[Cite as *Vajda v. St. Paul Mercury Ins. Co.*, 2003-Ohio-160.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80917

NICK VAJDA	:	
	:	
Plaintiff-Appellant	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
ST. PAUL MERCURY INSURANCE CO.	:	OPINION
	:	
Defendant-Appellee	:	

Date of Announcement of Decision:	JANUARY 16, 2003
Character of Proceeding:	Civil appeal from Court of Common Pleas Case No. 425521
Judgment:	Reversed and remanded
Date of Journalization:	
Appearances:	
For Plaintiff-Appellant:	LEON M. PLEVIN, ESQ. BRENDA M. JOHNSON, ESQ. 1370 Ontario Street Suite 100 Cleveland, Ohio 44113-1792
For Defendant-Appellee:	D JOHN TRAVIS, ESQ. DARLENE E. WHITE, ESQ. Bulkley Bldg., 7th Floor 1501 Euclid Avenue Cleveland, Ohio 44115

JAMES J. SWEENEY, J.:

{¶1} Plaintiff-appellant Nick Vajda appeals from a judgment of the Cuyahoga County Common Pleas Court that granted defendant-appellee St. Paul Mercury Insurance Company's motion for summary judgment. Vajda argues that the trial court erred in granting St. Paul's motion for summary judgment because he submitted sufficient evidence to demonstrate that a genuine issue of material fact exists as to whether he was an employee of Brentwood Limousine, Inc. For the following reasons we agree and reverse and remand.

{¶2} The record before us reveals that Brentwood Limousine, Inc. is a company that provides limousine services to clients on a hourly basis. This service includes the use of a limousine and a driver for hourly fees ranging between $35 and $150 per hour. Upon entering into a contract for services with a client, Brentwood Limousine will contact a driver from a list and offer them the job. The driver can accept or reject the job offer. Brentwood Limousine provides the vehicle to be used and pays for the gas, maintenance, and insurance relating to the vehicle. Brentwood Limousine pays the driver an hourly wage. Brentwood Limousine does not provide medical or health care benefits to the drivers, does not pay the driver's social security taxes and does not withhold taxes from the pay. Rather, Brentwood Limousine provides its drivers with a 1099 tax form.

{¶3} Vajda began working for Brentwood Limousine as a driver in 1994. He received an hourly wage of $8 from Brentwood Limousine and received 1099 tax forms. In his 1995 tax return, Vajda listed his income as self-employment business income from the operation of a sole proprietorship. The tax return also contains a Schedule SE, for self-employment tax.

{¶4} On October 2, 1995, Vajda was involved in a motor vehicle accident. He was not driving a limousine nor was he working for Brentwood Limousine at the time. Rather, he was riding

his own motorcycle on his way to a restaurant to have breakfast. The driver of the vehicle that struck Vajda's motorcycle was unlicensed and uninsured.

{¶5} On January 5, 2001, Vajda filed a complaint alleging that he is entitled to recover uninsured motorist coverage benefits from Brentwood Limousine's automobile liability insurer, St. Paul, pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660.

{¶6} In October and November 2001, St. Paul and Vajda filed cross-motions for summary judgment regarding Vajda's employment status at the time of the accident. St. Paul argued that Vajda was an independent contractor, and not an employee, at the time of the accident and therefore not entitled to receive uninsured motorist coverage benefits for the injuries he sustained in his October 2, 1995 motorcycle accident. Vajda argued that there was an issue of fact with regard to his employment status. The trial court granted St. Paul's motion for summary judgment upon finding no genuine issue of fact on the issue of employment status. Specifically, the trial court found that "no reasonable jury could find that [Vajda] was an employee." Vajda now appeals from that judgment and raises one assignment of error for our review.

{¶7} "I. The trial court erred to the prejudice of plaintiff-appellant Nick Vajda in granting defendant St. Paul Mercury Insurance Company's motion for summary judgment."

{¶8} In this assignment of error, Vajda claims that the trial court erred in granting summary judgment in favor of St. Paul because there is a question as to whether he was an employee of Brentwood Limousine at the time of the accident.

{¶9} We begin by noting that an appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. De novo review means that this court uses the same standard that the trial court should have used, and we examine the

evidence to determine if, as a matter of law, no genuine issues exist for trial. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120.

{¶10} Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc*. (1978), 54 Ohio St.2d 64, 66; Civ.R. 56(C).

{¶11} The burden is on the movant to show that no genuine issue of material fact exists. Id. Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc. which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293; Civ.R. 56(C). Unless the nonmovant then sets forth specific facts showing there is a genuine issue of material fact for trial, summary judgment will be granted to the movant.

{¶12} With these principles in mind, we proceed to consider whether the trial court's grant of summary judgment in St. Paul's favor was appropriate.

{¶13} Vajda's complaint alleges that pursuant to *Scott-Ponzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, he is entitled to recover uninsured motorist coverage benefits from St. Paul. In *Scott-Ponzer*, the Supreme Court extended insured status to employees of a corporation. The Supreme Court has not further extended such coverage to independent contractors. See *Schumacher*

v. Kreiner (2000), 88 Ohio St.3d 358. Accordingly, Vajda may only recover uninsured motorist coverage benefits from St. Paul if he was an employee of Brentwood Limousine at the time of his accident. Id.

{¶14} In an action to determine whether a person is an employee or an independent contractor, the court must determine who had the right to control the manner or means of doing the work. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146. The factors to consider include: (1) who controls the details and quality of work; (2) who controls the hours worked; (3) who selects the materials, tools and personnel used; (4) who selects the routes traveled; (5) the length of employment; (6) the type of business; (7) the method of payment; and (8) any pertinent agreements or contracts. Id.

{¶15} Whether someone is an employee or an independent contractor is ordinarily an issue of fact. Id. However, when the evidence is not in conflict, the question of whether a person is an employee or an independent contractor is a matter of law to be decided by the court. Id. All indicia of an employment relationship in a given case must be assessed together as a whole. *Harman v. Schnurmacher* (1992), 84 Ohio App.3d 207, 211.

{¶16} Here, the facts establish that a genuine issue of material fact exists as to whether Vajda was working as an independent contractor or an employee at the time of his injury. Although Brentwood Limousine claims that it did not have the right to control Vajda's work, there is evidence to suggest that it did. Brentwood Limousine determined who the clients were and what vehicles would be used in providing service to those clients. Brentwood Limousine provided the vehicles, paid for the gas and maintenance of the vehicles, and paid for the motor vehicle liability insurance. Although Vajda could accept or decline an assignment at-will, Brentwood Limousine controlled the hours he worked. In addition, Vajda was paid an hourly salary. All of these circumstances tend to

establish that Vajda was an employee of Brentwood Limousine. See *Celina Mutual Insurance Co. v. Hinkle* (1991), 75 Ohio App.3d 192; *Martinez v. Trimble* (Dec. 29, 1995), Lucas App. No. L-95-160.

{¶17} Tending to establish the opposite, however, is the fact that Brentwood Limousine did not deduct taxes from Vajda's pay and issued a 1099 form each year to Vajda for services performed. Indeed, Vajda filed his taxes accordingly. The use of 1099 forms typically suggests that the parties were not acting in an employer/employee relationship, but rather in that of an independent contractor relationship. See *Northeast Ohio College of Massotherapy v. John Burek* (2001), 144 Ohio App.3d 196; *Pavlick v. James Conrad* (Sept. 27, 2001), Cuyahoga App. No. 78705

{¶18} Since the facts concerning this issue are in dispute, the trial court erred in granting St. Paul's motion for summary judgment and denying Vajda's cross-motion for summary judgment.

Judgment reversed and remanded.

It is ordered that appellant recover of appellee his costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, P.J., CONCURS.

(See separate concurring opinion attached).

TERRENCE O'DONNELL, J., DISSENTS.

(See dissenting opinion attached).

JAMES J. SWEENEY

JUDGE

KENNETH A. ROCCO, P.J. CONCURRING:

{¶19} I agree with the majority that there is a question of fact whether appellant is an employee of Brentwood or an independent contractor, and that this question precludes summary judgment in favor of appellee. I write separately simply to point out that the evidence in the record that appellant is an employee is minimal, and that it will be his obligation at trial to prove that he is an employee.

{¶20} First, it is worth recalling the point of this analysis: The uninsured/underinsured motorist provision in the automobile insurance policy appellee issued to Brentwood defines the "insured" as "you." The Ohio Supreme Court has held that when "you" is a corporate insured, "you" includes the corporation's employees. *Scott Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660. Therefore, appellant may be considered an insured under Brentwood's policy, entitled to uninsured/underinsured coverage, if he is an employee of Brentwood.

{¶21} As the majority has explained, the fact that appellant is retained to drive a vehicle owned and maintained by Brentwood is some indication that appellant is an employee. That appellant is paid on an hourly basis is also somewhat indicative of an employment relationship. Although contractors are ordinarily paid by the job, both employees and independent contractors may be paid on an hourly basis. *Walker v. Lahoski* (July 28, 1999), Summit App. No. 19293; *Remy v. Graszl* (Dec. 23, 1998), Richland App. No. 98 CA 64. However, Brentwood does not really control the hours

appellant works; the length of each assignment is dictated by Brentwood's client, not by Brentwood. Thus, the majority's inclusion of this factor as indicative of "employee" status is tenuous.

{¶22} In short, the evidence that appellant is an employee is extremely limited.

TERRENCE O'DONNELL, J., DISSENTING:

{¶23} Respectfully, I dissent.

{¶24} The majority opinion has correctly focused the appellate issue for our resolution on the status Vajda enjoyed in his relationship with Brentwood Limousine, Inc.: as an employee, he would be entitled to coverage under the Commercial General Policy and therefore entitled to file a UM/UIM claim; as an independent contractor, he would not.

{¶25} The trial court in this case granted summary judgment in favor of Brentwood on this issue. Under Civ.R. 56(C), summary judgment is proper if: (1) no genuine issue as to any material fact remains to be litigated; (2) it appears from the evidence that reasonable minds can come to but one conclusion when viewing the evidence in favor of the non-moving party, and that conclusion is adverse to the non-moving party; and (3) the moving party is entitled to judgment as a matter of law.

{¶26} Here, significantly, both parties moved for summary judgment, thus inferring that no genuine issue of material fact exists, as each sought judgment as a matter of law. Vajda, however, in addition, alternatively moved to deny Brentwood's request for summary judgment contending a factual issue existed regarding his status: employee or independent contractor.

{¶27} In summary judgment cases, we are also guided by *Dresher v. Bert* (1996), 75 Ohio St.3d 280, where the court stated:

{¶28} " * * * we hold that a party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party."

{¶29} In *Bostic* v. *Connor* (1988), 37 Ohio St.3d 144, the court stated that the key factual determination to be made when deciding whether an individual is an employee or an independent contractor is who had the right to control the manner or means of doing the work. It also explained as follows:

{¶30} "Generally, where the evidence is not in conflict or the facts are admitted, the question of whether a person is an employee or an independent contractor is a matter of law to be decided by the court. See *Schickling v. Post Publishing Co.* (1927), 115 Ohio St. 589, 155 N.E. 143, syllabus. However, the issue becomes a jury question where the claimant offers some evidence that he was an employee rather than an independent contractor. See *Laird*, supra, at paragraph three of the syllabus.

As set forth in *O'Day v. Webb* (1972), 29 Ohio St. 2d 215, 58 O.O. 2d 424, 280 N.E. 2d 896, paragraph four of the syllabus:

{¶31} "'It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue * * *.' (Emphasis sic.)"

{¶32} On appeal, Vajda claims a genuine issue of material fact remains regarding whether he was an employee or an independent contractor at the time of his injury, and therefore he asserts the court improperly granted summary judgment in favor of Brentwood on this issue.

{¶33} In my view, the court correctly granted Brentwood summary judgment, because Brentwood met its *Dresher* burden to demonstrate the absence of a genuine issue of material fact regarding Vajda's status under the *Bostic* directive: it is undisputed that Vajda decided whether or not to accept an assignment from Brentwood Limousine, thereby controlling the hours he chose to work as well as the customers he chose to serve. Further, when Vajda accepted an assignment, the customer, not Brentwood, controlled and directed the routes he drove. The fact that Brentwood issued him a 1099 tax form instead of an employee W-2 statement for tax purposes is a further indication that Brentwood did not consider him to be an employee.

{¶34} I believe therefore that Brentwood demonstrated that Vajda controlled the manner and means of doing his work and that no genuine issue of material fact exists on that issue and therefore, reasonable minds can come to but one conclusion which is adverse to Vajda. Accordingly, I would affirm the judgment of the court, because it correctly ruled as a matter of law that Brentwood met its *Dresher* burden, Vajda did not, and from the evidence in this record, no genuine issue of material fact exists regarding Vajda's status. For these reasons, I dissent.