

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

(Judges O'Connell, White and Markey)

SELFLUBE, INC., a Michigan corporation,

Plaintiff,

v.

JJMT, INC. and JAMES A. DEHAAN,
Individually,

Defendants/Cross-
Defendants/Fourth-Party
Defendants,

and

ACTION INDUSTRIAL SUPPLY COMPANY,

Defendant/Cross-Plaintiff/Third-
Party Plaintiff,

H.S. DIE & ENGINEERING, INC.,

Third-Party Defendant/Fourth-Party
Plaintiff,

and

THOMAS WOOD,

Defendant.

Neil P. Jansen (P41922)
MIKA, MEYERS, BECKETT & JONES PLC
Attorneys for JJMT and DeHaan
900 Monroe NW
Grand Rapids, MI 49503
(616) 632-8000

Supreme Court Case No. 136377

Court of Appeals No. 261 743

Kent County Circuit Court
Case No. 03-05407-CK

FOURTH-PARTY PLAINTIFF
H.S. DIE & ENGINEERING'S
REPLY BRIEF

William H. Fallon (P33132)
Michael E. Stroster (P58982)
MILLER JOHNSON
Attorneys for H.S. Die & Engineering, Inc.
P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

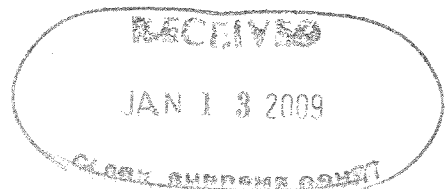


Table of Contents

	<u>Page</u>
Index of Authorities	ii
I. DEHAAN’S FAILURE TO RAISE THE ISSUE IN THE LOWER COURTS BARS HIS ARGUMENT THAT H.S. DIE’S RIGHTS AS A JUDGMENT CREDITOR ARE LIMITED BY OR INCONSISTENT WITH ITS ROLE AS PLAN ADMINISTRATOR.....	1
II. DEHAAN’S ARGUMENT THAT H.S. DIE’S ROLE AS PLAN ADMINISTRATOR PRECLUDES IN FROM TAKING ACTION AS A JUDGMENT CREDITOR IS CONTRARY TO LAW.....	1

Index of Authorities

	<u>Page</u>
CASES	
<i>Dation v Ford Motor Co</i> , 314 Mich 152; 22 NW2d 252 (1946)	1
<i>Lockheed Corp v Spink</i> , 517 US 882; 116 SCt 1873, 1789 (1996)	2
<i>Sengpiel v The BF Goodrich Co</i> , 156 F3d 660 (CA 6, 1998).....	1, 2
<i>Steelworkers of America v Cyclops Corp</i> , 860 F2d 1898 (CA 6, 1988).....	1
<i>Swartz v Dow Chem Co</i> , 414 Mich 433; 326 NW2d 804 (1982)	1

I. DEHAAN'S FAILURE TO RAISE THE ISSUE IN THE LOWER COURTS BARS HIS ARGUMENT THAT H.S. DIE'S RIGHTS AS A JUDGMENT CREDITOR ARE LIMITED BY OR INCONSISTENT WITH ITS ROLE AS PLAN ADMINISTRATOR.

DeHaan repeatedly argues that H.S. Die's rights as a judgment creditor are inconsistent with its duties as the Plan Administrator of the H.S. Die Employees 401(k) Salary Savings Plan. Scrutiny of this record shows that DeHaan never raised this argument in the lower courts. Thus he may not raise that issue in this Court.

A fundamental principle of appellate jurisprudence is that an argument not raised in the lower court may not be raised on appeal. "The general rule is that a question may not be raised for the first time on appeal to this Court." *Swartz v Dow Chem Co*, 414 Mich 433, 446; 326 NW2d 804 (1982) (quoting *Dation v Ford Motor Co*, 314 Mich 152; 22 NW2d 252 (1946)). This Court has been deprived of the development of the issue through evidence, argument and decision in the lower courts. H.S. Die has been deprived of the opportunity to develop the factual and legal record that would bear on this issue. DeHaan may not raise the issue in this court, for the first time in more than three years of litigation.

II. DEHAAN'S ARGUMENT THAT H.S. DIE'S ROLE AS PLAN ADMINISTRATOR PRECLUDES IN FROM TAKING ACTION AS A JUDGMENT CREDITOR IS CONTRARY TO LAW.

Federal law developed under ERISA consistently holds that an employer acts in a distinct legal capacity when it acts in its role as an employer as opposed to its role as an administrator of an ERISA benefit plan. It is well-established that an employer's "fiduciary duties under ERISA do not encompass all of its activities." *Sengpiel v The BF Goodrich Co*, 156 F3d 660, 665 (CA 6, 1998) (citing *Steelworkers of America v Cyclops Corp*, 860 F2d 189, 198 (CA 6, 1988)). An employer is subject to fiduciary duties under ERISA only when it is "fulfilling certain defined functions, including the exercise of discretionary authority or control

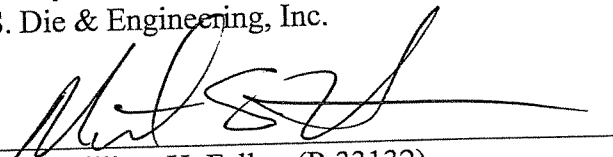
over plan management or administration.” *Lockheed Corp v Spink*, 517 US 882, 890; 116 SCt 1873, 1789 (1996). As a result, courts distinguish between actions by an employer that constitute administration of an ERISA plan and actions that are merely business decisions having an effect on an ERISA plan. *Sengpiel*, 156 F3d at 665.

As Plan Administrator, H.S. Die was and is obligated to act in conformance with the terms of the Plan documents. But as an employer, and as a judgment creditor, H.S. Die had every right to pursue Circuit Court protection of its interests as a judgment creditor.

Respectfully submitted,

MILLER JOHNSON
Attorneys for Appellant
H.S. Die & Engineering, Inc.

By



William H. Fallon (P-33132)
Michael E. Stroster (P-58982)

Business Address:

P.O. Box 306
Grand Rapids, MI 49501-0306
(616) 831-1700

Date: January 8, 2009