MANAGEMENT SERVICES, INC.*: NO RICO EXCEPTION

There have been arguments that there are more than the five exceptions mentioned to the law providing that only the WDCA applies to an employer when an employee is injured at work. All have been rejected. For example, in *Szydlowski v. General Motors Corp*,[81] the supreme court rejected the argument that an employee could sue a fellow employee and the employer for damages from malpractice during treatment at the plant infirmary. The condition of someone as a fellow employee and employer was not superseded by the parallel condition as a doctor and a medical care provider. In *Blackwell v. Citizens Ins. Co.*[82] the supreme court rejected the argument that an employee could sue an employer for damages for not providing certain medical care after an injury at work under the Uniform Trade Practices Act and common law. In *Jackson v. Sedgwick Claims Mgt. Services, Inc.*[83] there was an argument made for a sixth exception to the WDCA, but it was rejected.

In *Jackson*, Clifton E. Jackson sued his employer, Coca-Cola, its compensation claims administrator, Sedgwick Claims Management, and a doctor who had been hired to examine him, Paul Drouillard, M.D., for damages under the Uniform Trade Practices Act, and the Racketeer Influenced and Corrupt Organizations Act claiming that the three had conspired to deny him workers' compensation for which he was qualified.[84] A federal district court dismissed the lawsuit because in *Blackwell v. Citizens Insurance Co.* the court had already established that the obligation under the UTPA was to an employer, and not to an employee.[85] The court held that RICO could not be used to avoid section 131(1) which provides that the WDCA shall be the exclusive remedy when an employee is injured at work.[86] The RICO claim was barred because workers' compensation is a comprehensive administrative regime.[87] *Jackson* is important because it maintained the primacy of the WDCA and its five exceptions. Certainly, the decision avoided a host of problems. Most notably, the court avoided a potential conflict between the federal court and the workers' compensation agency having the

81. 397 Mich. 356, 358-59 (1976).

82. 457 Mich. 662, 672, 673 (1998).

83. No. 09-11529, 2010 U.S. Dist. LEXIS 22792 (E.D. Mich. Mar. 11, 2010), *aff'g* Jackson v. Sedgwick Claims Mgmt. Serv., No. 09-11529, 2009 U.S. Dist. LEXIS 62797 (E.D. Mich. July 22, 2009).

84. *Id.* at *3.

85. *Id.* at *54 n.28.

86. *Id.* at *62.

87. *Id.*

primary authority to hear and decide the eligibility of an employee for workers' compensation.

VII. *BAKER V. TRANS-PORTE, INC.*: RECONSIDERATION OF AN EXCEPTION UNDER THE AUTO OWNER'S LIABILITY STATUTE

The WDCA allows an employee to receive compensation from an employer.[88] The owner of an automobile is liable for damages from the negligent use of a car.[89] During the *Survey* period the court appeals decided *Baker v. Trans-Porte, Inc.*[90] In *Baker*, the court of appeals reconsidered how these two laws could operate when the employee was injured driving a car for business.[91]

In *Baker*, Rachel Baker received workers' compensation from U.S. Foodservice for the death of her husband, Jonathan, when he was hit by a truck at work.[92] She then sued a subsidiary of U.S. Foodservice—Trans-Port—for damages under the auto owner's liability statute.[93] She did not sue either U.S. Foodservice or the driver of the truck who was a co-employee of Jonathan in apparent recognition of the limitation of the first sentence of section 131(1) in the WDCA.[94]

After establishing that the auto owner's liability statute applied because Trans-Porte was the owner of the truck, and not merely a lessor, the court of appeals considered the claim that Trans-Porte was the employer of Jonathan and therefore only the WDCA could apply.[95] The court of appeals decided that the subsidiary—Trans-Porte—was not an employer subject only to the WDCA.[96]

The court of appeals had three reasons for this: (1) Trans-Porte had actually denied that it was the employer of Jonathan;[97] (2) Trans-Porte

88. MICH. COMP. LAWS ANN. § 418.301(1) ("An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act.").

89. MICH. COMP. LAWS ANN. § 257.401(1) (West 2006) ("The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law.").

90. No. 289191, 2010 Mich. App. LEXIS 928 (Mich. Ct. App. May 20, 2010).

91. *See id.*

92. *Id.* at *1.

93. *Id.*

94. MICH. COMP. LAWS ANN. § 418.131(1).

95. *Baker*, 2010 Mich. App. LEXIS 928, at *9.

96. *Id.*

97. *Id.* at *14. ("[Trans-Porte's] repeated admissions and adamant expressions that it was not [Jonathan] Baker's employer . . . conclusively established that [it] was not [Jonathan] Baker's employer.").

was not the employer of Jonathan Baker under the "economic realities" standard of law;[98] and (3) while a parent company could be considered an employer as well as the subsidiary that had directly employed the worker, a *subsidiary* could not be considered an employer when the parent corporation was the immediate employer.[99]

The decision is notable for what was improperly assumed. Certainly, Trans-Porte assumed that only the WDCA would apply to establish its liability to Rachel Baker for the injury and death of Jonathan at work if it were the employer. Apparently, Baker and the court of appeals assumed this, too. There was no recognition of MCL section 641(2) that expressly allows a claim for workers' compensation and a lawsuit for damages from an employer that did not have workers' compensation insurance, such as Trans-Porte.[100] Thus, the lawsuit by Rachel Baker for damages from Trans-Porte under the auto owner's liability statute was available under MCL section 641(2). The reason for the oversight may have been that the second sentence of section 131(1), which says that the only exception to applying the WDCA to an employer when an employee is injured at work is for intentionally injuring the employee.[101] A reasonable reader would look for no other exception because of the text ("only") in the exception immediately following the declaration of the general rule. Plainly, the word "only" is misleading in view of the four other exceptions in the WDCA described by the second and third sentences of sections 301(3), 171(4), 641(2), and 845 with its amendment.

The court improperly assumed that the so-called "economic realities" test was the standard by which an employment relationship existed. The WDCA was amended after the decision in *Clark v. United Technologies*

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98. *Id.* at *16. ("In *Clark v. United Techs. Auto., Inc.*, 459 Mich. 681, 688-89 (1999), the Michigan Supreme Court set forth the economic realities test, which is used to determine whether an employment relationship exists for purposes of the exclusive remedy provision.").

99. *Id.* at *18. The court stated:

> We find that *Wells* is distinguishable because it entailed an effort to sue the parent corporation where the employee worked for the subsidiary, which is the reverse of the situation here, and because the *Wells* Court placed much emphasis on the fact that the parent company carried worker's compensation insurance and supplied such benefits through its insurer. Here, the corporation seeking to use the exclusive remedy provision as a shield, [Trans-Porte], did not carry worker's compensation insurance.

Id. (citing Wells v. Firestone Tire & Rubber Co., 421 Mich. 641, 652 (1984)).

100. *Baker*, 2010 Mich. App. LEXIS 928, at *21 ("[Trans-Porte] admitted that . . . it carried no workers' compensation insurance.").

101. MICH. COMP. LAWS ANN. § 418.131(1) ("The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort.").

Automotive, Inc.,[102] that established the economic realities as the test by which to determine that someone was an employer of another under the WDCA. That change repudiated the economic realities standard as the supreme court observed in the case of *Hoste v. Shanty Creek Mgt., Inc.*[103] Again, the oversight was a function of changes in other statutes in the WDCA.

Finally, the court held that it was improper to assume that the condition of Transport as an employer could be decided by the circuit court on a motion. To be sure, under *Sewell v. Clearing Machine Co.*,[104] a circuit court has subject-matter jurisdiction to decide that someone was or was not an employer of another under the WDCA. However, in *Reed v. Yackell*[105] a plurality said that there were real problems with *Sewell*:

> Justice Corrigan has persuasively argued in her dissent that *Sewell* was indeed wrongly decided. However, we decline to overrule *Sewell* on this record. Both Justice Corrigan and amicus curiae are appropriately critical of the unseemly atmospherics surrounding the *Sewell* decision: it was decided peremptorily without plenary consideration, briefing, or argument. Appreciative of that criticism of *Sewell*, we believe it prudent to not replicate it and accordingly decline to overrule *Sewell* in the same peremptory fashion that it was adopted.[106]

Dissenting, Corrigan argued that *Sewell* should be overruled.[107] Justice Weaver's dissent wanted a hearing to compel the lawyers for the parties to brief the point.[108]

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102. 459 Mich. 681 (1999).

103. 459 Mich. 561, 572 (1999). In *Hoste* it was stated that:

This common-law-based approach was appropriate until the Legislature, as it of course has the authority to do, chose to speak about who was an independent contractor by amending § 161, in 1985, through the addition of subsection d, to define more completely the term 'employee.' Welch, *supra* at § 3.4. The new language, in superseding the old economic realities test, incorporated some, but not all the factors of the old test. Accordingly, while the common-law economic realities test cannot be used to supersede the statute, i.e., by adding factors not in the legislative formulation of the economic realities test, those factors in the legislative test can be construed by reference to the case law development of those same factors.

Id.

104. 419 Mich. 56, 62 (1984).

105. 473 Mich. 520 (2005).

106. *Id.* at 538-39.

107. *Id.* at 553-56 (Corrigan, J., dissenting).

108. *Id.* at 541 (Weaver, J., dissenting).

The real significance of *Baker* concerns those issues entirely missed by the parties, the trial court, and the court of appeals. It may continue unappreciated from a similar failure to recognize that there are indeed statutes other than the first and second sentences of section 131(1) to apply.

VIII. *CUNNINGHAM V. CUNNINGHAM*: WHEN WORKERS' COMPENSATION MAY BE MARITAL PROPERTY

The first sentence of MCLA section 131(1) establishes the WDCA as the only law that may apply to an employer when an employee is injured at work subject to the five exceptions by the statutes in the WDCA. However, the law has drawn little attention where it applies after the employer fulfills the responsibility to pay an employee workers' compensation after an injury. There have been just two decisions about workers' compensation as marital property before the *Survey* period: *Evans v. Evans*[109] and *Smith v. Smith*.[110] These earlier cases involved the situation of an employer paying workers' compensation to an employee who was married when injured.

During the *Survey* period, the court of appeals decided the case of *Cunningham v. Cunningham*,[111] resolving the problem about workers' compensation as marital property when the employee was married *after* having an injury at work. In *Cunningham*, James T. Cunningham married Rosemarie after having an injury at work and was paid workers' compensation only after the marriage when his claim was finally resolved.[112] The payment of the retroactive workers' compensation by the employer was deposited to a bank account held by both James and his wife, Rosemarie, and some was used to buy a house, with the rest and the continuing workers' compensation used to pay the costs of one or the other until the two divorced.[113] James claimed that the amount of the retroactive workers' compensation that the employer had paid while he was married was not marital property, having been based on an injury before he was married.[114] The court of appeals decided that neither the time of the injury, nor the time of the actual payment of workers' compensation was important.[115] Instead, the court of appeals ruled that

109. 98 Mich. App. 328 (1980).
110. 113 Mich. App. 148 (1982).
111. No. 285541, 2010 Mich. App. LEXIS 1325 (Mich. Ct. App. July 13, 2010).
112. *Id.* at *2.
113. *Id.*
114. *Id.* at *4
115. *Id.*

the time of the lost wages represented by the payment of the workers' compensation was important.[116] The amount of the workers' compensation that was paid to James while he was married for the wages he would have earned before the marriage was his separate property, while the amount that was for wages he would have earned during his marriage was marital property.[117] The decision states, "[b]ecause a workman's compensation benefit for lost wages is marital property if it compensates for wages lost *during* the marriage, only the portion of the retroactive award that compensated for wages lost *before* the marriage, from 1976 to October 1982, is properly characterized as separate property."[118] The reason for this conclusion was that workers' compensation is a substitute for the wage that an employee lost after an injury at work:

> Any compensation benefits awarded for time periods before the marriage or after its dissolution are akin to a party's individual earnings and are to be considered separate property, as those earnings fall outside the beginning and end of the marriage. It is not difficult to imagine certain factual circumstances where a spouse receives a benefit during the marriage for a time period before the marriage. Such a benefit would not be classified as marital property, but as separate property.[119]

This foundation for the decision by the court of appeals is usually true, but not always. There is workers' compensation paid independently of any loss of wage earning capacity. An employer is responsible for workers' compensation when an employee has one of the physical losses described by MCLA section 418.361(2)(a)-(l), and when an employee has two of the losses described by section 418.361(3)(b)-(e), or is blinded or insane because of an injury at work under section 418.361(3)(a) or section 418.261(f), even if fully able to work as before.[120]

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116. *Id.* at *15-16.

117. *Id.* at *15.

118. *Id.* at *15-16.

119. *Id.* at *14-15.

120. *Redfern v. Sparks-Withington Co.*, 403 Mich. 63, 79-80 (1978) ("There are two broad categories of workers' compensation benefits: scheduled benefits and general disability benefits. Scheduled benefits are awarded for specific medical losses without regard to whether there is a reduction of wage earning capacity; in general they are payable for permanent loss of a specific anatomical member or function, *e.g.*, a foot, hand, sight in one eye. General disability benefits are awarded for a loss of wage earning capacity even if there is no *specific* medical loss.").

In the case of *Cunningham*, the workers' compensation was for an injury independent of any lost wage. The court of appeals recognized that James was a paraplegic,[121] which qualified him for workers' compensation under MCLA section 418.361(3)(e) (paralysis of both arms or both legs) and independent of any lost wages.[122] The rationale did not affect the outcome. The court of appeals decided that any workers' compensation that might have been the separate property of James lost that character when deposited to an account that he had with Rosemarie and then used it to buy a house held with her as a home, "because [James] commingled those monies with marital funds and with [Rosemarie's] separate funds to purchase the marital home, it lost any separate character it may have had, and should have been included in the marital estate."[123] This was an accurate expression of the law about marital property; separate property loses that character when deposited into an account or used to purchase an item that is held jointly.[124]

The *Cunningham* decision is important because it is controlling precedent as a published opinion of the court of appeals under MCR 7.215(C)(2). It also should find wide application, as few employees who are married will maintain a separate account in which to segregate workers' compensation and maintain it as separate property from a spouse. Most married employees have workers' compensation benefits deposited to an account held with the spouse and use the money for the ongoing expenses of each, just as a paycheck. The only time that it might be different is the time that an injured employee continues to work and receives workers' compensation for a specific loss under section 361(2)(a)-(l) or multiple loss, paralysis, or blindness under section 361(3)(a)-(g), and sets the compensation aside in a separate account for some future use. Then, the time of benefit—not the time of injury and not the time of the actual payment—will be important under *Cunningham*.

IX. CONCLUSION

There are two notable features to the important decisions about workers' compensation during the *Survey* period. First, all cases concerned the common subject of exceptions to the general rule that the WDCA only applies to an employer when an employee is injured at

121. *Cunningham*, 2010 Mich. App. LEXIS 1325, at *1-2 ("[James Cunningham] suffered a severe and permanently disabling injury while employed in construction work. He broke his spine and became a residual paraplegic.")

122. *Redfern*, 403 Mich. at 79.

123. *Cunningham*, 2010 Mich. App. LEXIS 1325, at *19.

124. *See, e.g.*, Pickering v. Pickering, 268 Mich. App. 1, 12 (2005).

work. This is notable in view of the fact that the supreme court, court of appeals, and the United States district court did not confer or organize these cases together. The other notable feature is the silence of the courts on any question about workers' compensation itself. This may have been deliberate. The courts may have turned away from the body of workers' compensation law, only to confront its exceptions. That is, courts may have decided problems with the exceptions only because of a deliberate decision to exile the body of workers' compensation law from consideration. Proof of this exile may be manifest in the next few years.