# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR NEW CASTLE COUNTY

AMANDA MITCHELL, In	dividually and	)	
as Administratrix as the Estate of		)	
HERBERT L. MITCHELL, deceased,		)	
STACIE L. MITCHELL and,		)	
SARA A. MITCHELL,		)	
		)	CIVIL ACTION NUMBER
	Plaintiffs,	)	
		)	10C-06-005 JOH
v.		)	
		)	
ALLEN FAMILY FOODS,	INC.,	)	
a Delaware Corporation		)	
-		)	
	Defendant.	)	

Submitted: April 3, 2013 Decided: April 24, 2013

### **MEMORANDUM OPINION**

Bench Trial Decision Regarding Employer/Employee Status of Herbert Mitchell

## Appearances:

Gary S. Nitsche, Esquire, Weik, Nitsche & Dougherty, Wilmington, Delaware. Attorney for Plaintiffs.

Daniel McKenty, Esquire, Katherine L. Hemming, Esquire, Heckler & Frabizzio, and Nancy Chrissinger Cobb, Esquire, Chrissinger & Baumberger, Wilmington, Delaware. Attorneys for Defendant.

Decedent, Herbert Mitchell passed away in 2008, while working at the Allen Hatchery ("Hatchery") site in Delmar, Delaware, when several tons of soy bean meal fell on him while inside a silo. The Hatchery is part of a vertically integrated series of corporations of which Allen Family Foods ("Allen") is part. The two are separate corporations, but it, and the third corporation, are known informally as the "Allen Group," which is not itself any kind of entity.

Because of what they allege were acts of negligence of Allen employees, Mitchell's daughters have brought this wrongful death and survivorship action against Allen. Shortly after Mitchell's death, however, his wife (who later died) and daughters started receiving certain death benefits from Allen. This was done under procedures of the Industrial Accident Board. Several years later, the family filed a petition seeking additional compensation before the Board. The employer from whom these benefits were sought was Allen.

The plaintiffs' action here seeks damages from Allen. As the plaintiffs' exclusive remedy is through workers' compensation if Mitchell were an employee of Allen at the time of his death, this action is barred by the exclusivity provision of the Workers' Compensation Act. If however, Mitchell was a Hatchery employee and not an employee, or shared employee of Allen, the plaintiffs are entitled to maintain this separate action.

The determination of whether Mitchell was an Allen employee is an issue of law.<sup>1</sup> That issue is intermixed in this case with the issue of whether plaintiffs receiving and seeking benefits from Allen, claiming it was Mitchell's employer, estopps them from maintaining this action. Because of the corporate structure, there is also an issue of whether Mitchell was, in effect, an Allen employee, or even a shared employee of Allen and the Hatchery.

The Court finds that the plaintiffs are not estopped from this separate action. The Court holds Mitchell was an employee of the Hatchery and had no employment relationship with Allen which bars this action.

# I. Effect of Industrial Accident Board Action

Mitchell died on June 4, 2008. In November 2008, the Industrial Accident Board entered an order awarding Mrs. Mitchell death benefits of \$680.80 per month.<sup>2</sup> On January 27, 2009, she and her three children signed an Agreement for Compensation for Death on a Board form.<sup>3</sup> On that form, it is noted that the accident occurred at his employment with Allen Family Foods.<sup>4</sup> Somehow, the place of the incident was noted as

<sup>&</sup>lt;sup>1</sup> See Falconi v. Coombs & Coombs, Inc., 902 A.2d 1094, 1098 (Del. 2006).

<sup>&</sup>lt;sup>2</sup> Defs. Ex. 10, tab 3.

 $<sup>^{3}</sup>$  Id. at tab 2.

<sup>&</sup>lt;sup>4</sup> *Id*.

"Allens [sic] Hatchery, Milling Division, Harbeson, DE" not Delmar.5

On May 6, 2011, plaintiffs' current counsel filed, and Mrs. Mitchell signed, a Petition to Determine Additional Compensation Due naming Allen as the employer. The same counsel filed a stipulation with counsel for Allen's counsel in connection with an upcoming Board hearing. Allen is the named employer.

Ultimately, in March 2012, the Board conducted a hearing on the Petition for Additional Compensation Due, and some related matters. The Board denied the Petition on April 1, 2012. That decision was appealed to this Court in Sussex County, which affirmed the Board's decision.<sup>6</sup> The Supreme Court affirmed.<sup>7</sup>

The plaintiffs filed their action in this Court in June 2010. Allen moved for summary judgment on September 7, 2012, claiming the plaintiffs were precluded from seeking damages against it by virtue of the exclusivity provisions of 19 *Del. C.* § 2304.8 In a bench ruling on December 14, 2012, this Court denied Allen's motion on the basis

Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.

<sup>&</sup>lt;sup>5</sup> *Id.* The document supplied is not signed, but there is every indication that Mrs. Mitchell and the three children are named as beneficiaries.

<sup>&</sup>lt;sup>6</sup> Estate of Herbert Mitchell v. Allen, 2012 WL 6846555 (Del. Super. Nov. 28, 2012).

<sup>&</sup>lt;sup>7</sup> Estate of Herbert Mitchell v. Allen, 2013 WL 1182176 (Del. 2013).

<sup>&</sup>lt;sup>8</sup> 19 *Del. C.* § 2304 provides:

that a factual conflict existed.

Allen reasserted this issue on the eve of trial, which was set to begin on March 11th. At that time, the plaintiffs changed their position and agreed with Allen that the issue of Mitchell's status of employee, was an issue at law. A hearing was held.

Allen cites to a number of things in an attempt to show the plaintiffs are estopped from pursuing this action. It points to the original agreement between it and the family to receive death benefits. It points to documents filed with the Board signed by Mrs. Mitchell and plaintiffs counsel seeking additional workers' compensation. All of these documents list Allen as the employer. Allen contends it was not until late 2011 that the plaintiffs informed the Board that there was the dispute in this Court about Mitchell's employee status. However, Allen was aware of this lawsuit in June 2010, yet waited over two years to move for summary judgment on the exclusivity issue.

Respectfully, Allen's argument overlooks two important things. One is 19 *Del. C.* § 2363(a):

Where the injury for which compensation is payable under this chapter was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies, but such injured employee or the employee's dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section. If the injured employee or the employee's dependents or personal representative does not commence such action within 260 days after the occurrence of the personal injury, then the employer or its compensation insurance carrier may, within

the period of time for the commencement of actions prescribed by statute, enforce the liability of such other person in the name of that person. Not less than 30 days before the commencement of suit by any party under this section, such party shall notify, by certified mail at their last known address, the Industrial Accident Board, the injured employee or, in the event of the employee's death, the employee's known dependents or personal representative or the employee's known next of kin, the employee's employer and the workers' compensation insurance carrier. Any party in interest shall have a right to join in said suit.

Additionally, Allen's contentions overlook *Messick v. Star Enterprise*. In that case, the Supreme Court held that a claimant did not have to elect between filing a third party action or a workers' compensation action. Further, the defendant in the third party action could not invoke collateral estoppel against positions the claimant took before and the Board decided in its case. *Messick*, however, did not involve the issue of which of two potential entities had been the claimant's employer. It involved decisions the Board made on causation which the third party sought to invoke against the claimant in his third party action. Nevertheless, the holding that collateral estoppel could not be used is equally applicable to the facts of this case.

Allen cites *Merritt v. United Parcel Serv*. <sup>11</sup> for the proposition that the plaintiffs are collaterally estopped from arguing in this Court that Allen was not Mitchell's employer. *Merritt* is inapposite. Prior to the Board hearing in that case, the employer, UPS, admitted

<sup>&</sup>lt;sup>9</sup> 655 A.2d 1209 (Del. 1955).

<sup>&</sup>lt;sup>10</sup> Messick, 655 A.2d at 1213.

<sup>&</sup>lt;sup>11</sup> 956 A.2d 1196 (Del. 2008).

liability, but the Board did not give proper consideration to UPS' admission. In doing so, it erred.<sup>12</sup>

Merritt did not modify, or overrule Messick. Section 2363(a), protects claimants in the position of these plaintiffs, but it is not applicable in the Merritt type of situation. Further, the Supreme Court in Messick recognized the many material differences between a Board decision and a third party action in this Court. In Merritt, it was the same case involving the same parties before the same tribunal.

In conclusion, these plaintiffs are not estopped from pursuing their action against Allen in this Court.

### II. Mitchell's Status

Before addressing the specifics of Mitchell's relationship with Allen, an overall picture is instructive. The picture presented, with one exception, is the picture in 2008 when Mitchell died. Allen is one of three separate corporations informally labeled together as the "Allen Group." The Allen Group is not any kind of legal entity; it has no employees, does not pay taxes, etc.

The three corporate entities in the "Group" are Allen, the Hatchery, and JCR Enterprises. Allen is the biggest of the three with the most employees. It has the safety department and the human relations department for all three corporations. It "processes" the chickens and sends them to market. JCR takes the "remnants" from Allen and

<sup>&</sup>lt;sup>12</sup> *Id.* at 1201-02.

converts them with various products, such as feed.

The Hatchery provides the food for all the chicken farms, raises the chickens and sells the chickens to Allen. At the site in Delmar where Mitchell died, soybeans and corn were transported there and converted into feed. Hatchery is its own corporation and owned the land at the Delmar location.

Each corporation has its own federal identification number. Hatchery has an agribusiness designation under the Internal Revenue Code, which is a tax advantage (and obviously helpful to Allen). Each corporation files its own franchise tax reports. Each has its own authorized shares of stock. Allen has 1,000 voting shares, JCR has 300 voting shares, and Hatchery has 7,500 voting shares and 16,500 non-voting shares. Many of the same people serve in the same position as officers and serve as board members of all three corporations. Despite that, all three corporations have their own annual meetings, albeit on the same day. There are combined financial reports covering all three corporations with little or no demarcations of the assets or liabilities of each corporation. When loans or lines of credit are sought, they are obtained using these combined financials. No one of the three corporations could seek a loan for itself.

<sup>&</sup>lt;sup>13</sup> Defs. Ex. 10, tab 3, p. 16.

<sup>&</sup>lt;sup>14</sup> *Id.* at tabs 8 and 9.

<sup>&</sup>lt;sup>15</sup> *Id*. at tab 5.

<sup>&</sup>lt;sup>16</sup> *Id*. at tab 7.

Allen purchased the liability and workers' compensation insurance for all three corporations and it was the first listed insured; Hatchery and JCR were also listed as named insureds.<sup>17</sup> There was one 401K program covering all three corporations. JCR had union employees and was unionized. Allen had a few union members among its employees, while Hatchery had no union employees.

As noted, this is the general picture of the three corporations in 2008 when Mitchell died. Several years later all three filed for bankruptcy and their assets were purchased.

Though currently accepted that its determination of whether one is an employee or an employee of a particular employer is an issue of law, this Court is constrained to address the anomaly of that principle compared to every other issue involving employment, agency, independent contractor, etc., which are issues of fact.

There are two seminal cases. The first is *Gooden v. Mitchell*<sup>19</sup> which was an appeal from the Industrial Accident Board. The issues were whether the injured party was an independent contractor, or was not under a contract or performing services for pay, or was a casual worker and not engaged in the regular course of business of the company.<sup>20</sup> There were two, potential employers. Of course, Mitchell was not engaged as an independent

<sup>&</sup>lt;sup>17</sup> Defs. Ex. 10, tab 22.

<sup>&</sup>lt;sup>18</sup> See Porter v. Pathfinder Serv., Inc., 683 A.2d 40, 42 (Del. 1996).

<sup>&</sup>lt;sup>19</sup> 21 A.2d 197 (Del. 1941).

<sup>&</sup>lt;sup>20</sup> *Id.* at 200.

contractor of Allen or the Hatchery, but instructively, the court in Gooden said:

The test most indicative as to whether or not a person is an independent contractor, or an employee, lies in the control of the work which is reserved by the employer. It is not necessarily the exercise of control or interference by the employer, but the existence of the right of control or to interfere, which renders one an employee rather than an independent contractor.<sup>21</sup>

Realizing that Superior Court does not sit as a fact-finder on Board appeals, there is one more statement in *Gooden* which, in the full context of comment being made, is important:

The Industrial Accident Board had before it the witnesses in this case, and, by reason thereof, had an opportunity to observe the demeanor of each and to form an impression regarding the weight to be given to the testimony of each, an advantage I do not have. Consequently, findings of fact on appeal, in cases such as before me, should be disturbed if there is evidence in the record from which such a conclusion of fact could be fairly drawn.<sup>22</sup>

The other seminal case, and the one which sets down the four-prong test to determine whether an employee/employer relationship exists is *Newton Trucking Co. v.*Neal.<sup>23</sup> The four prongs will be discussed later when reviewing the record on the issue of who was Mitchell's employer. The Supreme Court cited *Gooden* to say the key test is

<sup>&</sup>lt;sup>21</sup> Gooden, 197 A.2d at 201.

<sup>&</sup>lt;sup>22</sup> *Id*.

<sup>&</sup>lt;sup>23</sup> 204 A.2d 393 (Del. 1964).

control.<sup>24</sup> The Court found substantial evidence existed to support the Board's decision.<sup>25</sup> In short, however, the Board made a factual decision.

In that case, the Court cited *Richardson v. Hardy & Sons, Inc.* which it said governed its decision.<sup>26</sup> The *Richardson* case was a personal injury action filed in this Court. The issue was whether the plaintiff was a borrowed employee and which, of two employees could be liable. In reading that decision, the Supreme Court said:

The general rule is that an employee, with his consent, may be loaned by his general employer to another to perform specific services, and that, in the course of and for the purpose of performing such services, he may become the employee of the specific employer rather than the employee of the general employer. Accordingly, a loaned employee may become the specific employer's employee while at the same time remaining, generally speaking, the employee of him who loans his services. Restatement of Agency 2d, § 227.

Whether or not a loaned employee becomes the employee of the one whose immediate purpose he serves is always a question of fact, and depends upon whether or not his relationship to the specific employer has the usual elements of the employer-employee status. Fundamentally, it is not important whether or not he remains the employee of the general employer as to matters generally. What is important to determine is, with respect to the alleged negligent act in question, whether or not he was acting in the business of and under the direction of the general or the specific employer. Restatement of Agency 2d, § 227, comment a; 35 Am.Jur., Master and Servant, § 541. This is almost always determined by which employer has the right to control and direct his activities in the performance of the act

<sup>&</sup>lt;sup>24</sup> 204 A.2d at 395.

<sup>&</sup>lt;sup>25</sup> *Id*.

<sup>&</sup>lt;sup>26</sup> 182 A.2d 901 (Del. 1962).

allegedly causing the injury, and whose work is being performed.<sup>27</sup>

Note the Court said the issue in that case was an *issue of fact*. *Goodon* and *Newton* were Industrial Accident Board appeals where Superior Court does not sit as trier of fact. Not so with *Richardson*. So, it is unclear where the issue of who the employer was in an action in this Court morphed into being of an issue of law.

Yet, juxtaposed to that principle, is the holding in *Fisher v. Townsends, Inc.*<sup>28</sup> *Fisher* outlines the tests for the fact finder to use to determine if someone is a servant really employee - or an independent contractor for *respondeat superior* purposes:

- (a) the extent of control, which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and

<sup>&</sup>lt;sup>27</sup> *Id.* at 902-03.

<sup>&</sup>lt;sup>28</sup> 695 A.2d 53 (Del. 1997).

(j) whether the principal is or is not in business.<sup>29</sup>

Perhaps someone more erudite than this judge can fathom how it is a legal issue whether one is an employee, which it really is not when the Industrial Accident Board determines that issue, yet in all the other situations it is a jury or fact-finder issue. The Court sees no meaningful distinction, and it has led in this case, to a bifurcation of this matter.

## This Case

Accepting the pronouncement that determining decedent Herbert Mitchell's status is an issue of law, the Court will analyze the record using the four-prong employee/employer test set forth in *Newton*, and utilized ever since.

### Who Hired Mitchell?

Mitchell was hired by the Hatchery. He had formerly worked at its facility in Dagsboro, Delaware. He sought a transfer to the Delmar site as he could get overtime pay there when he could not at the Dagsboro site. His maintenance job was the essentially the same. He was not hired by Allen.

## Who May Discharge?

Here the record is slightly less clear, but the conclusion remains the same, in that Hatchery could discharge him. But Allen had the human resources department which, in a sense, had some overall firing responsibility. It also had a safety department that

<sup>&</sup>lt;sup>29</sup> *Id.* at 59 (quoting Restatement (Second) of Agency § 220).

apparently had duties involving safety issues at tall the three corporations, including, of course, the Hatchery.

Mitchell's immediate supervisor was John Van Ginhoven. He, in turn, reported to Richard Parker, assistant mill manager, who reported to Sony Bradford, the mill manager. All were Hatchery employees. Parker had the power to discharge Hatchery employees, and did on one occasion for stealing, without initial approval or involvement of human resources at Allen. Disciplinary memos or letters came from the Hatchery.<sup>30</sup>

According to Paula May, the 2008 safety and loss control director at Allen, the safety department did not discipline employees directly. It could recommend discipline, even for Hatchery employees. The record is unclear, however, whether any such recommendation - depending on the circumstances - would go to the Hatchery mill manager or have to proceed through human resources. The Court is satisfied that Mitchell, if he were to be discharged, would be discharged by Hatchery personnel. But it is important to note that the human resources people at Allen may have been involved in any such decision.

# Who Paid Mitchell's Wages?

The simple answer is that the Hatchery paid his wages. His paychecks were

<sup>&</sup>lt;sup>30</sup> Pls. Ex. 1, tab S.

Hatchery checks. He was never paid by Allen. His W-2s were from the Hatchery.<sup>31</sup> But the Court would be remiss to overlook the combined financial statement of the "Allen Group" and the commonality of corporate officers. Yet, the corporations were distinct serving distinct, though integrated functions. Of importance is that Allen bought the chickens from the Hatchery. The Court is satisfied that Hatchery paid Mitchell's wages.

#### Control

The factor of who controlled Mitchell's activities while he was working, is the most important.<sup>32</sup> As was explained in *Newton* "the question is almost exclusively determined by the fact of which possible employer has the right to control and direct the activities of the employee in the performance of the act which caused his injury."<sup>33</sup>

As recited above, Van Ginhoven, a Hatchery employee, was Mitchell's immediate supervisor. Others like Parker and Bradford as mill managers had supervisory authority, but Van Ginhoven's testimony is determinative:

Q: Tell us about what Mr. Mitchell did?

A: He did servicing, greasing, basic maintenance like the rest of us did.

Q: How many other people that did what he did[,] worked for you?

A: Two other people.

Q: When he transferred to the Delmar Mill, did he always, essentially, do the same job?

A: Yes.

<sup>&</sup>lt;sup>31</sup> Pls. Ex. 1, tab G.

<sup>&</sup>lt;sup>32</sup> See White v. Gulf Oil Corp., 406 A.2d 48,51 (Del. 1979).

<sup>&</sup>lt;sup>33</sup> 204 A.2d 393, 395 (Del. 1964).

Q: Did he always report to you?

A: Yes.

Q: Did he always work at the facility?

A: Yes.

Q: Can you tell us in June, specifically[,] June 4, 2008, what you remember about what happened, sir?

A: Well, we were trying to clean out a bin that had a mechanical problem, and evidently, the feed fell, soybean meal, and he kind of made a bad mistake. He said let me down. He should have stayed up there[,] he would have been fine.

Q: Okay.

A: Panic, You know.

Q: What I am trying to find out, who was telling him what to do at the time this incident happened?

A: Well, that was my job.

Q: He was doing what you instructed him to do that day?

A: Yes.

Q: When you say someone getting down or let him down, was someone
- Mr. Mitchell was on a forklift pallet?

A: Yes.

Q: In a basket?

A: Yes.

Q: There was someone operating the forklift?

A: Yes.

Q: The person operating the forklift, who was that?

A: Jim Burtelle.

Q: Who did he work for?

A: Allen's Hatchery.

Q: Specifically, everything that Mr. Mitchell was doing leading up to including the incident where he was suffocated, was working at your direction at Allen's Hatchery, Inc.?

A: Correct.<sup>34</sup>

The work he was doing when the incident happened was within his normal scope of duties for the Hatchery. There was no Allen employee present of any kind, safety or

<sup>&</sup>lt;sup>34</sup> Estate of Herbert Mitchell v. Allen, C.A. No. 10C-06-005, at 37-40 (Del. Super. Mar. 13, 2013) (TRANSCRIPT).

otherwise, when this fatal incident occurred. As Van Ginhoven also testified, Mitchell did general maintenance at the Delmar Hatchery site. He did not work at Allen's main site in Seaford or any other Allen site.

This Court holds that the Hatchery controlled Mitchell's work at the time he died.

The facts in this case also do not support or suggest that Mitchell was a "borrowed servant" of Allen's while working at the Hatchery site in Delmar on "dual," "concurrent," or "joint employee" of Allen.

The evidence, when laid down next to the tests to determine for whom Mitchell was an employee, overwhelmingly shows he was an employee of the Hatchery, and not Allen.

## **Conclusion**

For the reasons stated herein, the Estate of Herbert Mitchell and the individual plaintiffs may maintain their tort action against Allen Family Foods. The case will now be set for trial on the issue of liability.

J.