

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

BRADLEY BASS, a Michigan resident,

Plaintiff,

Case No. 06-22591-NO  
Hon. Michael W. Labeau

v

MEIJER INC, a Michigan corporation,

**Hearing Date: 11/02/07, 1:15 pm**

Defendant.

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Bret Schnitzer (P38987)  
3334 Fort Street Lincoln Park,  
Michigan 48146  
(313) 389-2234

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**PLAINTIFF'S RESPONSE TO DEFENDANT'S  
MOTION FOR SUMMARY DISPOSITION**

NOW COMES Plaintiff, by and through his attorney, Bret A. Schnitzer, and for his response to Defendant's motion for summary disposition, states:

1. Admitted.
2. Denied that FHI provides "laborers." The contract provides that "FHI agrees to unload trailers at the times and places requested by MEIJER at its distribution centers." (Contract, par I, p 1 – Ex A). The contract adds that FHI "will function as an independent contractor" and have "exclusive direction and control" over its employees at the distribution centers. (Id, pars I and IIA, IIB).
3. Admitted.

4. Admitted.
5. No contest.
6. Denied that Defendant was Plaintiff's co-employer under the economic realities test. Denied that Plaintiff's action is barred by MCL 418.131(1).
7. No contest that Plaintiff could not maintain a tort action if the exclusive remedy provision applied. Denied that Defendant was Plaintiff's employer and that the exclusive remedy provision bars this case.
8. Denied that Defendant's brief establishes grounds for summary disposition.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny Defendant's motion for summary disposition and grant summary disposition in favor of the Plaintiff on this issue pursuant to MCR 2.116(I)(2).

Respectfully submitted,

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(313) 389-2234

Dated: October 26, 2007

**PLAINTIFF'S BRIEF IN OPPOSITION TO  
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION**

**COUNTER-STATEMENT OF FACTS**

Although Defendant moves for summary disposition under MCR 2.116(C)(10), it fails to present substantial material facts demonstrating that Plaintiff was not its employee. Instead, Defendant provides only selected facts favorable to its position. Plaintiff must accordingly set forth the complete, material facts.

## **The accident**

This case arises from an accident at Defendant's Newport distribution center on September 20, 2006 at about 10:00 am. Plaintiff, Bradley Bass, an employee of Freight Handlers, Inc (FHI), was breaking down a pallet on the distribution center's loading dock. (Plaintiff dep, pp 62, 67 – Ex B). Defendant's employee, Eric Baker, was driving a hi-lo in the area. It is uncontested that Baker was speeding, cut off another hi-lo driver, entered the unloading space on the loading dock, and lost control of the hi-lo. (Davis dep, pp 39, 47, 56, 58, 99 – Ex C). Not looking where he was driving, Baker struck Plaintiff from behind. (Id, p 40, 92; Plaintiff dep, pp 62, 67 – Ex B).

Mr. Bass' left leg was pinned and crushed in the collision. (Plaintiff dep, pp 71, 92 – Ex B). After several unsuccessful surgeries, his leg was amputated below the knee. (Id, pp 137-141).

### **Plaintiff's employer, FHI, is a national expert in unloading services**

Defendant omits that Plaintiff's employer, FHI, "provides professional unloading services to the grocery and general merchandise industries" throughout the country. (Web page – Ex D; Defendant's RTA response 20 – Ex E; Tollison dep, pp 38-39 – Ex F). FHI is an expert in production unloading. (Tollison dep, pp 12-13 – Ex F). It professionally trains its employees to be specialists in unloading trucks and related safety issues. (Id, pp 12, 14, 31, 45). FHI states that its "employees have perfected the art of unloading," which "sets FHI apart" from other companies. (Id, p 43). FHI promises customers that it will "increase production 25% or more." (Id, p 39; Web page 2 – Ex D). Defendant admits that FHI held itself out as a specialist in unloading operations. (Defendant's RTA response 22 – Ex E).

**Defendant's agreement with FHI specifies that FHI is an "independent contractor" and separate business that will have "exclusive direction and control" over its employees working at Defendant's Distribution Center**

On September 28, 2005, Defendant and FHI entered into a "service agreement." (Ex A). FHI agreed "to unload trailers at the times and places requested by MEIJER at its distribution centers." (Id, par I, p 1). The contract specified that "FHI will function as an independent contractor to MEIJER, various motor carriers, and shippers servicing MEIJER." (Id; see also par XIII, pp 5-6). It then reiterates that:

FHI is retained by MEIJER only for the purposes and to the extent set forth in this Agreement, and FHI's relationship to MEIJER shall, during the term of this Agreement, be that of an independent contractor. No partnership, joint venture, or other arrangement is intended nor should be inferred from this Agreement. Neither FHI nor its employees shall be entitled to participate in any plans, arrangements, or distributions by MEIJER pertaining to or in connection with any pension, stock, bonus, profit-sharing or other benefit extended to MEIJER's employees. (Id, par XIII, pp 5-6).

The agreement further specifies that FHI shall maintain exclusive control over its employees working at Defendant's distribution centers. Defendant's sole power over FHI employees is to exclude someone engaging in misconduct on Defendant's property:

FHI shall provide employees who shall be FHI's sole employees and under its exclusive direction and control in the performance of FHI's duties under the Agreement. FHI's on-site management and supervision will direct the activities of all FHI employees and will work closely with MEIJER management to maintain a safe, productive workplace. . . .

FHI and MEIJER shall, during the term of this Agreement, refrain from recruiting or soliciting for employment, employees of the other organization. MEIJER shall retain the right to exclude from its property and premises persons who in the sole exercise of MEIJER's discretion have engaged in misconduct on or about MEIJER premises. Subject to the foregoing, FHI shall retain the sole and exclusive right to determine who it shall employ and the terms and conditions of their employment and MEIJER's right of exclusion shall in no way interfere with FHI's sole and exclusive control in this area. (Id, par IIA and IIB, p 1).

FHI supervisor, Brandon Boylan, testified that the actual relationship between FHI and Defendant at the Newport distribution center was consistent with the terms of the contract. (Boylan dep, pp 4, 7-11 – Ex G).

**FHI provided Plaintiff's workers' compensation insurance**

Defendant omits that the agreement required FHI to maintain separate workers' compensation insurance for its employees. (Id, par IIIA, p 1; Defendant's RTA responses 47-49 – Ex E). Defendant and FHI did not modify their contract. (Id, response 33).

**Defendant and FHI are totally separate, unrelated companies**

It is uncontested that Defendant and FHI are totally separate companies. (Defendant's RTA responses 4, 5, 6 – Ex E; Tollison dep, p 14 – Ex F; Davis dep, p 13 – Ex C). There is no parent-subsiary relationship or shared ownership. Defendant is a Michigan corporation. FHI is headquartered in North Carolina. (Defendant's RTA response 11 – Ex E; Tollison dep, p 13 – Ex F; Davis dep, p 16 – Ex C). The two corporations have separate books, records, accounting, payroll, and separate websites. (Defendant's RTA responses 7, 13, 38 – Ex E).

Moreover, Defendant concedes that the contract establishes that FHI and its employees is an independent contractor. (Davis dep, p 27 – Ex C). Defendant also admits that, under the agreement, "FHI shall retain the sole and exclusive right to determine who it shall employ and the terms and conditions of their employment and Meijer's right to exclusion shall in no way interfere with FHI's sole and exclusive control in this area." (Defendant's RTA response 29 – Ex E). It is additionally undisputed that FHI provides unloading services to Michigan customers besides Defendant. (Defendant's RTA response 20 – Ex E; Tollison dep, pp 12, 38-39 – Ex F; Davis dep, p 17 – Ex C).

### **FHI exclusively trained, tested and hired Plaintiff**

In October 2005, FHI hired Plaintiff for the position of freight handler. (Plaintiff dep, pp 28-29 – Ex B). Before he was hired, FHI conducted extensive training and testing on Plaintiff. (Defendant’s RTA response 30 – Ex E; Tollison dep, pp 14-15, 24 – Ex F). FHI certified trainers exclusively prepared and administered all videos, materials, tests, and on-the-job training. (Herrera affidavit, pars 3, 10 – Ex H; Plaintiff affidavit, pars 3, 4 – Ex I; Tollison dep, pp 63-66, 154 – Ex F; Plaintiff dep, pp 105-106, 115 – Ex B). Plaintiff’s training and testing materials, which all bore FHI’s logo, included the following topics: power industrial equipment; freight handlers hazard communication; power jack operation; forklift operation; walkie pallet truck operation; heavy duty walking stacker operation; powered industrial truck safety rules and operating policies; anti-pull away policies and procedures; pre-shift safety procedures; and safety of FHI mentoring program. (Tollison dep, pp 63-64 – Ex F). Defendant did not prepare or administer any portion of Plaintiff’s training and testing. (Herrera affidavit, pars 3-4 – Ex H; Plaintiff affidavit, par 3 – Ex I; Tollison dep, pp 15-16 – Ex F). Nicholas Davis, unit director at the Newport Center at the time of Plaintiff’s accident, admits that FHI has “their own training rules and guidelines that they follow.” (Davis dep, p 16 – Ex C).

After passing FHI’s testing program, Plaintiff was hired to work at the Newport Center. Defendant freely concedes that Plaintiff was an FHI employee. (Defendant’s RTA response 9 – Ex E; Davis dep, pp 114-115 – Ex C).

In noting that it conducts a criminal background check on all FHI employees working at Newport, including Plaintiff, Defendant omits that FHI conducted its own independent background check before hiring Plaintiff. (Herrera affidavit, par 12 – Ex H; Plaintiff affidavit, par 12 – Ex I; Tollison dep, p 32 – Ex F). FHI also conducted pre-hiring drug tests. (Id).

Defendant falsely states that FHI will not hire any applicant who flunks the criminal background check. Defendant omits the testimony of FHI site manager Tollison that FHI could still hire an applicant precluded from the premises by Defendant and place him at another facility. (Tollison dep, pp 6, 33, 170 – Ex F). Moreover, after attempting to testify that “we regulate who (FHI) hire(s),” Defendant’s unit director Davis conceded that Meijer could only refuse an FHI employee access to its property. (Davis dep, p 15 – Ex C). Otherwise, Defendant has no involvement or input whatsoever into who FHI hires. (Herrera affidavit, par 10 – Ex H).

**After he was hired, Plaintiff obtained only FHI orientation materials, policies and handbooks**

After FHI hired Plaintiff in October 2005, Plaintiff received extensive orientation materials, policies and documents. These included his job description and duties; FHI’s substance abuse policy; terms of employment; no-fault attendance policy; equal opportunity employment rules; anti-harassment policy; disciplinary rules; vacation policies; health coverage and pension information. (Tollison dep, pp 60-62 – Ex F; Plaintiff dep, pp 103, 109 – Ex B). Each and every one of these materials was solely produced and distributed by FHI. (Herrera affidavit, par 3 – Ex H; Plaintiff affidavit, par 3 – Ex I; Davis dep, p 20 – Ex C). Defendant admits that it did not give Plaintiff a single handbook, policy, or procedure. (Defendant’s RTA responses 27-28 – Ex E; see also Tollison dep, pp 69-70, 79-81 – Ex F). Plaintiff signed acknowledgement of receiving FHI’s “Rules of Conduct” and other policies. (Tollison dep, p 74 – Ex F). Each document bore the FHI corporate logo. (Id).

**Plaintiff did not become a member of Meijer’s employee’s union**

As an FHI freight handler, Plaintiff did not belong to any union. (Tollison dep, p 153 – Ex F; Mayjtka affidavit, par 10 – Ex L). This included the United Food and Commercial Workers, the union representing Meijer employees at the Newport Center. (see Retail Contract excerpts – Ex K; Tollison dep, p 51 – Ex F). Neither Plaintiff nor any of the other FHI

employees received any benefits under the Meijer employee union contract. (Herrera affidavit, par 10 – Ex H; Plaintiff affidavit, par 10 – Ex I).

**FHI maintained Plaintiff’s only personnel files**

Defendant next omits that it did not maintain any personnel file on Plaintiff. (Defendant’s RTA response 18 – Ex E). FHI exclusively maintained Plaintiff’s personnel file, both at its North Carolina headquarters and at the Newport Center. (Tollison dep, pp 25, 71-72 – Ex F). FHI’s logo appears on all of Plaintiff’s personnel records. (Id, pp 72-74).

**Defendant admits it did not pay Plaintiff wages or keep financial records related to Plaintiff**

FHI exclusively paid Plaintiff’s wages through FHI checks. (Plaintiff dep, p 130 – Ex B; Davis dep, p 16 – Ex C). Defendant concedes that it did not pay Plaintiff wages or keep any financial records related to Plaintiff. (Defendant’s RTA responses 8, 19, 31 – Ex E). Defendant did not take any withholdings for Plaintiff. (Id, response 40). Plaintiff’s pay was based solely on FHI’s scale and was not directly tied to Defendant’s profits or income stream. (Plaintiff affidavit, par 9 – Ex I). FHI could receive less or more compensation from Defendant for certain unloading jobs than it paid its employees. (Id).

**An FHI supervisor exclusively conducted Plaintiff’s on-the-job training**

After Plaintiff started working for FHI at the Newport Center, an FHI supervisor, or “mentor,” conducted Plaintiff’s on-the-job training. (Herrera affidavit, pars 3-4 – Ex H; Tollison dep, pp 31-32 – Ex F; Plaintiff dep, p 100 – Ex B). Once again, Defendant was not involved in training Plaintiff. (Herrera affidavit, pars 3-4 – Ex H; Plaintiff affidavit, par 3 – Ex I; Mayjtka affidavit, par 10 – Ex J; Boylan dep, pp 15-16 – Ex G).



**FHI, Plaintiff and trucking vendors also  
supplied equipment and clothing Plaintiff used**

Defendant incorrectly alleges that it “provided the equipment that FHI unloaders, such as Plaintiff, used to perform their duties at the Meijer distribution center.” (Defendant’s brief, p 13; emphasis added). Defendant provided only some of the walkie or pallet jacks FHI freight handlers, or “unloaders,” used. Defendant omits that FHI unloaders also frequently used power jacks supplied in the trucks of vendors delivering to the Newport Center. (Plaintiff affidavit, par 5 – Ex I; Boylan dep, pp 23-24 – Ex G).

Defendant additionally omits that FHI supplied Plaintiff and the other unloaders with uniforms that were distinctly different from the work clothes Meijer employees wore. (Defendant’s RTA response 12 – Ex E; Herrera affidavit, par 10 – Ex H; Plaintiff affidavit, par 10 – Ex I; Tollison dep, p 52 – Ex F; Davis dep, pp 19, 103 – Ex C). Plaintiff’s uniform bore the FHI logo. (Plaintiff affidavit, par 10 – Ex I). Furthermore, FHI unloaders supplied their own steel-toed boots and work gloves. (Id; Herrera affidavit, par 10 – Ex H; Boylan dep, p 23 – Ex G).

**FHI used a separate parking area, break room, and its own data and fax lines**

Defendant’s motion also disregards evidence that it designated separate facilities for FHI employees at the Newport Center. Plaintiff, co-worker Josh Herrera, FHI production manager Boylan and former Meijer auditor Anthony Mayjtka state that Meijer had FHI employees park “in a separate designated area.” (Plaintiff affidavit, par 10 – Ex I; Herrera affidavit, par 10 – Ex H; Boylan dep, pp 12, 22 – Ex G; Mayjtka affidavit, par 10 – Ex J). Auditor Mayjtka adds that Defendant maintained a separate break room for FHI employees. (Mayjtka affidavit, par 10 – Ex J).

Moreover, while Defendant provided FHI supervisors office space at the Center, the contract required FHI “to install data/fax lines in those offices.” (Contract, par VII, p 4 – Ex A).

Defendant omits that Clint Tollison, after testifying that Meijer ran the phone lines, admitted: “I really don’t know how it works.” (Tollison dep, pp 30-31 – Ex F).

**FHI conducted the daily safety meetings, which were attended only by FHI employees**

In noting that FHI site manager Tollison attended meetings with Meijer management, Defendant conveniently omits the undisputed fact that Plaintiff and FHI freight handlers never attended any meetings with Meijer personnel. (Defendant’s RTA responses 35, 50 – Ex E; Mayjtka affidavit, par 10 – Ex J; Boylan dep, pp 88-90 – Ex G). Instead, FHI conducts its own pre-shift safety meetings. (Tollison dep, p 68 – Ex F; Boylan dep, pp 13-14 – Ex G). FHI employees exclusively attend these meetings. (Id; Plaintiff dep, pp 113-114, 132 – Ex B).

**FHI prepared the inspection lists Plaintiff used**

Defendant next omits that each time Plaintiff used a power jack supplied by Meijer, he completed an inspection checklist prepared by FHI. (Tollison dep, p 67 – Ex F; Plaintiff affidavit, par 4 – Ex I). FHI required Plaintiff and other FHI employees to complete this checklist before using any power equipment. (Id). The inspection reports, once again, bore the FHI logo. (Plaintiff dep, p 102 – Ex B).

**FHI fully and exclusively controlled Plaintiff’s job duties. Defendant’s only authority, like any other private property owner, was to refuse access to an FHI employee who engaged in criminal actions or “outrageous conduct”**

Defendant erroneously claims that it controlled Plaintiff’s job at the Newport Center. Plaintiff unloaded trucks for FHI. (Plaintiff dep, p 30 – Ex B). Plaintiff and the other FHI freight handlers would take items off trucks, sometimes break them down, and place (or stage) materials on the loading dock. (Id, p 32).

FHI supervisors assigned Plaintiff to the docks where he unloaded trucks and staged product. (Plaintiff dep, p 42 – Ex B; Mayjtka affidavit, par 9 – Ex J). Plaintiff testifies that FHI can send its employees anywhere, on or off site. (Plaintiff dep, p 29 – Ex B). FHI site manager

Tollison admits that FHI routinely transferred its unloaders between produce and cold storage. (Tollison dep, p 19 – Ex F). Indeed, just before the accident, FHI transferred Plaintiff from produce to cold storage. (Plaintiff dep, p 46 – Ex B). FHI can also transfer employees to another facility. (Herrera affidavit, par 12 – Ex H).

During his job, Plaintiff was directed exclusively by FHI supervisors. (Plaintiff dep, p 133 – Ex B; Plaintiff affidavit, pars 3-4 – Ex I; Herrera affidavit, par 3 – Ex H; .Boylan dep, pp 9-10 – Ex G; Tollison dep, pp 24-26, 44-45 – Ex F; Mayjtka affidavit, pars 3, 4 – Ex J). Plaintiff never received any direction or control from a Meijer employee or supervisor. (Boylan dep, pp 9-10, 15-16 – Ex G; Plaintiff affidavit, par 4 – Ex I; Herrera affidavit, par 4 – Ex H). Defendant also does not control FHI supervisors. (Tollison dep, p 45 – Ex F). Plaintiff could not go home until an FHI supervisor released him for the day. (Boylan dep, p 84 – Ex G; Plaintiff dep, pp 34-35 – Ex B). Plaintiff and co-worker, Josh Herrera, state that FHI supervisors determined what order trucks were unloaded, what equipment should be used, and how many unloaders were needed on a given truck. (Plaintiff affidavit, par 4 – Ex I; Herrera affidavit, par 4 – Ex H).

In discovery, Defendant conceded that FHI supervisors on site controlled Plaintiff and the other FHI employees. (Defendant’s RTA response 17 – Ex E). In the words of Meijer unit director Davis, FHI “takes care of their employees and Meijer takes care of its employees.” (Davis dep, p 14 – Ex H).

Defendant also conceded in discovery that the only action it could take regarding an FHI employee was to preclude him access from the premises. (Id, response 25). This is the same right any owner has to control access to his private property. (Tollison dep, p 33 – Ex F). Director Davis admits that Defendant would only bar an FHI employee from the distribution center for criminal behavior or “outrageous conduct.” (Davis dep, p 17 – Ex C). Defendant could not tell FHI to fire an employee. (Boylan dep, pp 16-17 – Ex G). Davis further admits

that, except for Defendant's right to eject someone, FHI exercises complete control over freight handlers at the Newport Center. (Davis dep, pp 17, 114 – Ex C). Davis adds that, even if Defendant precluded an FHI employee access to the Center, FHI controls the employee and may send him to another facility. (Id, pp 17, 114; see also Defendant's RTA response 25 – Ex E; Tollison dep, p 34 – Ex F). FHI site manager Tollison agrees that Defendant's right to exclude someone from the premises did not alter or interfere with FHI's sole and exclusive control over its employees. (Tollison dep, pp 25, 50 – Ex F).

**FHI fully controls assignment and hours of its employees  
based on the daily count of trucks to be unloaded**

Defendant incorrectly contends that it controlled FHI's "staffing and hours." Clint Tollison testifies that FHI determines the number of unloaders and anticipated hours based solely on the number of scheduled trucks arriving that day. (Tollison dep, pp 16-17, 55 – Ex F). Tollison agrees that, once he knows the truck count, "FHI takes it from there." (Id, p 20). FHI solely determines the number of employees needed, anticipated hours to be worked, and how its employees are assigned. (Id, pp 20-21). Defendant did not designate the number of FHI employees on a shift. (Id, p 146). As the unloading expert, FHI determined that on its own. (Id, p 21).

Defendant's allegation that a "Meijer supervisor" gave FHI the daily truck count is untrue. Any Meijer employee with access to the Midas computer system, including a clerk, would provide the truck count. (Id, p 17). Moreover, some FHI supervisors had access to the system. (Boylan dep, pp 27-28 – Ex G).

**Defendant did not "post overtime" for FHI employees**

Defendant falsely asserts that it posted overtime for FHI employees. FHI manager Boylan unequivocally testifies that FHI exclusively determines overtime for its employees. (Boylan dep, p 49 – Ex G). Defendant does not schedule FHI employees and has nothing to do

with FHI's allocation of overtime. (Id; see also Herrera affidavit, par 9 – Ex H; Plaintiff affidavit, par 9 – Ex I). Defendant can request that FHI assign more workers to a given area, but the decision is entirely up to FHI. (Boylan dep, pp 49-50 – Ex G).

**Some truck drivers unload their own trailers; the remainder pay FHI, either directly or through Defendant**

Defendant falsely alleges that its revenue is directly linked with FHI. Defendant overlooks the fact that vending trucking companies, and not Meijer, pay FHI to unload. Meijer auditor Kelly Thompson explains that the Meijer clerk gives the MD sheet and bills of lading to the truck driver. (Thompson dep, p 38 – Ex L). If the driver wants FHI to unload, he will go to FHI. (Id). Drivers have the option of unloading trucks themselves. (Id). About 10% of the trucks delivering to the Newport center are unloaded by the drivers. Another percentage are intra-center Meijer trucks, which the drivers also unload. (Id, pp 33-34). FHI unloads the remaining trucks. In those cases, the truck drivers give the assigned FHI unloader the MD sheet. (Tollison dep, p 29 – Ex F). As Mr. Boylan states, “the driver decides whether or not to hire us . . .” (Boylan dep, p 19 – Ex G).

Some vendors pay FHI cash to unload trucks. (Thompson dep, pp 39, 77 – Ex L). These transactions are called “casuals.” (Id, p 39). Other vendors invoice FHI directly. (Plaintiff affidavit, par 5 – Ex I; Boylan dep, pp 19-20 – Ex G). Defendant pays FHI for unloading the remaining vendors at the contracted rate. (Id). Defendant then bills the vendors for this service. (Id).

**Defendant does not pay for any product until its auditor approves it at the dock**

Defendant omits that it does not pay for any product damaged on a truck or during FHI's unloading. (Thompson dep, p 50 – Ex L). If FHI damages goods Defendant does not accept, the vendor charges FHI for the cost, not Defendant. (Id). Defendant does not assume responsibility for or control over the actions of FHI unloaders.

**FHI employee can refuse to unload any trailer that is unsafe**

Defendant also omits the fact that FHI freight handlers retain the sole discretion to refuse to unload any trailer that is unsafe. (Boylan dep, p 18 – Ex G).

**Defendant’s MD sheet does not control how, where or when FHI employees unload trucks**

As demonstrated above, overwhelming evidence establishes that FHI supervisors exclusively controlled the duties and performance of FHI unloaders. Defendant’s claim that the MD sheet provided unloading instructions or controlled FHI employees is incorrect. Brandon Boylan testifies that the MD sheet merely designates what pallets are to be unloaded from a truck and how high they are to be stacked on the loading dock. (Boylan dep, pp 30-33 – Ex G). The MD sheet does not tell the FHI employee what method of unloading to use, what equipment to use, where to stage the product, or how to perform his duties. (Id; MD sheet – Ex M).

Plaintiff, co-worker Herrera, and former Meijer auditor Mayjtka each concur that the MD sheet does not control or instruct FHI unloaders how, where or when to do their job. (Plaintiff affidavit, par 5 – Ex I; Herrera dep, par 5 – Ex H; Mayjtka affidavit, par 4 – Ex J). The MD states how high the product should be stacked so it can fit in shelve spaces in Defendant’s warehouse. (Boylan dep, pp 30-31 – Ex G). As such, it merely designates the configuration of the load to comply with FHI’s contract with Defendant.

**Meijer’s auditors do not supervisor or control FHI unloaders**

Contrary to Defendant, Meijer’s auditors do not supervisor or control FHI employees. Anthony Mayjtka, himself a former Meijer auditor, confirms that the auditors acted as “bean counters.” (Mayjtka affidavit, par 5 – Ex J). They are not supervisors or managers. (Id, par 3). They do not control how FHI employees unload trucks and break down pallets. (Id, par 5). Auditors “were not in control of FHI employees in any manner and did not dictate what they did or how they did it.” (Id, par 6). Instead, auditors determined whether the product FHI

employees unload and stage on the dock is the proper quantity and height and is undamaged. (Id, par 5).

Brandon Boylan confirms that auditors are simply gate keepers who verify that the quality, quantity and height of the unloaded product match the listing on the MD. (Boylan dep, pp 33-46 – Ex G). Auditors do not supervise or control FHI employees. (Id; see also Herrera affidavit, pars 6-7 – Ex H; Plaintiff affidavit, pars 5-6 – Ex I). Kelly Thompson, another Meijer auditor, admits that she has no training how to unload trucks, does not attend safety meetings, is not a supervisor, had only previous experience counting inventory, and does not dictate how FHI staffs docks or unloads product. (Thompson dep, pp 6, 9-10, 31, 32, 35, 59, 64-65, 72-73 – Ex L). She only determines whether the staged product meets the MD sheet. (Id, p 81). Even more, the auditor’s job is the same whether an FHI employee or truck driver unloads the trailer. (Id, p 73).

An auditor may request an FHI unloader to move or restack product. (Mayjtka affidavit, pars 4, 5 – Ex J). The FHI employee is not obligated to comply, however. (Id). If the FHI employee and auditor disagree over an issue, the matter is taken to an FHI supervisor, (Boylan dep, pp 39-40 – Ex G), who has the power to “mediate” and resolve the dispute. (Tollison dep, pp 148-149 – Ex F).

**The “white line” is only a traffic control device, not a tool to control FHI**

Defendant erroneously claims that the “white line” was placed at the dock to control FHI employees. Actually, the white line was merely a traffic control device, placed to separate FHI unloaders from the hi-lo traffic. (Thompson dep, p 61 – Ex L; Herrera affidavit, par 8 – Ex H).

**FHI exclusively evaluated, disciplined, and fired its freight handlers**

Defendant disregards the fact that FHI had the exclusive authority to evaluate, discipline, and fire its employees. (Herrera affidavit, par 10 – Ex H; Plaintiff affidavit, par 10 – Ex I). Unit

Director Davis admits FHI had its own disciplinary process and that Meijer did not discipline FHI employees. (David dep, pp 14, 114 – Ex C). Defendant’s emphasis on the fact that a Meijer employee could report and FHI employee for a safety violation ignores Mr. Davis’ concession that even a private person could report someone at the Newport center. (Id, p 119; See also Tollison dep, p 167 – Ex F). This does not alter the fact that only FHI could evaluate or discipline its employees.

Defendant does not dispute that only FHI had the power to fire its workers. As explained above, Defendant’s private property right to exclude an FHI employee for criminal behavior or outrageous conduct did not prevent FHI from retaining the employee and transferring him to another facility.

**Clint Tollison’s consultation with Defendant over the procedure change after Plaintiff’s accident does not establish that Defendant controlled Plaintiff’s duties**

Finally, Defendant mistakenly alleges that Clint Tollison sought Meijer’s “approval” to implement a process change after the accident, which allegedly proves Defendant “controls the unloading and putting away of product process at the distribution center.” (Defendant’s brief, p 12). In fact, Mr. Tollison consulted with Defendant regarding his proposal because it involved a change in how Meijer employees removed product from the dock. (Tollison dep, pp 163, 173 – Ex F). Defendant conveniently omits that Tollison “still could have changed the way we set product on the dock . . .” without Defendant’s input. (Id, p 166).

**ARGUMENT**

**Defendant was not Plaintiff’s employer under the economic realities test. FHI controlled Plaintiff’s duties, paid his wages, had the sole right to hire, fire and discipline Plaintiff, and was not an integral part of Defendant’s business.**

Defendant disregards overwhelming material evidence establishing that Defendant was not Plaintiff’s co-employer under the economic realities test. At a minimum, construing the



evidence and all reasonable inferences in Plaintiff's favor, *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455 (1998), the record raises a genuine issue of material fact. Defendant's motion for summary disposition must be denied.

Michigan applies the "economic realities test" to determine whether an employer-employee relationship exists for purposes of the exclusive remedy provision, MCL 418.131(1). *Clark v United Technologies Automotive*, 459 Mich 681, 687 (1999); *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 647 (1984); *Mantei v Michigan Public School Employees Retirement Sys*, 256 Mich App 64, 78 (2003). Whether a company is a particular worker's employer under MCL 418.131(1) is a question of law for the courts to decide if the pertinent evidence is reasonably susceptible of but a single inference. *James v Commercial Carriers, Inc*, 230 Mich App 533, 536 (1998). If "evidence bearing on the company's status is disputed, or where conflicting inferences may reasonably be drawn from the known facts," the issue is "one for the trier of fact to decide." *Id* (citation omitted); *Tucker v County of Newaygo*, 189 Mich App 637, 639-640 (1991).

The economic realities test requires examination of "a number of factors." *Mantei*, 256 Mich App at 76. These are: (1) control of the worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) the extent the duties performed are an integral part of the employer's business toward achieving a common goal. *Id*; *James*, 230 Mich App at 537. "In applying these factors, the totality of the circumstances surrounding the work must be examined, with no single factor controlling." *Id*; *Farrell v Dearborn Mfg Co*, 416 Mich 267, 276 (1982). Evaluation of these factors overwhelmingly establishes that Defendant was not Plaintiff's employer.

**A. FHI, and not Defendant, exclusively controlled Plaintiff's duties.**

FHI unquestionably exercised exclusive control over Plaintiff's duties. The parties' agreement unambiguously provides that FHI was an "independent contractor" and that its employees were "under its exclusive direction and control in the performance of FHI's duties

under the Agreement.” (Contract, pars IIA, IIB, and XIII, pp 1, 5-6 – Ex A). Defendant’s argument that the agreement is not determinative disregards testimony establishing that, in “practice,” FHI exclusively controlled the duties of unloaders at the Newport center. (Boylan dep, pp 9-11 – Ex G; see other evidence cited above). FHI trained Plaintiff how to perform his job and operate equipment. FHI scheduled Plaintiff at docks, routinely transferred him from produce to cold storage, and solely determined when he arrived and could leave. Plaintiff was never supervised or controlled by a Meijer employee.

Defendant and its unit director concede that FHI supervisors on site controlled Plaintiff and the other FHI employees. (Defendant’s RTA response 17 – Ex E; Davis dep, p 14 – Ex C). Defendant’s reliance on its ability to exclude Plaintiff from the premises for crimes or outrageous conduct ignores Mr. Davis’ testimony that, absent ejecting someone, FHI exercises complete control over freight handlers at the Newport Center. (Davis dep, pp 17, 114 – Ex C).

As demonstrated, Defendant’s argument that the MD sheets or auditors controlled Plaintiff’s duties is totally unsupported. The MD sheet did not instruct Plaintiff how to perform his job. It merely designated the configuration of the product pallet to be placed on the dock so it would fit in the warehouse. The auditors had no supervisory authority over FHI employees whatsoever. At best, an auditor could only ask Plaintiff and his co-workers to do something. If Plaintiff refused, an FHI supervisor would “mediate” the dispute, without Defendant’s intervention. (Tollison dep, pp 148-149 – Ex F). The coordination between FHI and Defendant is analogous to cooperation between carpenters and electricians at a construction site. Coordination/cooperation does not equal control.

Defendant’s claim that Plaintiff “must comply with Meijer safety rules” ignores testimony that Plaintiff attended only FHI daily safety meetings and never once attended a

Meijer meeting. It also ignores Davis' admission that Defendant does not discipline FHI employees for anything, including safety violations. (Davis dep, p 114 – Ex C).

As indicated above, Defendant falsely states that it provide “the equipment” Plaintiff used. Actually, FHI provided Plaintiff separate uniforms, Plaintiff provided his safety clothes, and both Defendant and different trucking vendors supplied power jacks Plaintiff could choose from.

The contract, FHI managers, FHI employees, Defendant's request for admission responses and unit director Davis' testimony all establish that FHI controlled Plaintiff's duties. This factor conclusively tips against Defendant's argument.

**B. Defendant admits it did not pay Plaintiff wages.**

Defendant admits that it did not meet the payment of wages factor. (Defendant's brief, p 15).

**C. FHI maintained the exclusive right to hire, fire, and discipline Plaintiff.**

Defendant erroneously claims it “shared with FHI the right to hire, fire and discipline Plaintiff.” (Defendant's brief, p 15). Defendant's position contradicts the parties' agreement, its request for admission response, (Defendant's RTA response 17 – Ex E), and the testimony of several witnesses. Contrary to Defendant, its right to preclude someone from the premises did not interfere with FHI's sole power to hire the employee and place him at another facility. (Tollison dep, pp 33, 170 – Ex F). Defendant also could not prevent FHI from transferring a current employee to another location. (Id, p 170).

**D. FHI was not integral to Defendant's business.**

Defendant avoids the fact that FHI did not unload all the trailers at the center, and that trucking vendors, and not Defendant, paid FHI. Defendant also avoids the fact that Defendant and FHI are separate companies that did not engage in a joint venture. Defendant additionally

ignores the fact that FHI provided separate workers' compensation insurance for Plaintiff, a salient factor in concluding that Defendant was not Plaintiff's employer. *Nardi v American Motors Corp*, 156 Mich App 275, 279 (1986). Accepting Defendant's argument would mean that any Meijer vendor, including companies selling diesel oil or electricity, is integral to Defendant's business and Defendant's employee. (see Tollison dep, pp 168-169 – Ex F).

Defendant's reliance on *Kidder v Miller-Davis Co*, 455 Mich 25, 35 (1997), is totally misplaced. *Kidder* involved a labor-broker, not a separate, independent contractor like FHI. The Supreme Court in *Kidder* emphasized that “[a] labor broker-customer arrangement presents a unique employment relationship and adds a further dimension to the analysis of who is an employer for purposes of the WDCA.” *Id.* FHI, unlike the labor broker in *Kidder*, did not “lease” and relinquish control over the plaintiff to the defendant company. *Id* at 27. Instead, FHI scrupulously maintained control over Plaintiff's duties, as well as the right to hire, evaluate, discipline, and fire. *Kidder* is materially distinguishable and does not remotely support Defendant's argument.

Overwhelming evidence conclusively proves that Defendant did not control Plaintiff's duties, did not pay his wages, did not have the right to hire, fire or discipline him, and that FHI's independent services were not integral to Defendant's business. At a minimum, however, more than sufficient evidence raises a genuine issue of material fact that Defendant was not Plaintiff's employer. Defendant's motion for summary disposition must be denied. If fact it should be granted in favor of Plaintiff pursuant to MCR 2.116 (I) (2).

Respectfully submitted,

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