2017

JOSEPH GOECKERITZ, Plaintiff/Appellant, vs. NEWSPAPER AGENCY COMPANY,, Defendant/Appellee : Brief of Appellant

Utah Court of Appeals

156

IN THE UTAH COURT OF APPEALS

JOSEPH GOECKERITZ, Plaintiff/Appellant, vs. NEWSPAPER AGENCY COMPANY,, Defendant/Appellee	**BRIEF OF APPELLANT** Case No: 20170625 District Court No: 160903171

Appeal from the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Judge Mark Kouris

Attorneys for Appellant
Tyler B. Ayres, 09200
Daniel Baczynski, 15530
AYRES LAW FIRM
12339 S. 800 East, Suite 101
Draper UT 84020
(801) 255-5555
tyler@ayreslawfirm.com
daniel.ayreslaw@gmail.com

Attorneys for Appellees
Scott Hagen
David Dibble
Adam Richards
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
shagen@rqn.com
jhansen@rqn.com
ddibble@rqn.com

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES	PGS
Utah Admin. Code § 994-204-303	**22,31,32,33**
Utah Administrative Code R610-1-4	**30,**
Utah Code Ann. § 35A-4-204	**21,22,29,30**
Utah Code Ann. § 34-28-(1-19)	**29,30,**
Utah Code Ann. § 78A-4-103(j)	**9,**

INTRODUCTION

Joseph Goeckeritz (Goeckeritz) challenges the practices of his prior employer, Newspaper Agency Company (NAC). Goeckeritz had worked for sixteen years delivering papers for NAC. NAC took advantage of paper carriers like Goeckeritz, stealing their tips and labeling carriers as independent contractors to further steal from their pay through deductions for supplies, complaints, and property damage. The lower court dismissed his claims, finding Goeckeritz was not the aggrieved party when NAC stole his tips, and further finding carriers were properly classified as contractors. The lower court erred in its ruling on both counts and Goeckeritz requests the Court reverse summary judgment.

NAC stole all tips solicited from customers for carriers on "down routes". Goeckeritz would deliver papers for two types of routes: regular contracted routes and "down routes". A regular route was a paper route with a contracted carrier – NAC forced carriers to sign Independent Contractor Agreements (Agreement) on routes. A "down route" did not have a contracted carrier, but carriers like Goeckeritz still delivered on the routes as if it was a contracted route. NAC would also perform the same on the "down routes", paying Goeckeritz the same per piece compensation and deducting from Goeckeritz's compensation for supplies and customer complaints. The difference

between the routes is NAC would keep all the tips received from customers on "down routes" (carriers were entitled to tips received directly from customers on "down routes) because NAC could not determine which carrier the customer intended to tip. NAC stole $123,000 in tips from May 2014 through May 2016. Those tips need to be returned to the paper carriers, as was the customers; intent.

The Agreement allowed NAC to make deductions from carriers pay for customer complaints and supplies. While this practice is lawful if carriers are contractors, it would violate state protections for employees. NAC had two classes of carriers, employees who delivered papers and carriers like Goeckeritz (the majority of paper carriers) who were classified as contractors. These classes performed exactly the same, under the same NAC control and expectations; the only difference being NAC compensated employees hourly and carriers per piece (though both were paid biweekly).

NAC used employees because it needed to exert significant control over paper delivery to satisfy the requirements of its advertisers and its customers: advertisers demanded the paper be assembled in a specific manner and subscribers were allowed to make very specific demands on delivery, including specific location of paper delivery (flowerpot, steps), delivery prior to the 7 am deadline, and even bagging the paper at carriers cost when the weather did not require bagging. Goeckeritz was required to abide

by all these controls. but NAC refused to classify Goeckeritz properly as an employee because it was cheaper to classify the majority of its work force as contractors. It also allowed NAC to nickel and dime carriers for supplies (bags. rubber bands charged at cost **plus profit to NAC**) and customer complaints (up to a $100 deduction for unverified complaint of snow blower damage). Goeckeritz. who worked side by side with employees delivering papers, should have be classified as an employee and reimbursed for the unlawful deductions.

STATEMENT OF JURISDICTION

Appellant appeals the Order from the Third Judicial District Court in Salt Lake County granting Newspaper Agency Company's Motion for Summary Judgment (dated 07-07-2017) R at 1193, 1197. The Utah Supreme Court transferred the case to the Court of Appeals. The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(j).

STATEMENT OF ISSUES/ STANDARDS OF REVIEW

1. Issue: Whether the District Court erred in finding Goeckeritz lacked standing to challenge NAC's practice of soliciting tips from customers for paper carriers like Goeckeritz and then retaining hundreds of thousands of dollars in tips.

Preservation: Goeckeritz preserved the argument that Goeckeritz had standing to contest NAC's practice of soliciting tips in his opposition to Newspaper Agency Company's (NAC) Motion for Summary Judgment Dismiss and at Oral Argument. R at 640-658. 1335-1339.

Standard of Review: The question of "whether a given individual or association has standing to request a particular relief is primarily a question of law." *Kearns-Tribune Corp. v. Wilkinson*, 946 P.2d 372, 373 (Utah 1997). The Appellate Court reviews the propriety of summary judgment de novo. All evidence and inferences must be reasonably drawn in the light most favorable to the non-movant. *Walker v. U.S. Gen., Inc.*, 916 P.2d 903, 905 (Utah Sup.Ct. 1996).

2. Issue: Whether the Court erred in ruling Goeckeritz was an independent contractor where Goeckeritz did not work for an independently established trade and NAC controlled all aspects of Goeckeritz's paper assembly and paper delivery.

Preservation: Goeckeritz preserved the argument that NAC misclassified Goeckeritz as an independent contractor in his opposition to Newspaper Agency Company's (NAC) Motion for Summary Judgment Dismiss. R at 658-679.

Standard of Review: The Appellate Court reviews the propriety of the summary judgment de novo. The evidence and all inferences must be reasonably drawn in the light most favorable to the non-movant. *Walker v. U.S. Gen., Inc.*, 916 P.2d 903, 905 (Utah Sup.Ct. 1996). Employee classification is a question of fact. *Id.* at 907.

STATEMENT OF THE CASE

On May 18th, 2016, Goeckeritz brought a complaint against NAC alleging several causes of action (Fraudulent Inducement, Declaratory Relief, Violation of Utah Payment of Wages Act, Breach of Contract, Violation of Utah Minimum Wage Act, Conversion, and Unjust Enrichment) on behalf of a class. R at 1-31. The causes of action were based upon two premises: (1) NAC's practice of stealing tips intended for carriers was unlawful; and (2) NAC had misclassified Goeckeritz and other paper carriers as independent contractors. *Id.*

On December 16th, 2016, NAC filed a motion for summary judgment. R at 126-259. After holding oral argument, the lower court determined Goeckeritz lacked standing to contest NAC's practice of retaining solicited tips, and Goeckeritz was an independent contractor. R at 1193-1197. Based on these rulings, the lower court granted summary judgment to NAC on July 7th, 2017. *Id.* Goeckeritz subsequently filed his notice of appeal. R at 1219-1220.

STATEMENT OF FACTS

EMPLOYEES, INDEPENDENT CONTRACTORS, AND THE NAC

1. NAC employs or "contracts" with carriers, spotters, district managers, assistants, and vice presidents, all of whom deliver papers but only some of which are classified as employees. R at 681-700 (21:24 – 22:6).
2. In 1999, Goeckeritz was hired as a carrier for assembling and delivering newspapers but was classified as an independent contractor. R at 681-700 (61:11-18).
3. Spotters are employees at NAC and are paid an hourly wage even though spotters deliver newspapers at the same level of service required by newspaper carriers. R at 681-700 (49:7-19; 61:6-10).
4. District managers, assistants, and even Vice President Traven also deliver newspapers for NAC but are classified as employees. R at 681-700 (64:9-20; 24:8-15).
5. NAC employees deliver the majority of NAC's down routes on a day-to-day basis. R at 681-700 (33:19-24).
6. The sole distinguishing factor between a carrier and an employee that delivers papers is that one is paid hourly and one is paid-per-piece, though both are paid biweekly.[1] R at 778, ¶ 59.

Q. What is the difference between [employees] delivery of down routes and an independent contractor who might deliver a down route?

AGREEMENT, NEGOTIATION, AND BREACH

7. Goeckeritz performed under the terms of the Independent Contractor Agreement. R at 773, ¶ 26; 781–791.

8. Goeckeritz was told by his District Manager they were not allowed to negotiate the terms of the Agreement and the Agreement was "take it or leave it". R at 701-759 (111:9 – 112:10); R at 681-700 (44:11-18).

9. Goeckeritz could not have negotiated his status as an employee or independent contractor or newspaper pickup and assembly at a place other than his Depo. R at 681-700 (44:11-18; 45:3 – 46:6).

Tony. Rephrase it, if you would.
Q. Sure. We have employees who take down routes and deliver the papers, right?
Tony. Correct.
Q. And we have independent contractors who, from time to time, do a down route and deliver the papers, correct?
Tony. Correct.
Q. What is the difference between what those people are doing for delivering papers?
Tony. The contractors negotiate a rate. Employees are paid an hourly wage and mileage.
Q. Any other difference?
Tony. Contractor does it their own way. So do most employees, as it relates to the delivery of their newspapers.
Q. Are there different criteria? I mean, the employees have to deliver by 6 a.m., correct?
Tony. Correct.
Q. And the independent contractors have to deliver by 6 a.m.
Tony. Correct.
Q. So what other differences are there? I mean, your only goal here is to get the papers delivered by a set time, correct?
Tony. Correct.
Q. Is there anything else I'm missing?
Tony. No. R at 681-700 (34:4 – 35:11).

10. NAC did not prioritize resigning carriers to Agreements: from April 2, 2014 through Mid-2015, Goeckeritz continued to deliver papers for NAC without a signed contract after his old contract had expired. R at 774, ¶ 31.

11. In addition to the signed Agreements, NAC and Goeckeritz (as well as other paper carriers) would often operate pursuant to oral agreements. R at 681-700 (47:22 – 48:10).

12. Though Goeckeritz did not receive training because he started delivering papers in 1999, NAC regularly provides training to new paper carriers of a duration lasting between days to weeks. R at 681-700 (58:8-14); R at 701-759 (118:13 – 120:21; 129:18 – 132:9).

13. NAC terminated Goeckeritz without providing 30-day notice and without a material breach, terminating Goeckeritz after he objected to independent contractor R at 774, ¶ 33; R at 701-759 (14:18-21, 175:16-23).

CONTROL AT DEPOS AND ASSEMBLY

14. NAC would order Goeckeritz to arrive at the Depo a day prior to major holidays to assemble the newspaper for delivery, even though Goeckeritz could have assembled the paper the day of the holiday. R at 816-819; R at 701-759 (135:21 – 137:3).

15. At the Depo, NAC provided Goeckeritz with a work station, carts, newspaper polybags, maps, rubber bands, twine, customer service representatives, a delivery list system, and a complaint tracking system. R at 774, ¶ 35; R at 803-812.

16. NAC would deduct from Goeckeritz's pay the cost —plus profit—of polybags (but not all polybags), rubber bands, and twine. R at 681-700 (63:9-25).

17. Goeckeritz was required to assemble the newspaper in a specific manner: Goeckeritz would received inserts with specific directions on how to assemble advertisements and the paper and Goeckeritz would present the paper to a manager for inspection. R at 775, ¶ 38; R at 820-821; R at 832-833.

CONTROL OVER DELIVERING THE PAPER

18. According to the Agreement, Goeckeritz could perform the obligations of the contract in the mode, manner, and method of Goeckeritz's discretion and only needed to finish delivering papers by 6 am on weekdays and 7 am on weekends. R at 780 - 791 (Section 1(b), 1(c), Section 7).

19. NAC provided Goeckeritz with a delivery list that included each customers' location, the paper to be delivered, and specific driving directions from one customer to the next. R at 776; R at 809-812.

20. NAC provided Goeckeritz with rules for delivering newspapers, including:

1. All papers must be delivered to the upper portion of the driveway with consistent placement.

2. Be cautious of rainy days and sprinklers ~ BAG when necessary.

3. Deliver early and at the same time each day.

4. Deliver to the porch if a customer requests. NO EXCEPTIONS. 1st call will be a 'memo', 2nd call will be a 'complaint'.

5. Sidewalk or gutter delivery is unacceptable and may be cause for termination.

6. Continue to deliver to paper tubes if currently delivering there.

R at 813-814.

21. In addition to the general guidelines, NAC would provide Goeckeritz's customer with accommodations regarding delivery time, place, and manner without consulting or obtaining approval from Goeckeritz. R at 775, ¶ 42; R at 803-808.

22. NAC would order Goeckeritz to abide by the accommodations or face deductions, probation, or termination. R at 775, ¶ 43.

23. NAC could and did force Goeckeritz to conform to the following requests when delivering papers:

    a. Walk on driveway/sidewalk only;

    b. Deliver to porch;

c. Ring the doorbell upon delivery;

d. Put papers by the door not the doorway;

e. Bag paper despite no risk of inclement weather;

f. Throw paper on steps;

g. Throw paper down the stairs;

h. Deliver the paper by 6:30 on weekends;

i. Deliver the paper to a flower pot; and

j. Bag the paper with a non-wrinkled bag.

R at 802-814; 825-26; R at 701-759 (65:25 – 67:7); Exhibit A, Att Q.

24. NAC had an audit process by which Goeckeritz was required to notify his district manager upon completion of his route and an NAC employee would verify that the route was delivered correctly. R at 777, ¶ 50; R at 830-31.

25. If a paper carrier was late, NAC district managers would have NAC employees or other paper carriers give the late paper carrier a wake-up call or check on the late paper carrier at his residence. R at 701-759 (145:19 – 148:13).

26. If a carrier was absent and needed to use a substitute to deliver papers for that day, NAC could remove substitutes it found unsatisfactory, would provide a substitute if carrier did not have one, and would resolve disputes between carriers and substitutes

regarding compensation by diverting money from the absent carrier to the substitute. R at 701-759 (170:21-173:21); R at 773 ¶¶ 24, 25.

27. NAC precluded Goeckeritz from delivering, concurrent with the newspaper, personal advertisement or even Christmas Cards: if Goeckeritz wanted to deliver a Christmas card, Goeckeritz was required to use (and pay for) NAC's Christmas cards. R at 776, ¶ 47-49.

DEDUCTIONS AND COMPENSATION

28. If Goeckeritz received more than one (1) complaint per thousand (1,000) papers delivered in a fourteen-day period, NAC would deduct two dollars from Goeckeritz's compensation per complaint. R at 780-791 (Section 2 "Complaints").

29. If a customer complained that Goeckeritz had caused property damage, NAC would resolve the claim with NAC's customer without Goeckeritz's input or knowledge and would then deduct a sum from Goeckeritz's compensation, up to $100 for a damaged snow blower complaint. R at 701-759 (46:2 – 47:3; 48:13-18).

30. NAC would also deduct supply costs (plus profit) from Goeckeritz's compensation. R at 681-700 (63:11-25).

31. Though Goeckeritz was paid per item, Goeckeritz's compensation, which was paid on a biweekly basis, generally remained constant (excepting for deductions for supply costs) from pay period to pay period. R at 777, ¶ 59; R at 839-842.

32. In advertisements seeking new newspaper carriers, NAC represented that newspaper carriers were paid a biweekly wage. R at 823-824.

33. Goeckeritz never failed to turn a profit and the risk, if any, that Goeckeritz could run paper delivery at a profit was fairly non-existent. R at 778, ¶¶ 58-60.

34. NAC would often fail to compensate Goeckeritz accurately; for example, NAC failed to compensate Goeckeritz accurately on: March 3, 2015, Goeckeritz delivered a five-part paper and was not accurately compensated for delivering the paper. Goeckeritz was not compensated the additional 1 cent per piece above the standard packaging schedule. R at 778, ¶ 61; R at 836-37.

NAC STOLE TIPS

35. Customers would tip Goeckeritz and other paper carriers for exceptional service. R at 845.

36. NAC solicited tips from customers on behalf of paper carriers, including in its subscription payment form a box for including a tip specifically for "paper carriers". R at 833-35.

37. NAC did not notify customers of the possibility that NAC would retain tips submitted by customers on "down routes" (a route that did not currently have a signed Independent Contractor Agreement). R at 681-700 (19:19 – 20:3).

38. If Goeckeritz received a tip from a customer directly while servicing a "down route", Goeckeritz was entitled to keep the tip. R at 780-791 (Section 6); R at 681-700 (17:8-23); R at 767.

39. If the same customer were to make a tip online, NAC would steal the tip. R at 778, ¶ 62; R at 681-700 (17:8 – 20:19).

40. From May 18, 2014, to May 18, 2016, NAC received and retained $123.067.99 in tips from carriers. R at 763-770 (Response to Interrogatory 2).

SUMMARY OF ARGUMENT

I. Goeckeritz has standing where NAC interjected itself in the process by which customers would tip Goeckeritz, soliciting tips on Goeckeritz's behalf and then stealing the tips.

NAC received and stole tips solicited from its "down route" customers. NAC represented the tips were for the carriers but then retained the tips, harming carriers like Goeckeritz. The lower court dismissed the claims associated with NAC's theft because the court concluded Goeckeritz was not an aggrieved party. The court erred as employees have consistently been found to have standing to challenge practices that deprived

employees of tips.[2] Dismissal should be overturned because Goeckeritz is an aggrieved party, as NAC breached its contract with Goeckeritz, committed conversion by interfering with the tipping process between customer and carrier, and/or was unjustly enriched by retaining tips.

II. Goeckeritz should be properly classified as an employee instead of an independent contractor because Goeckeritz is not customarily engaged in an independently established trade and NAC exerts control and direction over paper delivery.

The lower court dismissed Goeckeritz's cause of actions related to his misclassification as an independent contractor, finding that no facts were in dispute and that the facts supported Goeckeritz's independent contractor status. Classifying an individual as an employee rather than a contractor requires the failure of one of two tests: (1) that the individual is "customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract for hire"; and (2) "the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's

[2] *See i.e. Guifi Li v. A Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 U.S. Dist. LEXIS 83677, (N.D. Cal. June 14, 2012); *Cruz v. TMI Hosp., Inc.*, No. 14-cv-1128 (SRN/FLN), 2015 U.S. Dist. LEXIS 140139, (D. Minn. Oct. 14, 2015); *Dayton v. Fox Rest. Venture, LLC*, No. 1:16-cv-02109-LJM-MJD, 2017 U.S. Dist. LEXIS 8755, at *9 (S.D. Ind. Jan. 23, 2017); *McCullum v. McAlister's Corp.*, No. 08-5050, 2010 U.S. Dist. LEXIS 64214, at *7-8 (E.D. La. June 25, 2010)

contract of hire and in fact". Utah Code Ann. § 35A-4-204. Goeckeritz is neither engaged in an independent trade nor is Goeckeritz free of NAC's control.

Utah Administrative Code defines an independently established trade as "created and existed apart from a relationship with a particular employer and does not depend on a relationship with any one employer for continued existence". Utah Admin. Code § 994-204-303. In considering an independent trade, courts consider several factors: (1) maintains a separate place of business, (2) provides his or her own tools and equipment, (3) has clients other than the employing entity, (4) has the potential for either profit or loss, (5) advertises, (6) has or requires professional or other licenses to engage in the particular business, and (7) maintains business records and tax forms. Id. R994-204-303(1)(b)(i)—(vii). The majority of factors support a finding that paper delivery is not an independent trade, as Goeckeritz worked out of a NAC depo, received tools and equipment from NAC, had no other client than NAC, did not have a realistic potential for profit or loss, was prevented by NAC from advertising, and does not require a license.

If an individual is "customarily engaged in an independently established trade", the Court then considers classification under the control test Though the contract stated paper carriers would be free to perform in whatever manner they choose, NAC exerted control over the who, what, where, when, and how of paper delivery; "who": what

customers to deliver the paper to and in what order; "what": specific directions on how to assemble the newspaper and advertisements, complete with a review from a NAC supervisor; "where": requiring Goeckeritz to assemble papers at the NAC depo and then dictating specific locations (stairs, doorstep, flowerpot) to deliver the newspaper; "when": ordering Goeckeritz to deliver newspapers to specific customers at a time prior to the delivery deadline; and "how": rules on how Goeckeritz to present the paper (ring a doorbell first, double bad, etc.) and directions on how to drive from house to house. NAC exerted control through customer service (which NAC provided without input from carriers) which would accommodate customers and then force paper carriers to provide the accommodation or risk deductions or termination.

ARGUMENT

I. Goeckeritz is an aggrieved party where NAC solicited tips from "down route" customers on Goeckeritz's behalf and then stole and retained the tips for itself.

The District Court erred in granting summary judgment on Goeckeritz's claims (breach of contract, conversion, and unjust enrichment) based on NAC's theft of tips [3],

[3] In its mail and electronic forms for subscription payments, NAC includes a spot labeled "[g]ive a tip to your carrier" which allows the customer to input a dollar amount to be added to subscriber's bill to be supposedly forwarded to the paper carrier. If the tip was submitted by a subscriber on a "down" route—a route without a signed Independent Carrier Agreement—the tip would be retained by NAC. Over time, these down route tips constituted an additional income stream for NAC, culminating in $123,067.99 in withheld tips from 2014 through 2016.

wrongfully concluding that Goeckeritz was not the aggrieved party. [4] Under all three claims, Goeckeritz is the aggrieved party as he suffered a particular injury (loss of tips) through NAC's theft. Pursuant to the terms of the contract, Goeckeritz was entitled to all tips received from the routes serviced. NAC's retention of tips breached the contract. Prior to NAC's involvement, customers would gift tips to paper carriers directly. By soliciting tips NAC converted funds that customers would have directly transferred to Goeckeritz. Finally, NAC was unjustly enriched through retention of the tips to Goeckeritz's detriment. But it was Goeckeritz, not NAC, who provided superior service warranting a tip.

A. *Breach of Contract* [5]

NAC and Goeckeritz entered into an Independent Contractor Agreement for each of Goeckeritz's routes. The Independent Contractor Agreement addressed compensation which included per piece compensation as well as tips provided by customers for

---

[4] The Court's order, drafted by Defendant, provides alternative bases for dismissing the breach of contract claim: that Plaintiff failed to plead breach of contract regarding tips and tips were not included in the terms of NAC and Goeckeritz's agreement to service "down routes". Neither justification was included in the Court's oral ruling on summary judgment. To the extent they are valid justifications for dismissal, Plaintiff responds that the claim was plead in his complaint at ¶¶ 3, 174 – 192 (R at 1-31), and there are questions of fact regarding the terms of the contract which cannot be resolved on summary judgment.

[5] The elements of a prima facie case for breach of contract are: (1) a contract; (2) performance by the party seeking recovery; (3) breach of contract by the other party; and (4) damages. *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 14, 20 P.3d 388, 392 (Sup.Ct.). These elements have been satisfied because NAC and Goeckeritz entered into an Independent Contractor Agreement (a contract), Goeckeritz performed his paper delivery obligations under the contract, NAC received tips from customers to which Goeckeritz was entitled to as compensation and NAC refused to forward those tips to Goeckeritz (breach), and Goeckeritz was damaged by not receiving those tips.

exceptional service. Goeckeritz received tips from NAC on these routes, and continued to receive tips on these routes even when Goeckeritz's contract for these routes lapsed.

Though Goeckeritz and NAC did not have a signed Independent Contractor Agreements governing "down routes", Goeckeritz and NAC would perform under the same terms as if the "down" route was a contracted route: Goeckeritz delivered the paper pursuant to the same standards indicated in the Independent Contractor Agreement; NAC compensated Goeckeritz pursuant to the terms identified in the Agreement; and NAC deducted costs of supplies and complaints from Goeckeritz's compensation. The only difference between the routes is NAC would withhold tips.

The agreement to deliver papers on "down" routes serves as the basis for Goeckeritz's breach of contract claim. The terms of the agreement are in dispute. NAC argues compensation for "down routes" did not include tips, but this claim is opposed by the fact that carriers on "down routes" retained tips received directly from customers. The terms for "down route" service were never negotiated, so both parties performed their obligations as to "down routes" as if the route was contracted, with the sole exception of tips. With the terms in dispute, the lower court erred in finding the contract clearly did not provide for tips on "down routes". This is a question of material fact, and to the extent Goeckeritz was entitled to tips on "down routes", Goeckeritz is an aggrieved party

where NAC stole his tips. *See i.e. Springer v. Indus. Comm'n*, 23 Ariz. App. 429, 433, 533 P.2d 1166, 1170 (1975).

B. *Conversion*

By retaining tips solicited on behalf of and intended for paper carriers, NAC committed conversion. "A conversion is an act of wilful interference with a chattel, done without lawful justification by which the person entitled thereto is deprived of its use and possession." *State v. Twitchell*, 832 P.2d 866, 870 (Utah Ct. App. 1992). NAC does not have and does not claim a lawful justification for retaining "down" route tips. NAC interfered in the typical tipping process: a direct tip from customer to paper carrier, soliciting tips on carriers' behalf without explaining to customers that NAC would retain some tips. By retaining the tips intended for paper carriers, NAC deprived Goeckeritz of his tips.

The lower court ruled the customers who tipped were the aggrieved part, and the paper carriers who were the intended recipients lacked standing. The court's ruling is in error. Conversion actions by employees to recover tips are commonplace and employees have been found to have standing to challenge these practices. [6]

[6] *See* Guifi Li v. A Perfect Day Franchise, Inc., No. 5:10-CV-01189-LHK, 2012 U.S. Dist. LEXIS 83677, (N.D. Cal. June 14, 2012); Cruz v. TMI Hosp., Inc., No. 14-cv-1128 (SRN/FLN), 2015 U.S. Dist. LEXIS 140139, (D. Minn. Oct. 14, 2015); Dayton v. Fox Rest. Venture, LLC, No. 1:16-cv-02109-LJM-MJD, 2017 U.S. Dist. LEXIS 8755, at

The traditional standing test addresses whether the party has a distinct and palpable injury. *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 967 (Utah 2006). There are three inquiries for establishing palpable injury: (1) whether a party has been adversely affected by the challenged action; (2) a casual relationship between injury, the challenged action, and relief requested; and (3) the relief requested will redress the injury. *Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 34 (Sup.Ct.).

All three elements can be satisfied by carriers whose tips were stolen. The injury (loss of tips) was adversely affected by NAC's practice of soliciting tips then withholding tips from "down route" carriers. Had NAC not solicited tips, carriers like Goeckeritz would have received some (if not all) tips transferred to NAC directly from the customers. There is a casual relationship between the injury and NAC's theft as NAC's practice directly resulted in withheld tips. Finally, the relief requested (disgorgement of tips) will redress the injury to Goeckeritz. NAC has standing to contest NAC's practice under a conversion action, therefore the lower court erred in its dismissal. *See i.e. Wash. Cty. Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 14, 82 P.3d 1125, 1130 (Sup.Ct.).

---

*9 (S.D. Ind. Jan. 23, 2017); McCullum v. McAlister's Corp., No. 08-5050, 2010 U.S. Dist. LEXIS 64214, at *7-8 (E.D. La. June 25, 2010)

C. *Unjust Enrichment*

If Goeckeritz is unable to seek recovery on the theories of breach of contract or conversion, Goeckeritz is entitled to recovery of his tips based on the doctrine of unjust enrichment. To establish a prima facie case of unjust enrichment, a plaintiff must present: (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value. *Howard v. Manes*, 2013 UT App 208, ¶ 30, 309 P.3d 279, 289. Goeckeritz has established these elements, demonstrating he conferred a benefit on NAC through exceptional service, NAC knew of the benefit because it specifically solicited customers for tips, and that retention of the tips is inequitable.

Goeckeritz would be entitled to his tips through an unjust enrichment action if Goeckeritz conferred a benefit to NAC that resulted in the tip. The Utah Supreme Court addressed standing in *Desert Miriah*, finding that an indirect benefit, such as Goeckeritz's benefit to NAC via superior service resulting in a tip, can be a basis for unjust enrichment. *Desert Miriah, Inc. v. B&L Auto, Inc.*, 12 P.3d 580 (Utah Sup.Ct. 2000). In *Desert Miriah*, Defendant Denning loaned Zimmerman (who was president of Desert Miriah) $55,000 in exchange for a personal promissory note. *Id* at 581. Denning knew

Zimmerman's business and knew the $55,000 would be used by Desert Miriah to pay off a house boat. *Id.* Desert Miriah argued that it did not receive a benefit when Denning loaned money to Zimmerman but only received a benefit when Zimmerman gave the money to Desert Miriah to pay off the house boat. *Id* at 583. Addressing this argument, the Utah Supreme Court found the benefit to plaintiff was not so far removed from Denning's actions as to find that Denning did not confer a benefit on plaintiff in making the loan. *Id.*

Similarly, without Goeckeritz's service, NAC would have never received the benefit of the tips. The distance between exceptional service and tips by customers is also not so far removed as to find Goeckeritz did not provide NAC with a benefit. This benefit provides Goeckeritz with standing sufficient to prevail on summary judgment.

II. Goeckeritz should be properly classified as an employee rather than an independent contractor because Goeckeritz is not engaged in an independently established trade and NAC exerted control and direction over his services.

The lower court dismissed Goeckeritz's causes of action [7] related to his misclassification as an independent contractor, finding that as a matter of law

---

[7] Plaintiff requested declaratory judgment and alleged violations of the Utah Payment of Wages Act, conversion, and unjust enrichment, relying on Goeckeritz's misclassification as the basis for these claims.

Declaratory judgment is a mechanism through which a court can adjudicate a justiciable controversy between adverse parties. *Baird v. State*, 574 P.2d 713, 715 (Utah Sup.Ct. 1978). The legal relations between Goeckeritz and NAC, a justiciable controversy between adverse parties, is a question ripe for determination by declaratory judgment.

Goeckeritz's classification as an employee was appropriate. Because the claims were dependent on misclassification, this sole finding resulted in dismissal. The lower court erred in ruling Goeckeritz was properly classified as an independent contractor because many material facts are in dispute and the undisputed facts are insufficient to overturn the presumption that persons who perform "[s]ervices . . . for wages or under any contract of hire" are employees. Utah Code Ann. § 35A-4-204(3); see also *BMS Ltd. 1999, Inc. v. Dep't of Workforce Servs.*, 327 P.3d 578, 579-80 (Utah Ct. App. 2014).

Under Utah law, an individual must be classified as an employee if either: (1) they are not customarily engaged in an independently established trade, occupation, profession or business; or (2) individual has been and will continue to be free from control or direction over the means of performance of those services. Utah Code Ann. § 35A-4-204. Paper delivery is not an independently established trade, as paper delivery is completely dependent on a continued contractual relationship with NAC. Furthermore, even if he is

---

Goeckeritz alleged a violation of the Utah Payment of Wages Act based on NAC's failure to accurately compensate Goeckeritz. This claim is premised and supported by evidence showing Goeckeritz was not paid for every item delivered.

Goeckeritz alleged conversion based on NAC's deductions from Goeckeritz's compensation and withholding tips intended for Goeckeritz. These practices are unlawful under Utah Code Ann. § 34-28-3(6); Utah Administrative Code R610-1-4.

Goeckeritz's final allegation is for unjust enrichment based on NAC's failure to accurately compensate Goeckeritz for items delivered, NAC's deductions, and NAC's theft of tips.

engaged in an independent trade. Goeckeritz cannot be an independent contractor because NAC exerts control over every aspect of Goeckeritz's paper delivery. Under both tests, Goeckeritz is an employee.

A. *Paper-delivery is not a trade independently established from NAC where Goeckeritz's place of work was located at NAC's depo, NAC was his sole customer, and NAC precluded Goeckeritz from advertising*

To assist in the analysis of whether a trade is independently established, the Department of Workforce Services has promulgated a list of factors to be considered. Utah Admin. Code R994-204-303. The factors are whether the worker (1) maintains a separate place of business, (2) provides his or her own tools and equipment, (3) has clients other than the employing entity, (4) has the potential for either profit or loss, (5) advertises, (6) has or requires professional or other licenses to engage in the particular business, and (7) maintains business records and tax forms. Id. R994-204-303(1)(b)(i)—(vii). The factors should not be applied rigidly; the substance of the working relationship is the key characteristic of the independent contractor relationship *BMS Ltd. 1999, Inc. v. Dep't of Workforce Servs.*, 327 P.3d 578, 579-80 (Utah Ct. App. 2014). The substance of Goeckeritz's relationship, where Goeckeritz's service was entirely dependent on NAC, indicates an employee relationship.

Classifying Goeckeritz as an employee is supported by the weight of the seven factor test promulgated by Workforce Services.

Separate Place of Business

Goeckeritz did not maintain a separate place of business – in fact, Goeckeritz performed services for NAC at NAC's warehouse. The Court of Appeals has interpreted this factor in terms of two related considerations: (1) whether work is performed at a location separate from the employer's place of business; and (2) who is responsible to provide the workplace. *Petro-Hunt, LLC v. Dep't of Workforce Servs.*, 197 P.3d 107, 115 (Utah Ct. App. 2008). As required by the Agreement, Goeckeritz worked at a NAC depo assembling newspapers. The depo was not separate from the employer's place of business and NAC was required to provide the depo. Goeckeritz did not maintained a separate place of business, therefore the factor supports employee classification. *Needle Inc. v. Dep't of Workforce Servs.*, 372 P.3d 696, 700 (Utah Ct. App. 2016).

Tools and Equipment

This factor requires the Court to determine whether "[t]he worker has a substantial investment in the tools, equipment, or facilities customarily required to perform the services." Utah Admin. Code R994-204-303(1)(b)(ii). Goeckeritz had little if any investment in the tools, equipment, or facilities required to deliver papers. NAC provided

Goeckeritz with a workstation, customer support, delivery software, bags, and rubber bands. Though Goeckeritz provided his own vehicle, this was a personal vehicle purchased separate and apart from paper delivery. Furthermore, if carriers were ever unable to provide a vehicle, NAC would lend carrier a NAC vehicle to perform deliveries.

Weighing the respective investments, Goeckeritz's investment in his personal vehicle (which Goeckeritz purchased prior to and irrespective of paper delivery) pales in comparison to NAC's investment. *Needle Inc.*, 372 P.3d at 702 (employer's investment in a customer software platform outweighed employee's investment in personal computer and internet connection). Goeckeritz did not have a substantial investment in paper delivery, therefore the element also supports employee classification.

Clients other than the employing entity

Goeckeritz had no clients other than NAC. After 16 years of paper delivery, he was unable to continue paper delivery after being terminated by NAC. NAC will argue Goeckeritz was free to work for other employers, but the rule requires more: that the "independently established trade . . . is created and exists apart from a relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence." Utah Admin. Code R994-204-303(1)(a); see also *Leach v. Board of*

Review of Indus. Comm'n, 260 P.2d 744, 748 (Utah 1953). Goeckeritz's business was dependent on NAC as the business' sole client, therefore this element supports employee classification.

Has the potential for either profit or loss

This factor requires the Court to determine if "[t]he worker can realize a profit or risks a loss from expenses and debts incurred through an independently established business activity." Utah Admin. Code R994-204-303(1)(b)(iv). Goeckeritz incurred few expenses from paper delivery (gas for his vehicle and vehicle maintenance) for which Goeckeritz was paid per piece delivered. The money Goeckeritz received was essentially pure profit with no real accompanying risk of loss. *Compare Needle Inc.*, 372 P.3d at 706 (advocates had no risk of loss where expenses consisted of computer and internet connection costs and advocates were compensated at regular intervals on a per-chat basis). Though Goeckeritz could influence his income by delivering more or less papers, this sort of decision "does not involve the true uncertainty of result that characterizes the sort of "risk" inherent in the concepts of profit or loss." *Id.* Without a true risk of loss, the element plays against contractor status.

Advertisement

Goeckeritz did not advertise for his business. NAC precluded Goeckeritz from delivering items, including advertisement, along with the newspaper to NAC's customers. Because NAC precluded Goeckeritz from advertising his service, this element supports employee classification.

Has or requires professional or other licenses to engage in the particular business

Goeckeritz was not required to obtain any licensing prior to delivering papers for NAC.

Maintains business records and tax forms

NAC provided Goeckeritz with 1099 tax forms. Though 1099 forms do suggest independence, they are not determinative, particularly where the decision to provide a 1099 form (rather than a W-2, for instance) has not been shown to have been made by the advocates themselves and where there is no other evidence of documentation, record maintenance, or filings consistent with the operation of an independent business. *Needle Inc.*, 372 P.3d at 708. The decision to provide 1099s over W-2s was made by NAC pursuant to the non-negotiable contract it required paper carriers to sign. This element does not weigh in support of either classification.

B. *NAC exerted control over all aspects of Goeckeritz's service, including paper assembly and deliver, to satisfy NAC's advertising customers and paper subscribers*

Goeckeritz is not an independent contractor because NAC exerted control and direction over carriers' performance. [8] Carriers, along with other NAC employees (spotters, managers, assistants, vice presidents), were required by NAC to abide by an ever-growing list of accommodations NAC provided to its customers in the name of customer service. These accommodations governed the gambit of paper assembly and delivery, from specific assembly instructions requested by advertisers, to specific delivery instructions requested by paper subscribers. Recognizing the control needed to satisfy these requests, NAC began using spotters, managers, and assistants (employees) to deliver newspapers alongside carriers. But even though carriers performed the same services as employees, NAC refused to classify the carriers as such, not only because it saved NAC money, but it allowed NAC to nickel and dime carriers for deductions on complaints and supplies. NAC's control, especially in this context where the control over

[8]The lower court ruled NAC did not have the right to control carriers because the Independent Contractor Agreement stated carriers would be free to determine the mean, manner, and mode of delivery. The ruling was in error as it did not consider the actual relationship between NAC and carriers. Though the Agreement stated NAC did not have the right to control, NAC did exert control over the paper carriers. It is the substance of the relationship, rather than the contracted terms, that are key to the independent contractor/employee analysis. *Salt Lake Transp. Co. v. Bd. of Review*, 296 P.2d 983, 984 (Sup.Ct. 1956) ("In determining whether a relationship is an [employee/independent contractor] **the actual status of the persons rather than the contract entered into between them will determine that question.**").

employees and contractors is equal, requires NAC to properly classify Goeckeritz as an employee.

Utah case law and Utah Admin Code identifies factors for determining whether NAC exerts sufficient control to warrant employee classification, including: (1) whether a worker is required to comply with instructions; (2) whether workers are trained; (3) a requirement that service be provided at a pace of ordered sequence; (4) work performed on employer's premises; (5) personal service vs assignment; (6) continuous service relationship; (7) set hours of work: and (8) method of payment. Utah Admin. Code § 994-204-303; *Harry L. Young & Sons v. Ashton*, 538 P.2d 316, 318 (Utah Sup.Ct. 1975); *Salt Lake Tribune Pub. Co. v. Indus. Comm'n*, 102 P.2d 307 (Sup.Ct. 1940). [9] These factors support classifying Goeckeritz as an employee rather than an independent contractor.

Comply with Instructions

Compliance can be established where an employee is required to comply with instructions about the when, where, and how of work; or it can also be established where the employee is required to provide reports or undergo reviews. *Smith v. Ariz. Dep't of Econ. Sec.*, 623 P.2d 810, 817 (Ct. App. 1980) (addressing the similar Arizona statute on

[9] In *Salt Lake Tribune Pub. Co. v. Indus. Comm'n*, the Utah Supreme Court considered whether Salt Lake Tribune's paper carriers should be classified as employees or independent contractors. 99 Utah 259, 102 P.2d 307 (Sup.Ct. 1940). Salt Lake Tribune exerted similar levels of control of its paper carriers as NAC did to Goeckeritz, and even though the paper delivery boys of the 1940s faced a greater risk of loss than Goeckeritz, the Utah Supreme Court found paper carriers to be employees. NAC, who currently delivers papers for Salt Lake Tribune, should also classify its paper carriers as employees.

employee classification). Though the contract stated Goeckeritz would be free to choose the mean, mode, and manner of service, NAC forced Goeckeritz to comply with customer accommodations through deductions and threats. NAC dictated how to assemble the paper, what order to deliver the paper, how to approach a house for delivery, whether to ring the doorbell or not, whether to bag, double bag, or not, and where specifically to place the paper. If Goeckeritz did not deliver as required, NAC would deduct from Goeckeritz's compensation.

Not only would NAC order Goeckeritz to abide by accommodations, NAC had practices in place to insure compliance. NAC would require Goeckeritz to present his assembled paper to a manager for inspection. NAC would also audit Goeckeritz's deliveries to assess compliance. NAC's control, coupled with its auditing measures, supports employee classification.

Workers are Trained

When Goeckeritz started working as a paper carrier back in 1999, paper delivery for NAC was significantly different and Goeckeritz did not receive training. Currently, NAC's managers provide training to new paper carriers, taking each paper carrier along for deliveries. Training can last between a few days and a few weeks, depending on the complexity of the route and NAC's delivery instructions. Training suggests an employee

relationship. *See Evolocity, Inc. v. Dep't of Workforce Servs.*, 347 P.3d 406, 412 (Utah Ct. App. 2015).

A requirement that service be provided at a pace of ordered sequence

NAC had the right to control the pace and sequence of deliveries. According to the contract, Goeckeritz was only required to deliver papers all papers, in whatever order, by 7:00 am. However, NAC, through its customer service, would accommodations for its customers without input from the paper carriers and then require the paper carriers to comply with the accommodations. These accommodations included delivery for certain customers prior to the 7:00 weekend deadline (NAC required delivery to Customer CR315025 before 6:30 am) or requiring Goeckeritz to deliver papers to certain customers prior to other customers. Through these accommodations, forced on Goeckeritz through the threat of deductions, NAC controlled the pace and sequence of deliveries.

NAC will certainly argue that these accommodations were rare and do not indicate control. However, "it is the right of control [rather than the actual use of control] that is the critical element underlying an employment relationship". *Kinne v. Indus. Comm 'n*, 609 P .2d 926, 928 (Utah 1980). Though NAC did not exert its right every time, the fact that NAC could control and did control the pace and sequence of deliveries supports employee classification.

Work performed on employer's premises

This factor was addressed in the independently established trade analysis. The factor supports employee classification because Goeckeritz needed a workplace to assemble papers, NAC provided a workplace for Goeckeritz, and NAC required Goeckeritz to assemble papers at the depot so that managers can guarantee proper assembly.

Personal service vs Assignment

Goeckeritz, pursuant to the Agreement, had the right to hire, supervise, and pay assistants to perform his paper carrying obligations. Goeckeritz took advantage of this right and hired his children and wife to help him deliver papers. Goeckeritz would also find substitutes to perform paper delivery if he was on vacation or could not come into work. These facts suggest Goeckeritz was an independent contractor.

However, Goeckeritz's ability to subcontract was not free and clear of NAC's control. NAC could refuse to allow a paper carrier to serve as a substitute for Goeckeritz. Alternatively, NAC could pull temporarily pull a route from a substitute if that substitute did a poor job. When Goeckeritz subbed a route for a paper carrier and paper carrier refused to compensate Goeckeritz, NAC stepped in and resolved the issue, deducting pay from paper carrier and compensating Goeckeritz. Furthermore, NAC would provide

substitutes, either paper carriers or NAC employees, if paper carriers were unable to provide a substitute. Ultimately this element suggests Goeckeritz was an independent contractor, but the control NAC exerted over Goeckeritz's ability to subcontract and NAC's willingness to provide a substitute where paper carriers were unable to find one suggests Goeckeritz was an employee. *Tasters, Ltd. v. Dep't of Emp't Sec.*, 863 P.2d 12, 21-22 (Utah Ct. App. 1993).

Continuous service relationship

"A continuous service relationship between the worker and the employer indicates that an employer-employee relationship exists". Utah Admin. Code § 994-204-303. Goeckeritz was hired on a continuous basis and worked for NAC for some sixteen (16) years. Sixteen years of service supports employee classification.

Set Hours of Work

"The establishment of set hours or a specific number of hours of work by the employer indicates control". Utah Admin. Code § 994-204-303. NAC established a set of hours for Goeckeritz to work, between 1:30 (the time the depo opened) and 6 am/ 7am on Sunday (the deadline for delivering papers). Set hours indicate Goeckeritz was an employee.

Method of Payment

This factor considers whether the payment was in wages or fees as compared to a payment for a complete job or project. *Mallory v. Brigham Young Univ.*, 332 P.3d 922, 933 (Utah Sup.Ct. 2014). Employees get paid in regular amounts at stated intervals whereas independent contractors are typically paid a fixed sum on a by-the-job basis. *Tasters, Ltd.*, 863 P.2d at 28. Goeckeritz was paid a regular amount (with some degree of variation) every two weeks. The biweekly compensation cycle is stated in the Independent Contractor Agreement. NAC also advertises the paper carrier position as biweekly compensation of $600 to $800 a month. NAC does not advertise the position as compensation per job.

FedEx had a similar compensation system to NAC's wherein drivers were paid weekly based on "stops made, packages handled, and distance traveled, after deductions for the Business Support Package, insurance and other items paid by FedEx.". *Wells v. FedEx Ground Package Sys.*, 979 F. Supp. 2d 1006, 1020 (E.D. Mo. 2013). FedEx argued drivers were compensated on a by-the-job basis and drivers argued this was piecemeal compensation—compensation for less than completion of a job. *Id.* Ultimately the court was persuaded to find the method of payment supported employee classification because FedEx compensated drivers on a regular basis, which was consistent an

employee relationship. *Id* at 1021. Similarly, the Court should find this factor supports employee classification because NAC also pays paper carriers on a regular basis. Goeckeritz's compensation most closely resembled an employee's compensation and therefore this factor supports employee classification.

CONCLUSION

Goeckeritz respectfully requests the Court reverse dismissal of his claims based on NAC's practice of stealing tips and NAC's misclassification of Goeckeritz as an independent contractor, reinstating Goeckeritz's claims for declaratory judgment, as well as for violations of the Utah Payment of Wages Act, breach of contract, conversion, and unjust enrichment.

DATED this 7th day of February, 2018.

/s/ Dan Baczynski
Daniel Baczynski
AYRES LAW FIRM
Attorney for Appellane

CERTIFICATE OF COMPLIANCE

Word Count

As required by rule 24(a)(11), I certify that this brief contains 8,998 words. I relied on my word processor to obtain the count and it is Microsoft Word 2016. I also certify this brief complies with Rule 21 governing public and private records.

I certify that the information on this form is true and accurate to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Daniel Baczynski

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of February, 2018, I caused a true and correct copy of the foregoing **BRIEF OF APPELLANT** to be served via electronic mail and United States Mail, first class postage, upon the following parties:

Scott Hagen
David Dibble
Adam Richards
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, UT 84111
shagen@rqn.com
jhansen@rqn.com
ddibble@rqn.com

/s/ Daniel Baczynski

ADDENDUM

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPH GOECKERITZ Plaintiff, VS. NEWSPAPER AGENCY COMPANY Defendant.	CASE NO. 160903171

BEFORE THE HONORABLE MARK KOURIS

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114

SUMMARY JUDGMENT

ELECTRONICALLY RECORDED ON

JUNE 27, 2017

Transcribed by: Colleen C. Southwick, RPR/CSR

A P P E A R A N C E S

FOR THE PLAINTIFF:

SCOTT C. BORISON
Attorney at Law

FOR THE DEFENDANT:

SCOTT A. HAGEN
Attorney at Law

PROCEEDINGS

THE COURT: Good afternoon, everyone. We're here today on the -- is it pronounced Goeckeritz? Is that correct? Goeckeritz. Thank you. On the Goeckeritz versus the NAC, if the attorneys would please state their appearances for the record.

MR. BORISON: Good afternoon, your Honor. Scott Borison on behalf of the plaintiff.

THE COURT: Is it Warson?

MR. BORISON: Borison.

THE COURT: Morrison. I apologize for that.

MR. BORISON: With a b, Borison.

THE COURT: Thank you.

MR. BACZYNSKI: And Dan Baczynski here for the plaintiff.

THE COURT: Very good.

MR. HAGEN: And Scott Hagen for defendant.

THE COURT: Mr. Hagen, this is your motion. I've read everything that's been filed. So with that then you may begin.

MR. HAGEN: Thank you, your Honor. This is our motion for summary judgment. And there are really two fundamental issues at stake. First is whether Mr. Goeckeritz was truly an independent contractor as opposed to an employee. And the second was whether he was entitled to receive tips from

subscribers on open routes or down routes that he delivered during his tenure as a carrier.

He was a carrier for quite a while. As you know from reading the papers, from 1999 to about 2015.

THE COURT: Right.

MR. HAGEN: And during that time he had a number of routes. He enlisted the services of his wife and all of his -- he has seven children -- seven children helped him deliver those papers. And so during the 16 or 17 years that he delivered papers for NAC, what he would do is he would -- the papers themselves were delivered from the publishing house, from Newspaper Agency Company's publishing division and taken to various depots.

THE COURT: Right.

MR. HAGEN: In his case it was the Sandy depot. So they would take them and bring them in big tracker trailer rigs and deliver the papers to there like to a distribution center or a warehouse.

THE COURT: Sure.

MR. HAGEN: And then the carriers, including Mr. Goeckeritz, would come get the papers that belonged to them and then they would have the responsibility of fulfilling two end results. They had to assemble the newspaper. The newspaper had to be assembled to fairly uniform requirements. They had to be folded in the way that they usually are when you

think of a daily newspaper, and then there was sometimes advertisements that needed to be in certain specific places in the newspaper package because of the contract between Newspaper Agency and the advertiser.

So that was No. 1 end result was the assemble of the newspaper. And that could be done literally anywhere. And Mr. Goeckeritz testified in his deposition that he did it most often at the depot, but not always. He did it in his car. He did it in various places, he assembled those newspapers. And then the other end result of the contract was he had to deliver the newspapers. He had to deliver them by a certain time and he had to deliver them in a condition that was readable and dry and in a place where they wouldn't be -- where the newspaper wouldn't be eaten up or get wet and to the reasonable delivery requests of the individual subscriber.

Now, many years ago, you probably remember many years ago in the olden days newspapers always were porched. They were always delivered to the front porch. And at some point in the last 10 or 15 years that changed. Obviously newspapers are much much smaller than they ever used to be. It's a business that is far less lucrative than it ever was and so they had to be very very cost conscious in the way they go about delivering the newspapers.

And so what has happened is they've kind of consolidated the newspapers. Instead of being delivered to

carrier's front lawns or driveways, they are now delivered to these depots. The routes are larger and the carriers typically deliver them now using a car. And they take those larger routes and go out and deliver the papers.

And the standard is now driveway delivery. Many years ago it used to be the standard was porch delivery. Now it's driveway delivery, but if a subscriber requests it, then they can get porch delivery. So that's kind of the current status. And Mr. Goeckeritz had those routes for 15 or 16 years. During the time that he was a carrier, he would occasionally deliver down routes. A down route is one -- see, each carrier signs a written contract. And one was attached to the motions and the memoranda in response.

THE COURT: Right.

MR. HAGEN: And that contract covers a specific route or routes. And I'll just hand up a copy.

THE COURT: Thank you.

MR. HAGEN: And I've marked this up just a little bit, highlighted provisions that I'd like to refer to.

THE COURT: Okay.

MR. HAGEN: So Mr. Goeckeritz, his wife and his seven children helped him. It was literally a family enterprise. Run like a business with his children and wife being employees or subcontractors. I don't know of any other job, your Honor, that would allow you to do that. No normal employment

occupation would allow you to literally bring your wife and children to have them do the work for you while you're being paid by the hour or by some other kind of wage.

And he also used other substitutes. These substitutes were not approved by NAC. NAC did not always know who they were. They simply -- he was responsible for an end result and he could do that however he wanted to. With regard to tips on those open routes, if there was no contract signed for a tech route, it was called on open route or a down route. And that meant that the newspaper agency was basically the carrier for that route. It was responsible for it. It had to find someone to deliver it every day. Sometimes it would arrange with Mr. Goeckeritz to deliver an open route. Sometimes it would arrange with some other carrier to do it.

Most often it arranges with its own employees to deliver an open route. Tips on open routes are retained by Newspaper Agency because it is the contracted carrier by definition. There's no one else who is contracted for that route. Now, when tips are paid, an ordinary subscriber to the newspaper nowadays -- of course the newspaper is delivered very very early in the morning. It's rare that you would come into contact as a subscriber with your actual carrier.

And so tips -- it's not like in a restaurant where you hand the tip to the server. It does happen with newspaper carriers, and there's no question that when a carrier receives

a tip that's personally handed to him, he or she always retains that tip regardless of whether he's delivering an open route or a contractor route.

However, when the route was contracted, the contracted carrier who takes on the burden of responsibility for that route always receives the tips. Mr. Goeckeritz testified that even when his children delivered the routes, he used those tips as an inducement to have them deliver better. And so he would give them the tips if they did a good job, I assume, but he wasn't contractually obligated to give the tips to them.

He was the contracted carrier and the tips were paid by the Newspaper Agency to him as that contracted carrier. And those tips are the tips that come in when newspaper subscribers pay for their subscription. They pay for two months or three months or even as long as a year. When they pay for that subscription, they have the ability to designate a tip, $5 or $10 or whatever that amount is. And it goes to the contracted carrier. We don't have any way of knowing who the subscriber is thinking of when he or she writes down that he wants to make a tip.

We don't know if they are thinking of the carrier who delivered it the previous week or last month. I think most generally the case is those tips come in around Christmas time and it's considered to be sort of a Christmas present to the

carrier, but the carrier when it's an open route, it might have been a different person every day of the year theoretically. And so a Newspaper Agency doesn't know who those trips intended for. So for practical reasons Newspaper Agency doesn't attempt to find out who those people are and pay them the tips. The tips go to Newspaper Agency.

THE COURT: So are all the tips that were mentioned in the papers something like a $123,000?

MR. HAGEN: Yes, over the last six years.

THE COURT: Okay. Over the last six years the source of all those are all open routes? They are one of the contract routes of Mr. Goeckeritz?

MR. HAGEN: Right. There's no allegation that Newspaper Agency did not pay tips to the contracted carrier when the route was contracted.

THE COURT: I see. Okay.

MR. HAGEN: We're only talking about open routes.

THE COURT: Okay.

MR. HAGEN: Now, Mr. Goeckeritz had as many as 2400 papers. He explained that he delivered 1300. His wife delivered 900. I think they had their children helping them both assembling the paper and delivering the paper. His wife also held a job, but, otherwise, that was the family income was delivering all those newspapers. He testified that although he had access to a delivery list that he could request from

Newspaper Agency, and the delivery list would have all the subscribers in a particular area on a particular route, and it would also give a suggested sequence of delivery, a kind of a suggested route, Goeckeritz testified that when he got -- he was asked on occasion for his input on the sequence of delivery on a delivery list. So he contributed to that and it was nothing more than a recommendation. It was absolutely clear that he could deviate from that. And he testified that he deviated from it and nothing happened when he did it.

In fact, he testified that his practice was not to use a delivery list. They were charged $10 a piece when they asked for a delivery list, and so he used a manifest which would be a list of all the subscribers, and he used a map, and I think he did it apparently just because it was the cheapest way to do it. He could save money. And as a business person, you save costs, you have a higher profit and so that's what he did.

Poly bags are a type of equipment that's used. You've probably seen the newspaper in the poly bags. And those poly bags are offered to the carriers by NAC. And they can buy them from NAC. They don't just get them except very rarely. They typically have to buy them or they can buy them from a supplier. Any of the supplies they use they can buy from another source.

Now, let me go through this contract a little bit,

your Honor. If you start on the first page, and I've highlighted some provisions under delivery and delivery area, this is where the carrier's duty is set forth. In the highlighted portions, 1-b, it says, Contractor agrees to distribute complete fully assembled newspapers to each delivery location identified on the delivery list and contractor's delivery area.

And then going down to c it says, Contractor shall not place within or on any newspaper or newspaper package any item that has not been pre-approved by NAC. So NAC is the agent to newspapers and for other newspapers that are delivered by NAC, and so it has to protect the integrity of that newspaper package. So the newspaper package looks basically the same every day. That's the product. And the carrier does the final work on assembling and then delivering that product.

Contractor agrees that the newspapers will be distributed in a clean, dry, undamaged and readable condition and at a location which protects newspapers against theft and damage from animals or moisture at a place and time that meet the reasonable delivery requests and expectations of each delivery recipient, but in no event later than 6:00 a.m. on Monday to Friday, 7:00 a.m. on Saturday and 7:00 a.m. on Sunday.

And then skipping down to d, Contractor agrees to assemble all newspaper parts and related items into a newspaper

package prior to delivery to the delivery recipient. Contractor acknowledges that as the circulation agent for the newspaper NAC has the right to determine the makeup and appearance of the newspaper package. And that's what I was just referring to.

So if you go to the second page, these are the provisions that deal with the relationship between the contractor and Newspaper Agency. Under complaints at the very top of the page it says, Contractor shall perform services under this agreement independent of NAC in all that pertains to the execution of contractor's work. And contractor shall not be subject to the routine rule or control of NAC.

The parties agree that contractor shall be subordinate to NAC only in effecting the results contracted for under this agreement. Contractor agrees to provide distribution results for newspapers delivered without complaints from delivery locations.

Then going to the next page. I've highlighted a lot. I won't read this whole page, your Honor, but Paragraph 7 deals with the independent contractor relationship. And it makes crystal clear that the intention of the parties is that this is an independent contractor relationship and that NAC disclaims any right to control the manner and means of accomplishing the assembly or the delivery of these newspaper packages.

Paragraph 8 it begins, This is not a personal

services contract. Contractor is free to subcontract all or any part of contractor's obligations pursuant to this agreement, and at contractor's expense hire employees as contractor deems necessary to assist contractor in providing the results required by this agreement.

And there is no question that Mr. Goeckeritz took advantage of that. He did hire or subcontract with his children and his wife. He talked about contracting with others who also delivered the newspaper for him at times. As the contracted carrier for his routes, he was responsible to make sure that they were delivered every single day of the year by that deadline time. And so if he was going to go out of town, he needed to find someone to do that for him.

Going down to 9. Contractor assumes all risks of loss regarding damage, destroyed, stolen or lost newspapers after pick by contractor until pick up by the reader at each delivery location. No. 10 makes clear that taxes are all the responsibility of the carrier. If you turn to next page, Paragraph 11 indicates that no employee benefits are paid. This is strictly a contractor relationship.

12, there's a limitation on contractor authority. He's not an agent or representative of NAC as you might find in some employment context, and doesn't have the right to employ, contract or make representations on behalf of NAC. And then finally one final provision that's of note for our purposes

today is Paragraph 19. It says, Deduction of amounts owed to NAC. Contractor agrees that any amounts owing to NAC by contractor for any reason whether or not related to this agreement including, but not limited to, damages or expenses incurred as a result of a breach of this agreement may be deducted from any amounts owed by NAC to contractor.

The compensation is set forth in attachments. If you skip a couple of pages and look at Attachment A, you'll see that NAC agreed to pay the contractor, Mr. Goeckeritz, 8 cents for each daily -- delivery of each daily newspaper and 20 cents for each Sunday newspaper. And then there are other fees that were agreed to be paid for the delivery services that were being provided. So it's a fee for delivery, a fee for service-type contract. And that's also important for our considerations.

THE COURT: Is this the same agreement that was signed every time it was renewed?

MR. HAGEN: Essentially. Essentially the same. There may have been a few details that were changed here and there but not in significant part.

THE COURT: Okay.

MR. HAGEN: Okay. So the law on the independent contractor versus employee issue is stated in a case that we cited, Harry O Young & Sons, Inc versus Ashton. It's a Utah Supreme Court case from 1975, and the Court made out a four

part test. And this is not really contested. The applicability of this test is, as I understand the response to the motion, was not contested by plaintiff.

It says the main facts to be considered as bearing here on the relationship are, one, whatever covenants or agreements exist concerning the right of direction and control over the employee whether express or implied. No. 2, the right to hire and fire. No. 3, the method of payment i.e., whether in wages or fees as compared to payment for a complete job or project and, four, the furnishing of the equipment.

So if you look down through each of these tests, each of them weigh pretty heavily in favor of independent contractor status. And, your Honor, I'd just like to -- on this, sort of from the 30,000-foot level on the contractor status, delivery service is often something that you contract out, you know, Amazon, for example, hires Fedex or UPS or some other third-party delivery service to make deliveries.

And we've all seen distribution centers with big semi-trucks going on and picking up loads and delivering. And sometimes those drivers are employees, but very often probably the majority of the time they are not employees. They are contracted. They work for a different company or they work for themselves.

So this is just falling in that tradition of delivery services that are contracted for and not necessarily performed

by employees. Secondly, newspaper carriers have traditionally been independent contractors. In fact, Mr. Goeckeritz seems to concede that at least when he started in 1999, he felt like he was an independent contractor. And his argument is that at some point along the line he became an employee rather than an independent contractor, but he doesn't specify exactly what happened that caused that transition in his mind to occur.

The transitions that have happened is the switch to depots, using those depots which actually puts more of a responsibility on the carrier and requires as a practical matter that the carrier have an automobile increasing the carrier's investment in the enterprise. So I think it weighs more in favor of contractor status rather than employee status, but that's one change that has happened.

So if we look at these four factors one by one, the first is control over the means and method of performance, the manner and means of performance. And Mr. Goeckeritz makes an argument regarding various issues that he believes means that he was an employee, not an independent contractor. First, he says well my pickup and location requirements were designated for me. He has start time of between 1:30 and 4:30 in the morning. In reality, your Honor, I think that the requirement, as you can see in the contract, was just to deliver by 6:00 on weekdays, 7:00 on weekends, but even if he had a report time of informally speaking from 1:30 to 4:30 a.m., I don't know of any

job that allows you a three hour window, at least no wage earning job that allows you a three hour window to report.

And it simply is a practical matter, a guideline to assist in reaching that contractual end of delivery by the deadline time. And the location requirement, they have to pick up papers somewhere. Any delivery service has to have a pick up location. The pick up location for this particular delivery service is the depots. And it's reasonable it has to be somewhere.

THE COURT: But one thing in the list that came through that made me question a bit was the idea that they have to present the paper to a manager to review the assembly on occasion. What was that about?

MR. HAGEN: There's no proof of that, your Honor. My understanding was there was an audit requested by one advertising customer at one time and they checked to make sure that the advertisements were in the proper place on that one occasion. I know of no practice of Newspaper Agency where carriers are monitored on a daily or weekly basis to make sure they are doing their jobs.

THE COURT: How about something involving reprimanding? What was that about?

MR. HAGEN: Mr. Goeckeritz testified that in his 16 or 17 year relationship with NAC he had interactions or confrontations with district managers and zone managers. I

have no doubt. I know there was some disputes towards the end of his relationship. He hadn't signed a contract, refused to sign a contract for about the last year it looks like of his relationship. It's a contract dispute, your Honor. They have happen every day as your Honor would encounter in your courtroom.

And, you know, he's -- he claimed in his deposition that it was the sort of tone of the reprimand that made him feel more like an employee, but as a practical matter it could happen in any sort of a typical contract relationship. You think of a homeowner and a contractor who is doing work on a house and, you know, you can have a dispute with raised voices and it's still clearly a contract relationship and not an employment relationship.

THE COURT: Okay.

MR. HAGEN: Mr. Goeckeritz also complained about the delivery location as being sort of an element of control, but, again, any kind of a delivery service has to have a delivery location. If anything, the delivery location has sort of gone down in importance over the years as the general idea is to deliver to the driveway instead of the porch with the porch being an exception upon request from the subscriber.

The plaintiff could deliver the newspapers in whatever order he chose. Now, the delivery list did suggest an order. It was nothing more than a suggestion. The bottom line

of the contract is you had to deliver by the time in question and it has to be done every day of the year, but if he could do it exactly backwards or any other way, it didn't matter. And Mr. Goeckeritz testified specifically he did do that and nothing happened.

He indicated that -- he testified that he himself was not trained at all. He said that he believes that other carriers have been trained. He's the issue here on this motion for summary judgment. It's not a class action yet. He has to show that he has a claim first. And he testified and there's no question he had absolutely no training when he started as a carrier for NAC.

He provided his own tools. Now the fact is he provided his own automobile. He provided fuel for the automobile. He maintained the automobile. He paid for all the poly bags except for a few occasions. I think he testified there were about ten over the 17 years of his tenure with Newspaper Agency. There were rubber bands and other incidental materials that he used, some twine, I think, but whenever he used those materials if they were provided by NAC, he had to pay for them. And he was free to go get these other materials from any other source.

He testified at length about trying to get poly bags from another source. And it's interesting because he had this interaction with the main poly bag supplier to Newspaper and

wanted to set up an opportunity for him to buy directly from that poly bag supplier at a better price. And I think ultimately he decided not to do it because it cost too much or it was too much hassle. Just the kind of decision that a business man makes in deciding whether to buy product from a particular vendor.

The second factor -- so I think that first factor weighs very clearly in favor of contractor status. The second factor is the right to hire or subcontract and the right -- and whether the contractor is subject to being terminated at will. And on the termination at will Mr. Goeckeritz's argument is that he was terminated without cause.

THE COURT: Right.

MR. HAGEN: But the fact is he was without a contract at that point. It had been more than a year or approximately a year since the last time he had signed a contract. And Newspaper Agency just at some point said we're not willing to continue this relationship until you sign the written contract.

He testified that at that point he knew what their position was. His own position was he didn't like the contract or he wanted to proceed with a verbal contract and Newspaper Agency was not willing to do that. He went off on a vacation and while he was gone they gave the routes to someone else. And he admitted in his deposition they had every right to do that.

It wasn't that he was terminated with cause. They just simply ended the relationship approximately a year after the expiration of the contract. That's what happens in a business relationship. If you refuse to come to terms, you're not going to keep doing business typically. And there's no question that he had the right to hire or subcontract as he showed with his own wife and children and other people he had delivering his routes when his family wasn't available.

NAC had nothing to do with how much he paid his wife and children, nothing to do with how much he paid the substitutes he contracted with that weren't family members. NAC had nothing to do with whether he gave them the tips or kept the tips for himself. And NAC had nothing to do with whether -- with when he would be taking time off and subcontracting with someone else to take care of those routes.

Finally or next he was paid by the job. The consideration is whether you're paid a salary or whether you're paid by the job. And as you look through, this is a delivery service, he was paid a specific amount per item delivered on a daily basis. Now, the compensation was paid every two weeks, but it's not -- it's not convenient or realistic or efficient for NAC to stand out there with 8 cents and put it into his palm every time he delivers a newspaper. There has to be some period of time when there would be a payment for the services that he'd provided.

It's also true that the amount didn't change a whole lot from one two-week period to the next, but unless you're changing your routes, doing other things, the amount is not going to change because you're delivering pretty much the same number of papers every day. So the compensation would be very consistent, but it is clearly not a wage. He wasn't paid by the hour. He wasn't paid by the week. He was paid by the specific amount per paper delivered as we read from the contract.

And the final part of that test is he used his own equipment. As we've already discussed, he used his own vehicle. He used his own maps and pencils. He indicated that he -- you know they provided space for him at the depot. And that's true. He could use space at the depot. He didn't have to, but there was a place in the depot for any carrier and carts that could be used just for convenience in assembling the newspaper, but they didn't have to use those carts. And he certainly wasn't required to use those carts.

He indicated that on occasion he assembled his newspaper elsewhere. There are a couple of cases that I think would be helpful for the Court to consider. I apologize. I thought I had them up here with me. The first is the Fedex cases. Plaintiff's cited these Fedex cases. These cases -- this is multi-district litigation across the country in various federal courts regarding where there were class actions against

Fedex ground package system which ran its delivery delivers as independent contractors rather than employees.

And I just want to read some of the facts from those cases just to give your Honor a sense of the kind of different situation we're dealing with in those cases. The Court said in the Estrada case which was a California Court of Appeal case said under terms of the operating agreement -- this is the agreement between the driver and Fedex -- the driver must provide his own truck meeting Fedex's specifications. There were no specs that had to be met with the NAC vehicle. Mark the truck with the Fedex logo. Obviously no one -- in fact, they were barred in the contract from -- Mr. Goeckeritz could not put an NAC logo on his vehicle whatever it was.

Use the truck exclusively in the service of Fedex or mask the logo if the truck is used for any other purpose. Mr. Goeckeritz -- I assume he used his car for every other purpose that he used his cars for. He was finished with it by 6:00 in the morning on virtually all weekdays and could have used that car for any purpose. The operating agreement gives Fedex the right to reconfigure primary service areas and to reassign packages to another driver if the volume of packages in the driver's primary service area exceeds the amount the driver could reasonably be expected to handle on any given day.

There was nothing like that in NAC. You had your route and you were responsible for that route. NAC could not

take your newspapers from you and give them to another carrier on a day-to-day basis. The driver's in the Fedex cases were responsible for fostering Fedex's professional image and good reputation. There's nothing like that in the NAC contract. The driver agrees to drive safely, prepare driver logs, inspection reports, fuel receipts and shipping documents in on a daily basis to return these items and any collected charges and undeliverable packages to Fedex.

The driver agrees to wear a Fedex approved uniform and to maintain his appearance consistent with reasonable standards of good order, his uniform in good condition and his truck in a clean and presentable fashion. There's just nothing like that in our situation. This was a far greater element of control. And actually even with that greater element of control you had a split in the courts in the way that they viewed those.

There was a California case and a Missouri case that held in favor of employee status for those Fedex drivers, but other courts that held in favor of independent contractor status. A case that I think would be helpful also for your Honor to consider would be the Taster's case. It was decided by the Court of Appeals, our Court of Appeals and the Utah Court of Appeals decided in this 1993 case that the Labor Commission had improperly concluded that these independent contractors were actually employees.

So it was -- and it was also an interpretation of our Unemployment Compensation Act, so it was to be given a liberal interpretation. And still the Court of Appeals disagreed with what the Labor Commission had decided. And for some of those considerations, these tasters, the independent contractors in those cases, were the individuals who go to like Costco stores and do demonstrations. And it's just very much -- it's exactly sort of the same thing we have here where they don't have to do any particular job themselves. Once they agree to be responsible for a particular job, they can delegate it to someone else. They can hire someone else. And the contracting organization wouldn't necessarily even know about that.

There were some guidelines that they had, a list of -- I think there were 14 items that the list said you absolutely must know these 14 items, but the Court kind of downplayed that and said in practice they didn't really need to follow all those 14 items. And we have the same sort of issue here in our case with a list of, I think, six suggestions that NAC made. And some of these are obvious in the way that the newspapers are delivered. Stay off people's lawns and do other things like that.

And in the taster's case the Court of Appeals decided as a matter of law that these individuals were independent contractors overruling the Labor Commission. So that's a case that I think that the Court ought to consider strongly.

Finally, there was an argument made that the fact that Newspaper Agency Company employees deliver routes from time to time, down routes, is some kind of an argument that the carriers who deliver it every day as their principal duty, that they are somehow employees because these other people are employees.

Well, that doesn't take into consideration all the other job duties that those other employees may have. And it is true, you know, we had here today some executives from Newspaper Agency including the Executive Senior Vice President of Circulation, and I'm sure that he has at times during his newspaper career delivered a newspaper because it absolutely has to get done every day. And if for whatever reason the carrier doesn't show up or something else happens, it has to delivered.

And if there's no one else to do it, then it might be an executive who goes out and throws that route, but it doesn't mean that everybody who throws a route is an executive or even an employee of any kind with Newspaper Agency.

Your Honor, do you have any questions about that independent contractor employee issue?

THE COURT: I do not.

MR. HAGEN: Okay. Let me move on to the other big issue which is the tips issue. The first argument Mr. Goeckeritz makes on this is that it's a breach of contract

not to pay those tips. And, again, we're only talking about down routes. On the contracted routes he got the tips, okay? We're only taking about when he agreed to deliver a route, say, for 50 bucks or for whatever the compensation was, he agreed to deliver that route.

He's claiming now after the fact that it was a breach of contract to in addition -- for the NAC to not give him in addition to that 50 bucks any tips that might have been received at, I guess, approximately that same time period on the route that he threw. In addition to the practical reasons I stated before, there's some technical legal reasons that just require rejection of that claim.

First of all, it was never pled in the complaint. The complaint alleged at the very beginning in an introductory type paragraph that there was a failure to -- that there was a breach of contract in the failure to pay tips, but that's the only reference to it. There's a breach of contract claim in the complaint that goes over three pages of the complaint and does not mention tips at all.

And, your Honor, we wouldn't miss something like that in our initial motion for summary judgment. We didn't on the tips issue, didn't even address that in our breach of contract section because it wasn't raised at all in the complaint. The second argument is that it's a breach of an oral contract, but Mr. Goeckeritz does not point to any oral contract except --

now I will -- there is an exception at the very end of his relationship with NAC, but he doesn't plead in the complaint an oral contract.

There has to be allegations of a meeting of the minds on specific issues what the contract is about. And there is no allegation in the complaint that there was a specific verbal agreement between Newspaper Agency and anybody to deliver a route and receive tips. We will admit that there was one, I guess, verbal agreement in terms of the continuation of those routes that Mr. Goeckeritz was delivering towards the end of their relationship when he went for approximately a year it looks like without a written contract, and he continued, I believe, to get those tips on those routes because they were specifically assigned to him. And I think the hope was that he was in the process of persuading himself to sign that contract.

But in that situation it would have been the only one where he was promised a tip for a route and the promise was made verbally. Otherwise, he was only entitled to the tips if there was a written contract in place that he signed and covered that route in question.

THE COURT: Wouldn't that be the basis of his unjust enrichment claim, though, that there is no contract and I should put one in place because of that exact scenario?

MR. HAGEN: Well, the fact is -- I think that is his argument, your Honor, but there is a contract. That's the

thing. He did have -- he had a contract and it was -- he knew whenever he delivered an open route, it was done based on a contract. Now, it might have been a very casual informal contract. He offered to deliver the route for 50 bucks and NAC agreed to pay him 50 bucks or whatever the agreement was, but in that situation he has a claim. He has a contract claim. He just hasn't pled it. He never pled that he agreed on such a such a day to deliver such and such a route and was promised the tips from that route.

And NAC's contention is that never happened. He was never offered tips in return for delivering an open route. On many occasions he was offered tips as an inducement where they said if you sign the contract, you can have the tips. That was a common inducement that NAC would say to carriers to get them to sign up for more routes.

THE COURT: For open routes?

MR. HAGEN: Well, for open routes if they agreed to sign a contract which would by definition make them not an open route anymore.

THE COURT: Okay. Okay.

MR. HAGEN: But never an agreement to deliver an open route in return for some fee plus tips. That was never part of the deal. So he has a breach of contract claim, but he hasn't pled it because he doesn't have the facts for it.

The conversion claim also fails for the reasons we've

stated in our brief. And he has to point out, you know, some ownership interest he has in those tips, but aside from the fact, that he may have been delivering a route at a particular time in question in a general timeframe when a tip was paid, he's got no claim on that money. He's got no -- he hasn't identified any subscriber who said I intend this money to go to Joseph Goeckeritz. And he never could. It would be impossible for anyone to tell. You just can't do the match between the subscriber who may pay a tip at Christmas time and Mr. Goeckeritz who delivers the route on December 15 or July 4th. You know you just don't know. You can't tell.

And the responsibility is in the contracted carrier or in NAC if there's no contracted carrier.

THE COURT: Okay.

MR. HAGEN: Your Honor, do you have any questions about --

THE COURT: I don't.

MR. HAGEN: -- these points that I've made? All right. I'll leave it there.

Your Honor, I think that we have established that none of the claims that have been asserted have merit. And this is a situation where you have Mr. Goeckeritz who has worked for the newspaper for many many years as a carrier, he got what he was entitled to. He was paid. He received tips when he was entitled to be paid tips on those contracted

routes.

And interestingly, you know, his argument on the tips when he had his children -- according to his argument, his children would have a legal right to the tips when they delivered those routes, but NAC paid those tips to Mr. Goeckeritz and I don't think he considered that to be controversial.

THE COURT: Okay.

MR. HAGEN: Thank you.

THE COURT: Thank you.

MR. BORISON: Thank you, your Honor.

THE COURT: Sure.

MR. BORISON: As early as 1940 the newspapers have been claiming that newspaper carriers are independent contractors. There's a 1940 case involving the Salt Lake Tribune where the Court, the Supreme Court of Utah held that a newspaper carrier was not an independent contractor. They were employees subject to the unemployment scheme in the state.

The reason I bring that up is because when we look at the act for the Wage Act, the Wage Act doesn't define employee sort of ironically, but what we do have is the unemployment, the security -- the Employment Security Act of Utah. And specifically we cite this case which is Needles, and it's 372 Pacific 3d 696.

The reason we think that case is important, your

Honor, is because that case deals with the Employment Security Act which has a specific definition for employee. And in that case the Court made two observations. First, they said, look, you look to the definition, and specifically it's 35a-4-204 Section 3, and that for an employee sets forth two tests for determining whether someone is an employee.

Now, before I get to those, the important part from Needle is they said there's a presumption that someone is an employee. And then they looked at this two-part test. And the two-part test, the first part is whether or not the person is engaged in independent professional occupation. Now, despite their claims I don't think they can stand up here and convince the Court that being a newspaper carrier is an independent professional occupation.

THE COURT: Well, before we get there, tell me then how do you square the Young & Sons case versus with the Needle case?

MR. BORISON: Well, the Young & Sons case is -- I believe it's from 1975.

THE COURT: So are you saying Youn & Sons case is old law? It doesn't apply here?

MR. BORISON: Well, it's old law in this sense. First of all, it dealt with a worker's comp claim. And second, the statute that we're talking about that was addressed in Needles that's the current statute which was in effect, the

Needles is a 2016 case, so I do think that the law has evolved or at least has addressed the changes in the statutes under the employment security.

And I would also say to you to the extent that you're talking about whether a newspaper carrier is considered an employee, you can look back to the 1940 Salt Lake Tribune case where they held it was. And it's never been overruled. So if we're looking for specifically cases that address our situation, in 1940 the Supreme Court of Utah held a newspaper carrier was an employee.

THE COURT: So I guess what you're telling me then is every newspaper that's been delivered since then that has included the contract that your client signed that is full of indications here indicating that, in fact, they are independent contractors, this was all a legal fiction. Is that what you're telling me?

MR. BORISON: The issue is whether it's a legal fiction is maybe too broad. I think it's a factor for the Court to consider in determining --

THE COURT: Okay. But the Newspaper Agency wasn't born last night. So they obviously knew the status of the law and they thought it would be okay despite the fact that the law, as you stated, hasn't been changed since 1940. And then we end up with this Young & Sons case and this new case in Needles. You think that during that entire time NAC says well

we're comfortable with this. We're just going to continue it? Or did instead did they say there's a chance that these folks might be determined to be employees and we better make some changes because of that?

MR. BORISON: Well, I think the answer is there's no question that they would prefer these people to be independent contractors and so they write the agreement. I mean in private practice sometimes you put a provision in a contract that you're not sure is enforceable. I think ultimately, and we're here on summary judgment, the question before you is whether there's any genuine issues of fact to be determined by the trier of fact.

And I think one of the factors that they can argue, they can present that contract to the jury and say, look, everybody agreed, but that's just one of the factors. It's not the conclusive factor. I don't think -- because it's no different than if we entered into a contract and we said, look, we are not joint venturers, absolutely not. There's plenty of case law that comes back and says the parties don't get to dictate how the law treats the relationship. And that's no different here.

Whether or not, for instance, and I think that's why the unemployment is important, unemployment is something that the State has passed that thinks it's public policy that people who are considered employees should be protected by

unemployment insurance.

THE COURT: Okay.

MR. BORISON: And so when we look at that statute, what that statute talks in terms of -- first of all, like I said, Needles they said it's a presumption you're an employee. Then they give a two-part test. The first part of that test is whether or not you're in an independent professional job.

THE COURT: So are you saying it would have been impossible for NAC to construct a situation whereby these carriers would be independent contractors?

MR. BORISON: I believe so because it doesn't meet that first test of the definition of an employee under the Employment Security Act. Just because they want them to be an independent contractor doesn't allow them to make them one.

THE COURT: Well, I know that, but the reality is -- I don't even know how to define independent professional occupation. And I'm not sure what that really means. I'm trying to think of different examples of people that work as contractors now and we know they are contractors. Let's say a custodial crew that goes inside a grocery store at night to clean the store.

MR. BORISON: Right.

THE COURT: And they are hired as independent. I don't think we'd consider that an independent professional occupation.

MR. BORISON: Right.

THE COURT: So you're saying that there's no way a grocer then could hire a janitorial service as an independent contractor and not put them on their own payroll as employees? That would be impossible?

MR. BORISON: Well, I don't know if it would be impossible. I think if you hired -- like, for instance, he said to you well Amazon hires Federal Express. And he was saying that's an independent contractor relationship, but the issue here isn't Amazon versus Federal Express.

THE COURT: Oh, I don't think that's the right relationship anyway because they pay Amazon independently but --

MR. BORISON: Well, and --

THE COURT: You're telling me then based on the construct of what we have in front of us and looking, again, at those four Young & Sons factors, there's no construct in your mind you could make where the newspaper could ever use carriers as independent contractors?

MR. BORISON: Well, I think the answer to your question is based on the situation -- and here's -- what he said was when he pointed you to the contract --

THE COURT: Right.

MR. BORISON: -- pointed you to the first three paragraphs --

THE COURT: Right.

MR. BORISON: -- and then he said that's the product which defines how it's assembled, what it should look like and when it should go out.

THE COURT: Okay.

MR. BORISON: So I think in those situations where the only things are controlled by the person, I mean, what else is to be controlled here? The appearance of the documents and when they are delivered and we've submitted even how, they, down to Attachment A to our response, chose where they are supposed to throw the paper. So the idea that there was additional things that they are not controlling --

THE COURT: So you --

MR. BORISON: What are the critical things that they are controlling is what's at issue. And he said that's the product.

THE COURT: Well, the problem you have is that if you want to have an independent contractor deliver your newspapers, if they aren't delivered on time, if the right product is not -- then the company goes out of business, right?

MR. BORISON: Right.

THE COURT: So I guess by your argument then you've effectively eliminated the contract for almost everything then. Can you think of anything you can hire a private contractor for?

MR. BORISON: Well, forgive me, your Honor. It's not me.

THE COURT: Oh, I know.

MR. BORISON: I'm going by the statute.

THE COURT: I know that and I didn't mean to infer that.

MR. BORISON: No, no, I --

THE COURT: Let's talk about a contractor that builds a house. I'm going to tell him I want that hall here. I want this many square feet. I want all those things. Is he now my employee?

MR. BORISON: I don't believe he's your employee.

THE COURT: Well, that's much more specific than what NAC is telling these carriers.

MR. BORISON: Well, no, but, again, it depends on what -- the crucial things they are telling them what they want. The only things that matter they are telling them. The thing that -- here's -- I mean --

THE COURT: Well, no, no, the only things that matter is they tell you we need to have this product on this door at this time. There are really no other factors there, but if you're saying that that's more specific than for me to say I want that wall moved an eighth of an inch this way and I want this many square feet, that's certainly not more specific or not less specific than I think these carriers are and yet those

people are contractors. Their name is even contractors. So how come that isn't my employee?

MR. BORISON: Well, I believe the difference is -- and it might be as simple as dealing with an independent company, a separate entity, as opposed to individuals.

THE COURT: Well, there's -- okay. Go ahead. I'm sorry. I didn't mean to interrupt you.

MR. BORISON: No, no, and I apologize.

THE COURT: No, please continue.

MR. BORISON: Yes, your Honor, but, again, here's the issue we're here on is whether there's any issues for a trier of fact to decide.

THE COURT: Okay. But we first have to wrap our head around the idea before we can make that decision, don't we?

MR. BORISON: Well, and what I'm suggesting is based on the Employment Security Act they bothered -- the State of Utah has bothered to say who is going to be considered an employee? And they want you to determine two things. The first thing is whether you're an independent profession. And the second issue -- and you only get to -- and what Needles says is you only get to the second issue if you find that they are engaged in independent professional --

THE COURT: So an independent -- well, let's break down those terms. Independent profession means you work for yourself and you're paid. Is that right?

MR. BORISON: Yes.

THE COURT: Okay. Why isn't a newspaper carrier working for themselves and they are paid?

MR. BORISON: Well, okay. And let me -- because I -- let me read it to you because I think that might help.

THE COURT: Okay. Thank you.

MR. BORISON: It says, The individual is customarily engaged in and independently established trade, occupation, profession or business of the same nature as that involved in the contract for hired services.

THE COURT: So this man fed his family for 15 years doing this. Why wouldn't his trade of delivering newspaper qualify under that definition?

MR. BORISON: Well, I guess my argument would be, first of all, we have a 1940 case that says it's not an independent. They are employees. Second, the idea, I think, and I'm just suggesting to the Court --

THE COURT: No, no, I'm trying to understand this.

MR. BORISON: But independently established trade. Being a newspaper delivery person is not independently established trade, occupation, profession or business. That's for the Court, but that might be for a jury to decide whether they think it's an independent. I mean we're only here whether there's any issues of fact that remain. If the Court decides that no, it doesn't fit in that -- you know it is independent,

I understand that.

THE COURT: I appreciate it.

MR. BORISON: I'm --

THE COURT: No, no, and I appreciate -- please don't misinterpret. I've got a unique loud voice so people think I'm yelling and I'm not. I'm just trying to discuss --

MR. BORISON: No, I appreciate the questions.

THE COURT: Okay. And I apologize for that.

MR. HAGEN: Go ahead.

MR. BORISON: So I guess the question is is this really something that's independent that you can go out and hang out a shingle saying I deliver newspapers or is it something that's an integral part of their business? And I think that's the difference, your Honor. Going back to your contractor example, the contractor is not integral to the homeowner's business that he build that house versus here it is integral to their business that the papers get delivered.

And I think if you look at that connection as to their business, that's the distinguishing factor between these two. So going back to your builder, it's not integral to the homeowner's business that that be. And I think that is the difference. The homeowner is not engaged in the business. They are. And they need this service done.

Now they come and say well we're only going to treat you as an independent contractor. And I'm suggesting that the

State of Utah says no we want protection for people who are employees and so we're going to treat them as employees regardless of what you say in your contract. And there's no doubt in my mind that they'd love them to be independent contractors, but I think when it's integral to their business, that's where it becomes difficult for them to be able to create independent contractors.

THE COURT: So if I understand what you're saying, are you conceding then that under the Young test that they qualify as independent contractors, but I need to ignore Young and look --

MR. BORISON: Well, I think even under the Young test those are factual issues here. I mean, for instance, your Honor, a jury could decide that some of the factors in Young are more important than others. They might not interpret it the same way as you would interpret those factors. And if there's different facts, I mean, we had a back-and-forth where he said well Mr. Goeckeritz says this, but we say that.

I think that leads to a factual issue that a jury gets to decide. There's nothing in that list of factors that says one of them is determinative. And whether or not they apply in a particular instance is something factually to be determined. So that's -- and here's the other thing. I mean what we did present to the Court is when we asked the simple question of what's the difference between someone who does the

down route as an independent contractor versus an employee? The only response is well that's how we pay them. One guy we pay hourly. One guy we pay per piece.

Now, where the wage law does help us there is that it defines wages. And wages include a per piece analysis. So it's not limited to someone who is being paid hourly.

THE COURT: But that wasn't the only difference they cited, right? The employee also had other jobs back at the plant and they just wanted to make sure the papers got delivered. And the contractor had no interest in what happened at the plant.

MR. BORISON: Right, but for the work that was being performed by the newspaper delivery person, there was no difference except how they were compensated. In other words, I understand that they had other jobs, but when we focus in on what's different about someone who is an employee delivering versus someone who is an independent contractor, the only difference was compensation, the method of compensation. That's -- that's the issue.

THE COURT: I want to back you up for just one second.

MR. BORISON: Sure.

THE COURT: And I apologize for doing this. I'm just trying to understand this. You made a point by saying it's up to the jury to decide whether to apply Young or whether to

apply Needle. And I don't think that's right. I think we've got to give them that. Oh, go ahead.

MR. BORISON: But I didn't mean --

THE COURT: And I probably misunderstood what you said.

MR. BORISON: Yeah, I didn't mean to say that, your Honor.

THE COURT: Okay.

MR. BORISON: I meant that there's four factors in Young.

THE COURT: Right.

MR. BORISON: And if the Court decides to instruct the jury saying these are four factors for you to consider --

THE COURT: Right.

MR. BORISON: -- you're not going to tell them but No. 1 is more important than No. 4. You're going to say you can consider and give them such weight as you determine that's appropriate.

THE COURT: And what would I instruct them then? Do I have them look at the Young factors or the Needles factors?

MR. BORISON: Well, I believe it's the Needles factors based on -- I mean Young was also a worker's comp. And you know the problem is -- and I'll tell the Court I haven't examined since the 70's how the worker's comp statute has changed in Utah. I did not do that for this argument, but what

I did do is look at Needles which is the most current on the Employment Security Act which has a definite definition for employee that I think would apply here.

THE COURT: Okay.

MR. BORISON: And so I think those factors, you know, it could be an issue whether it's an independent in the words independently established trade, occupation or profession or business. So -- and then the second part if you get -- if you decide that it is, then you still have to go into the next part of it is the individual has been and will continue to be free from control or direction of the means of performance of those services both under the individual's contract of hire and in fact.

So, again, if we go into what we've presented in Mr. Goeckeritz's affidavit that he was basically told he has to appear at the depot at a particular time, he has to do certain things, fold the papers a certain way, he has to go -- and you know he mentioned well there's no evidence that you know any manager checked. And Attachment E to our response shows that yes actually they were supposed to do the insert and then check with the manager. So I think there was control. And then timing-wise that they have to deliver by a particular time.

THE COURT: Are you aware of any employee that would be allowed to show up for work with that three-hour window?

MR. BORISON: Well, actually I guess no. I mean to

answer your question I guess it depends. And you know in the restaurant business I think that happens all the time, your Honor, where you're told to show up for a shift depending on the length or the amount of people that show up. I mean and I'm going back to college days when I --

THE COURT: Fair enough.

MR. BORISON: When they used to tell us, you know, be here at 10:30 because we don't know what the lunch crowd is going to be and whether we're going to need you earlier because, you know, I always got sort of the loser shift from two to five where, you know, I don't even know why I went, but that just happened.

THE COURT: Right, but the very first part you indicated is you need to be here at 10:30 to see how big the crowd was. They didn't say be here between 10:30 and three.

MR. BORISON: Yeah, but I wasn't allowed to clock in, I mean, which is a different issue, you know.

THE COURT: Oh, okay.

MR. BORISON: But in any event, again, that might be a factor for the jury to consider, your Honor. Obviously if you find no reasonable minds can differ on that point, you can grant summary judgment. To the extent that there's a factual issue to be decided, respectfully that should be left to the jury.

THE COURT: All right.

MR. BORISON: So the other issue, burning issue in the case is the tips.

THE COURT: Right.

MR. BORISON: Now, on the tips he said well there is no contract right to that. And the only thing that I'd like to call your attention to is page 2 of the contract that he provided to you, and specifically Paragraph 6, The parties agree that contractor shall receive no other compensation or payment for services performed under this agreement except as set forth in Attachment A including tips paid by customers.

That specifically addressed that tips go to the employee. That was the agreement between the parties.

THE COURT: Except doesn't this agreement only pertain to the route that he signed up for?

MR. BORISON: It does.

THE COURT: Okay. So then how do we expand this to include every route he might have?

MR. BORISON: All right. Well, we can do it one of two ways. The first way we do it -- now, he said well there was sort of an informal agreement as to if you'll do a down route, we'll pay you X dollars.

THE COURT: Right.

MR. BORISON: And there was no mention -- based on how he described it, there was no mention of tips either way.

THE COURT: Right.

MR. BORISON: Well, of course the conduct between the parties is that he gets the tips.

THE COURT: What happens if the amount of money he offers is different than what's offered in this contract? They aren't following the same course of conduct then, right?

MR. BORISON: They may not be, but as to the issue of whether the tips should go to them or to the carrier, I think the conduct between the parties is the tips go to the person delivering. I mean keep in mind, your Honor, when you go on the website, what they say on the website is do you want to give a tip to your carrier? They don't say give a tip to the company. They are specifically designed for the carrier.

So they are representing to the public that we're collecting these for the carriers, not as a tip to our company to charge you more for the thing you've already agreed to pay x dollars per month for.

THE COURT: So logistically then how does that work?

MR. BORISON: Logistically the testimony was, we asked could you determine who did a particular route? And let me back up because they claim that it's an impossible task.

THE COURT: Right.

MR. BORISON: Either because they don't keep accurate records to do it, which wouldn't in my mind be a defense because just failing to keep records so that you could pay someone something they are entitled to isn't much of a defense.

The second thing is, your Honor, we also asked, I said okay so what about the tips on the other routes, the contracted routes?

THE COURT: Uh-huh.

MR. BORISON: Well, we have a very simple program. If the tip comes in on the 31st of March, whoever is running that route on March 31st gets that tip. Doesn't matter if the guy just started March 1st and it was for a six month period, the tip. We pay it. That's how they approach it.

So they can do it in a contracted route. And they pay out the tips. I mean, they are paying out the tips someway on the contracted routes.

THE COURT: So you're saying that when the tip is given, whoever owns the contract at that time, regardless of how long they've had it --

MR. BORISON: Right.

THE COURT: -- will give the full tip?

MR. BORISON: That was the testimony. And so while I might not agree with that because, you know, it's not a perfect system by any means.

THE COURT: Right.

MR. BORISON: The point of it is the one person who doesn't get the tip is the company. The company has no right to those tips. And whether they have an imperfect system for delivering the tips, they do it on every contracted route. They can do it on the down routes the same way, but they choose

not to because, quite frankly, it's not a bad source of revenue. Now, he said it was a $123,000 over six years.

THE COURT: Right.

MR. BORISON: Actually the $123,000 was two years. We asked for six year's worth of information. They only gave us two years. So the 123 is not for six years. It's for a two year period. So -- and -- so let's say there's no contract on it. Again, what everything shows is the one person whose not entitled to these tips is the company, whether it's Carrier A who happened to be on the job on the day they got the tip or whether it's Carrier B who did five-sixths of the work, somebody else is entitled to that.

And if there's no contract term either way because he said it's just a loose agreement which means it's incomplete, and going back to your question how do you get to it? Well, this is a term that was not negotiated and it's not covered by this loose agreement.

THE COURT: So the down routes that are done by employees on a regular basis, are those tips passed down to the employees or does the company keep them?

MR. BORISON: As I recall, they said no, they didn't give it to them.

THE COURT: So it's actually being represented then, the language actually says if you want to tip, this will go to your carrier?

MR. BORISON: On their website it says -- and I can grab it for you, but it says carrier tip. So which is another issue separate and apart from ours.

THE COURT: Right.

MR. BORISON: But here's my point. And so my argument is either we have a contract that addresses it. If we don't have a contract, then they are being unjustly enriched because they are soliciting it from the public as being paid to someone else. And there's no equitable reason they should be able to retain it. So that's our unjust enrichment. Or they are converting it.

Now, their argument on the conversion is well we lawfully obtained it.

THE COURT: Right.

MR. BORISON: But that's not -- you know, if there's a book on the floor over there and I pick it up and it's yours, I lawfully obtained it, but if you come and ask for it back and I say it's mine, go away, then I'm now converting your personal property.

So I think on the tips there's a variety of issues that make it inappropriate. And whether or not the parties agreed, and I understand what the Court said that there was no agreement as to, but usually if you have incomplete terms, it just means you have an incomplete term and then you have to decide what terms applied. And I think we can show a course of

conduct here over a number of years. I think the contract is relevant to that as to the expectations of the parties. And why wouldn't a jury be allowed to decide whether or not these people who tell the public that we're collecting these tips for carriers, whether they should be allowed to keep it or should it go to the person who did the work.

THE COURT: Okay. Let me ask you this. So they turn to your client and say we have a down route. We want you to cover for the next month and we'll give you 50 bucks if you do it. And then they collect a tip during that time. It seems to me that the harmed party in that instance -- I already told you I'm going to give you 50 bucks and I gave you 50 bucks so you're taken care of.

It seems like the harmed party in that instance would be the customers themselves, would it not? Because they give that money thinking it's going to go -- I mean if he says I'm not going to do it for 50, I'll do it for 60. He can do that if he wants. Or if he wants to say 50 plus tips, he can do that too. He didn't do either one of those, but if he says I'll do it for 50, it seems at that point then the agrieved party would be the customer if, in fact, it was advertised that it would end up with the carrier. The carrier wouldn't have planned on that money to -- I'm having a hard time how you're linking the carrier to --

MR. BORISON: Well, I'm saying because he's getting

tips on every route he does. And he expects the tips, that if tips come in for the work that he does, that's the whole purpose of a tip is to reward him for the work he does.

THE COURT: Right. But --

MR. BORISON: So in my view it's not unreasonable for him to assume that if you hire me for another route, that yes, the same way that you're paying me a per piece or a set rate for that route that I'm also going to get the tips for that route.

THE COURT: See, I don't -- oh, go ahead. I'm sorry.

MR. BORISON: No, no, I apologize. And you're right. There is a third party here. It's the people who pay the tips, if they have a claim saying well give me back my money if you didn't distribute it.

THE COURT: Right.

MR. BORISON: But see the only thing I'd say about that is but those people intended for the carrier, the person who did the work, to get that tip.

THE COURT: Right.

MR. BORISON: So I mean it's sort of like an intervening tort.

THE COURT: Right.

MR. BORISON: They intervened and grabbed our money that those people, the public, intended to go to me. So I understand. And I guess --

THE COURT: Yeah, I just know the way it's pled, I just don't see that's how it comes out. It's almost -- I mean it bordered on almost a fraud claim to say give us your money and we'll help the poor with the money and then I put the money in my pocket, right?

MR. BORISON: Right, but the only difference is is if you short stop it, if you actually paid it to the people you intended to get it, the poor people.

THE COURT: Right.

MR. BORISON: Then that person hasn't been defrauded. They got what they bargained for.

THE COURT: Right, but the poor person couldn't then turn around -- would the person be able to turn around and sue at that point?

MR. BORISON: Sue the person who short-stopped the money?

THE COURT: Yes, I guess they could. Yeah.

MR. BORISON: Well, I think under the circumstances where it's not maybe as nebulous that there is a pattern and practice of paying the tips and receiving the tips, I don't think it's outlandish to say that it's reasonable to say that they should have gotten these tips as well.

THE COURT: Your client did this 15 years and never questioned whether those tips on the pickup routes would ever go to him? He obviously didn't receive any. So I thought 15

years -- it just seems if we were going to talk about what the general practice would be, we could say well, wait a minute, he's been picking up down routes for 15 years now. He hasn't received a tip in year one. Now in year 15 he thinks he's going to get a tip from there. Wouldn't that be the common practice?

MR. BORISON: That is a negative to my argument.

THE COURT: Okay.

MR. BORISON: No, but seriously, your Honor, yes, I mean, you know, and here's the thing. I mean you know we're talking like they are equals here.

THE COURT: Who are the equals?

MR. BORISON: The company versus my client.

THE COURT: Oh, uh-huh.

MR. BORISON: They are on equal footing. And they both have attorneys working on these agreements. I mean my guy wants to make some money. Whatever agreement -- and the testimony is that it was offered on a take-it-or-leave-it basis, the language about independent contractor. So I think that's another reason why. When you look at whether it's controlling or not, you have to look at the circumstances that it was offered, who the parties are, you know.

THE COURT: Well, that said, though, he could have found another job, right?

MR. BORISON: Absolutely. Yes, your Honor, but that

doesn't -- that doesn't give them the right to shortchange him.

THE COURT: No, I agree. Once things are in place if he's shortchanged, but if they say these are my terms, accept them or walk, you say fine. I'm going to walk. There's somebody next door I can go to work for, right?

MR. BORISON: Yes, your Honor.

THE COURT: All right.

MR. BORISON: But the facts are he did continue to work there. And we think as far as -- just to summarize, not to take much more of the Court's time. We think on the independent contractor versus employee, we think Needles is important. We think that the statue that Utah has passed is important ultimately. And he mentioned the Fedex cases. They have gone both ways. And actually one of the cases I did want to bring to the Court's attention. One of the cases that we cited, and we cited it for the language as far as what the factors, you know, that they had 11 factors.

THE COURT: Right.

MR. BORISON: And that, if I could just look half a second, your Honor, that was Wells versus Fedex. And the cite on it was 97 Fed Supp 2d 1006. The reason I want to bring it up was obviously because it would help me to bring it up. That case was reversed. In that case the trial court determined as a matter of law that the people were employees, not independent contractors. On appeal the Eighth Circuit -- and I can give

you that citizen -- the Eighth Circuit turned around and said in 799 Fed 3d 995 that the trial court erred because there were factual issues. That these are really factual issues to be presented to the jury and they shouldn't have granted summary judgment which is the reverse of what we have here, but --

THE COURT: Right.

MR. BORISON: -- for the same reason. And then I won't reiterate the tips. I think I've done as much as I can.

THE COURT: Thank you. Appreciate that.

MR. BORISON: Thank you.

THE COURT: So does the newspaper website really say if you want to tip these guys, we'll give them to the carriers and then they are sticking the money in their pocket?

MR. HAGEN: What it says is it gives -- it says tip for your carrier. And it does give an opportunity --

THE COURT: So when then are offering that money, they think they are giving it to that person that got up at 6:00 in the morning and threw it on their lawn, right?

MR. HAGEN: Well, we don't know for sure, but we expect, that. But, your Honor, that's who NAC would like to give the tips to. I think there's no question NAC would like to have all of these routes be contracted. And they would definitely provide the tips to the contracted carrier. When they don't have a contracted carrier, I mean -- now, look at how this really happens is Mr. Goeckeritz, he didn't deliver

every single one of those newspaper. His wife delivered 900, was his testimony, or she -- and I think she had some of their kids working for her. He delivered 1400 of them. And he had some of his kids working for him. And sometimes he had substitutes doing that.

Now, when Joe Dokes paid a tip through the internet as he paid his bill, who did he intend that tip to go to? Did it intend it to go to Mr. Goeckeritz who signed the dotted line and was responsible for the route? That's NAC's assumption. And that's why we gave the tips to Mr. Goeckeritz.

THE COURT: Okay. But what do we know about who they didn't want the tip to go to?

MR. HAGEN: What do we know about who they didn't want it to go to?

THE COURT: Didn't want to. And the answer I think is your client.

MR. HAGEN: Possibly. Possibly.

THE COURT: What do you mean possibly? Your client is not the carrier.

MR. HAGEN: Well, actually, your Honor, they're not -- they actually are the carrier in this sense. Bear with me.

THE COURT: Okay. We're stretching here, but go ahead. We'll stretch for a minute.

MR. HAGEN: We're stretching. They are the carrier

in the sense that they are -- when there's no one else that has signed on the dotted line to have responsibility for delivering that route, NAC is of necessity the carrier. It takes responsibility. And it might be Kelly Roberts who goes out and delivers the route and does such a great job, that's the day that the customer decides he wants to pay a tip, but, you know, it's not a perfect world. We can't match that up.

And sometimes Mr. Roberts will deliver ten papers, and someone else as an employee will deliver 50 papers and they'll carve up a route just to get it delivered. And we don't know on those days when you've got an open route when it just has to be thrown, we don't know if a subscriber wanted to give a tip on that particular day unless he was standing out there with ten bucks in his hand handing it to the carrier. So I admit, I agree it's not a perfect situation.

THE COURT: Right.

MR. HAGEN: NAC agrees it's not. And they made very clear that if any of those carriers would sign on the dotted line and take responsibility for the route, they would gladly pay them the tips, but when it's a day-to-day thing --

THE COURT: But they've come up a system which is a little surprising to say, okay, we don't know how we're even going to divvy up the tips to the people that have the routes, so what we'll do is the day the tip comes in whoever has the route on that day will get the tip. Even if they are giving it

for 12 months back when this person didn't have this route.

MR. HAGEN: Right, because in the absence of a better way of doing it.

THE COURT: Right. So if they want to put in some system that's almost random that way, why couldn't they do the same thing on the other side and say, okay, here's the open route, a tip came in the 15th, you delivered on the 15th, here it is?

MR. HAGEN: Your Honor, that might be a good idea, but it takes away one of the main inducements to get carriers to sign up for routes, No. 1. And No. 2, it may be a good idea. Maybe it's possible. I think it's unworkable from just from a practical standpoint because when you have a route that's contracted, you know who the carrier is despite even if it's being subcontracted out to a particular person on certain days.

THE COURT: Right.

MR. HAGEN: In fact, it could be subcontracted out the entire year and still the tips would go to that carrier who has signed on the dotted line. It's just -- when we have an open route, typically it's just not that simple where you'd say, okay, this tip came in. We're going to give it to the carrier who happened to deliver that paper on that particular day.

THE COURT: Except, though, don't you think it's

better than having $60,000 in your account at the end of that year that the subscribers meant to give to the poor personnel walking those streets throwing those the newspapers instead of the corporation?

MR. HAGEN: Is it better? Possibly. I mean we're assuming that they really did intend it to go to a specific person.

THE COURT: It says carrier on the website.

MR. HAGEN: It may, but, your Honor, it's just -- it's a practical issue. There's nothing illegal about it. Newspaper Agency intends it to go to the carriers, but the fact is it's just as a practical matter. It's a no -- it's something that can't be done for practical reasons because we just -- some of these routes are assigned at the very last second. And they just don't keep great records of that because, you know, this is something that has to be done every day of the year. And so, you know, we acknowledge that that's not a perfect situation, the perfect system.

THE COURT: We've got some more water if you'd like it.

MR. HAGEN: No, I'm good.

THE COURT: Okay.

MR. HAGEN: But it's the best that can be done under the circumstances. Let me talk about the independent contractor issue just briefly. First of all, the Supreme Court

did decide a carrier case in approximately 1940 on an unemployment compensation issue. That case was cited by neither party because it absolutely does not apply. And I'm not claiming dirty pool, I'm bringing it up in oral argument, but it wasn't cited.

THE COURT: Right.

MR. HAGEN: And I think there's good reason for that.

THE COURT: Okay.

MR. HAGEN: Second, there's a statement in that test and the Needles case was cited. It was cited in one place of their brief and here's what they say. It's a stream cite and they cite Needle, Inc. versus Department of Work Force Services, give the citation and say in parenthesis proper classification of employment relationship is determined through fact intensive inquiry.

That doesn't say anything about a two part test. And frankly that wasn't argued in their brief. And the test that we pointed out in our moving memorandum was a four-part test. In the case that we've cited and your Honor has averted to and both parties discussed in the memoranda going back and forth, that's the controlling case as we understand it, it's a four-part evaluation of considerations.

The Needles test of this professional classification or something it's just -- it just isn't part of the case. It's not part of the briefing. And it shouldn't be part of this

oral argument. And the Young & Sons case, there are these four factors. The right of control is the most important.

THE COURT: Uh-huh.

MR. HAGEN: And I think if you look at our briefs and you look at the contract that we have here, and as a practical matter, the fact is he had absolute control. He would come in, put the paper together, and of course we had specifications. That's what we contracted for, for the paper to look in a particular way when it went out the door. And so he contracted to provide that service and he went out and delivered it.

No one went along with him when he delivered. No one supervised him as he delivered the papers. He was on his own. And it might be a complete stranger who come in on any day of the week to take care of Mr. Goeckeritz's papers. As long as it got down, Newspaper Agency wasn't going to fuss at Mr. Goeckeritz. It just had to get done. He was liable for an end result. That's all.

The spotter issue, yes, there are employees who have many other duties who occasionally are called upon to deliver a newspaper. I think your Honor understands that that's just faulty logic. The mere fact that one thing that a particular employee does is deliver papers, doesn't mean that someone who only delivers papers is also an employee. And I found it -- counsel pointed out that he had -- I think he called it the loser shift, the two to five, when he was working in that

restaurant, but he had a shift it sounds like, two to five.

And here in this case they had an open time when they could show up when the depot was open, but basically the bottom line was just get your papers assembled and delivered by 6:00 every morning.

With regard to the tips, we've talked about that a little bit. Your Honor is correct that those contracts pertained to a specific route. Counsel referred to conduct between the parties that the tips go to the carrier was not established by conduct between the parties. Otherwise, we wouldn't be here. It's always been the practice that those tips on down routes do not go to the carriers that deliver them on any particular day. It's only the contracted routes that the carriers get those tips for.

And the agreement -- when I said -- I said casual agreement, not loose agreement. The agreement that I'm talking about is a verbal agreement where an individual, a carrier or someone else agrees to deliver a route for 50 bucks or some other consideration. And that is a specific contract. And those specific contracts don't include the tips.

And I can tell that that particular issue is something that gives the Court concern. As between Mr. Goeckeritz and Newspaper Agency, it's not his right to those tips. He always knew that as a matter of contract, he wasn't entitled to those tips. He always knew that if he

wanted the tips, he could sign the agreement and take responsibility for the route and he would, as the contracted carrier, get those tips.

And on those days when his children delivered the routes, it was Mr. Goeckeritz's determinations as to whether those children would get the tips. When he had a substitute deliver his route --

THE COURT: So --

MR. HAGEN: -- it was also his determination.

THE COURT: Obviously -- you can obviously tell I'm troubled by the idea that the website says you can tip your carrier if you choose to and the money never went. Who in that instance, if that's where my issue is, who is the agrieved party there?

MR. HAGEN: Well, I think it's the subscriber. If we're really -- and I don't think we are talking about a situation where someone was defrauded. I think this is a situation where NAC puts out on its website here's an opportunity for you to pay a tip. In most situations, I think almost all situations it does, in fact, go to the contracted carrier, but the problem is because of the way newspaper subscriptions are paid for, there's no way of matching up when they pay online. There's no way to match up exactly the tip to the carrier that delivered the paper on any one particular day except the way that has worked out over time.

THE COURT: Wouldn't that be -- wouldn't that be NAC's problem, the fact that they can't match those up? Why would they solicit the tip?

MR. HAGEN: Well, because the majority of the time they do get them to the carriers. And the tip does go to the carrier. It goes to the carrier who has the route.

THE COURT: So if they came in and they concluded they couldn't match it up, why wouldn't they send it back to the person that sent the tip in then?

MR. HAGEN: Well, you know, I think, your Honor, maybe that would be a better way of doing it, but the intent is that tips are going to be paid to carriers. And the intent is that routes are going to be contracted for. It's one of the inducements for it.

THE COURT: All right.

MR. HAGEN: Any other questions?

THE COURT: I don't have any. If you'll give me five minutes, I will come back and announce my decision.

(Recess was taken.)

First of all, I want to say thank you to both parties. This case was extremely well briefed and even better argued. Of course it does the work of putting me in a box which I appreciate. I think obviously there's two issues here.

The first being the employee versus the contractor issue. The 1940 case was one that wasn't brought up in the

briefs. And I obviously didn't go back there and read it. And I'm not sure if it's something I can consider given the fact that they were somewhat blind-sided it.

As well, and if, in fact, Mr. Borison, son if you plan to appeal this, this is probably a good place to start. I think the status of law, at least as far as I could read, and I tried to read quite a bit of this, well, I did read quite a bit of this last night is Young & Sons are the factors we deal with. I'm not sure Needle is the one. And I think the briefs were done in such a way to respect those four factors put in the Young & Sons.

So that is the standard that I'm going by today. So if, in fact, you disagree with me, you're certainly more than welcome to take that up and see if, in fact, Needles has overruled Young & Sons. I'm not sure it has. Nonetheless, that's the direction I'm going with regard to this. And if we go under the four factors there, the first factor of the right and direction and control over the employee, I think that it's fairly clear to me that the Newspaper judged the defendant or the plaintiff here only on the end result. Was the paper assembled properly and was it put in the yard at a certain time. And everything between those two points the person could probably do on their own.

They had a three-hour window of when they could go assemble the papers. So conceivably if they got there at the

very earliest they could have, they could have had paper delivered by 4:30 or if they got there at the latest, they could have it delivered by 6:00. And how they did it whether by bicycle or car or anything like that, that was all up to them. They didn't really care. They just wanted to make sure it was where it supposed to be.

It didn't matter what order you did it. You provided your own car, your bike, or however you deliver the newspaper. And I think that is precisely -- I'm trying to think of what they could have changed to make it more of an independent contractor. And there's really quite frankly nothing I could think of that would do that. So I find the first factor very much in favor of independent contractor.

The rights to fire and hire I think is a clear one with regard to independent contractor given the fact that I don't know of any job where you can actually employ your wife and your children to do the work for you or hire subcontractors to do work for you. Again, the only thing that matters is the bottom line. And they did not have the right to fire and hire the plaintiff in this case. That was done by contract.

And if, in fact, they were under an agreement at the time, they asked him to leave or whatever transpired there, he would have a remedy to come back and sue and say, wait a minute, this thing says 30 days and they got rid of me of 20 days. I want something for that. But, in fact, there wasn't

an agreement in place at the time. There were still negotiating it and finally decided to walk away. That's what happened. So I find that factor very much in favor of independent contractor.

The method or payment, again, that was paid by the papers delivered. Although the number came out to be fairly close, that would happen every month because the route size would be the same, but nonetheless it was per-paper delivery. In other words, no delivery, no paper or no delivery, no money. So I think the method of payment goes to that. And lastly furnishing equipment, I think that's probably the easiest one of all because you were the ones that paid for your car. You insured it. You filled it with gas. You made sure is ran. You purchased the bags. You purchased the map. You purchased the rubber bands.

And in this case this man, the plaintiff was obviously industrious and went and tried to find his own bags that might be even cheaper and save his bottom line a little bit. And despite the fact that they didn't work it, it tells you that Newspaper just was not providing the equipment for you.

So I find that, in fact, there is no genuine fact with regard to whether this was an independent contractor. And by a matter of law I'm going to find in favor of the defense.

With regard to the tips, I find that issue to be more

troubling, but I find it troubling given the fact that I don't think we might have the right party here. If I look through it through the plaintiff's eyes, he did this for 15 years. He was offered these routes for $50 for a route. And he at that point could have said well and plus I'll get the tips that go along with that. It appears he never did that.

Not only that, he was never given those tips. So after year one if you turned and says holy cow, I was expecting these tips and I never got them. You say, okay, well, maybe you have an argument there. Say, you know, this is how we do business, but they'd done business this way for 15 years now and he never got the tips.

So to say it's the -- I appreciate the argument to say, you know, that's the way we did business is with the tips. Well, the reality is that actually wasn't the way because they did this for a long long time without him ever getting the tips for those routes, for the down routes that he was volunteering to do and was paid a flat fee.

The fact the Newspaper organization was advertising that these went to the carrier and they actually didn't, I think that's troubling, but I don't think that he would be the agrieved party because he would have no reason to expect those tips. He'd never received them before. They weren't discussed when he decided to take on those down routes. They were in his agreement, but there was nothing -- there were a number of

things in these agreements that didn't automatically filter down. When he said $50 for the route, he couldn't expect the other things in the agreement either.

So I'm going to grant the summary judgment on both of those matters. And I do believe, and please correct me if I am wrong, I believe that takes care of all seven counts that is pled. Is that accurate?

MR. BORISON: Yes, your Honor.

THE COURT: All right. And Mr. Hagen, if you wouldn't, please, preparing something reflecting what I've said as well as anything else that doesn't conflict, I'd appreciate it.

MR. HAGEN: Okay.

THE COURT: Thank you.

MR. HAGEN: Thank you, your Honor.

MR. BORISON: Thank you, your Honor.

THE COURT: I appreciate it.

(PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
: SS.
County of Utah)

I, Colleen C. Southwick, Registered Professional Reporter for the State of Utah, do certify that the foregoing transcript was taken down by me stenographically from an electronic recording and thereafter transcribed;

That the same constitutes a true and correct transcription of the said proceedings;

That I am not of kin or otherwise associated with any of the parties herein or their counsel, and that I am not interested in the events thereof.

Witness my hand at Heber, Utah, this 30th day of August, 2017.

Colleen Southwick

Colleen C. Southwick, CSR-RPR

The Order of the Court is stated below:
Dated: July 07, 2017 10:41:35 AM
/s/ MARK KOURIS
District Court Judge

SCOTT A. HAGEN (4840)
DAVID B. DIBBLE (10222)
ADAM K. RICHARDS (14487)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Email: shagen@rqn.com
ddibble@rqn.com
arichards@rqn.com
Attorneys for Defendant Newspaper Agency Corporation

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JOSEPH GOECKERITZ,

Plaintiff,

v.

NEWSPAPER AGENCY COMPANY, LLC,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Civil No.: 160903171

Judge Mark Kouris

Defendant Newspaper Agency Company, LLC's Motion for Summary Judgment came before the Court for hearing on Tuesday, June 27, 2017. Scott A. Hagen of Ray Quinney & Nebeker appeared as counsel and made oral argument for Defendant. Scott C. Borison, admitted pro hac vice, and Daniel Baczynski of Ayres Law Firm appeared as counsel on behalf of Plaintiff, and Mr. Borison made oral argument on behalf of Plaintiff.

Prior to the hearing, the Court reviewed and considered the legal memoranda and exhibits (including declarations) submitted by the parties in support of and in opposition to the Motion.

Based on the foregoing, the Court deems itself fully briefed as to the applicable law and facts concerning Defendant's Motion for Summary Judgment, and hereby grants that Motion for the following reasons, as well as all other reasons stated in the legal memoranda filed in support of the motion to the extent not inconsistent with the reasons stated herein.

Plaintiff's first cause of action, which alleges fraudulent inducement, was withdrawn by Plaintiff in response to the Motion for Summary Judgment, and is hereby dismissed with prejudice.

Plaintiff's second cause of action, which alleges a request for declaratory judgment that Defendant's newspaper carriers have been improperly classified as independent contractors rather than employee, is rejected based on the Court's application of the test stated in *Harry L. Young & Sons, Inc. v. Ashton*, 538 P.2d 316 (Utah 1975), which both parties accepted in making their arguments on this issue. In *Ashton*, the Utah Supreme Court laid out four factors for consideration in determining whether an independent contractor was properly classified as such:

> The main facts to be considered as bearing on the relationship here are: (1) whatever covenants or agreements exist concerning the right of direction and control over the employee, whether express or implied; (2) the right to hire and fire; (3) the method of payment, *i.e.*, whether in wages or fees, as compared to payment for a complete job or project; and (4) the furnishing of the equipment.

538 P.2d at 318. The Court finds that consideration of all four factors weighs heavily in favor of independent contractor status. First, based on the written contract between Plaintiff and Defendant and the undisputed facts regarding Plaintiff's actual actions, Plaintiff clearly controlled the means and manner of contractual performance, and was required only to provide the ultimate result, i.e., the assembly of the "Newspaper Package" and delivery to the subscribers

on Plaintiff's contracted routes. Second, Plaintiff had the right to hire, which he exercised by hiring or subcontracting with his wife and children, as well as others. In addition, Plaintiff was not subject to termination at will, as the contract allowed termination only for cause or upon 30 days' notice. Plaintiff's relationship with Defendant came to an end when he refused to sign a new contract; he was not "terminated without cause." Third, Plaintiff was paid a piece rate, not a wage. Fourth, Plaintiff was responsible for providing his own equipment and supplies, including his vehicle, including fuel and maintenance, as well as polybags, rubber bands, twine, and the like. Plaintiff typically purchased these items from Defendant, but the undisputed facts showed that he could have purchased them from any other source. Accordingly, all of these factors weigh heavily in favor of contractor status. The Court holds as a matter of law that Plaintiff was properly classified as an independent contractor. Accordingly, Plaintiff's second cause of action is dismissed with prejudice.

Plaintiff's third claim for relief alleges a violation of the Utah Payment of Wages Act. This claim fails because Plaintiff was an independent contractor, not an employee, and therefore not covered by the Act. Accordingly, Plaintiff's third cause of action is dismissed with prejudice.

Plaintiff's fourth claim for relief alleges breach of contract. In response to the Motion, Plaintiff focused on his claim that Defendant breached the "Home Delivery Independent Contractor Agreement" signed by the parties ("Contract") by failing to pay tips on "down routes." This claim fails because it was not pleaded in the complaint and because the Contract clearly did not provide for tips except on the specific route or routes covered by the Contract. It

did not include any provision giving Plaintiff a right to receive tips on down routes. Accordingly, Plaintiff's fourth cause of action is dismissed with prejudice.

Plaintiff's fifth cause of action, which alleges a violation of the Utah Minimum Wage Act and Utah Administrative Code R610-1-4, was withdrawn by Plaintiff in response to the Motion for Summary Judgment, and is hereby dismissed with prejudice.

Plaintiff's sixth cause of action, which alleges conversion, fails because Plaintiff was not the aggrieved party concerning the tips. Accordingly, this cause of action is dismissed with prejudice.

Plaintiff's seventh cause of action, which alleges unjust enrichment, fails because was not the aggrieved party concerning. Accordingly, this cause of action is dismissed with prejudice.

Based on the foregoing, IT IS HEREBY ORDERED that Plaintiff's complaint, including all causes of action alleged therein, is dismissed with prejudice.

Approved as to Form:

AYRES LAW FIRM

/s/ Daniel Baczynski
(permission given via email)
Tyler B. Ayres
Daniel Baczynski

END OF ORDER

** In accordance with the Utah State District Courts E-filing Standard No. 4, and URCP Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order. **

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, I electronically filed the foregoing **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the Utah Trial Court/ECF system which sent notification of such filing to the following:

Tyler B. Ayres
Daniel Baczynski
AYRES LAW FIRM
12339 S. 800 East, Suite 101
Draper, Utah 84020

/s/ Scott A. Hagen

LexisNexis®

User Name: tbayres98
Date and Time: Wednesday, February 7, 2018 3:50:00 PM EST
Job Number: 60974335

Document (1)

1. *Utah Code Ann. § 35A-4-204*
   Client/Matter: -None-
   Search Terms: Utah Code Ann. § 35A-4-204
   Search Type: Natural Language

35A-4-204. Definition of employment.

(1) Subject to the other provisions of this section, "employment" means any service performed for wages or under any contract of hire, whether written or oral, express or implied, including service in interstate commerce, and service as an officer of a corporation.

(2) "Employment" includes an individual's entire service performed within or both within and without this state if one of Subsections (2)(a) through (k) is satisfied.

(a) The service is localized in this state. Service is localized within this state if:

(i) the service is performed entirely within the state; or

(ii) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

(b)

(i) The service is not localized in any state but some of the service is performed in this state and the individual's base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is in this state; or

(ii) the individual's base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(c)

(i)

(A) The service is performed entirely outside this state and is not localized in any state;

(B) the worker is one of a class of employees who are required to travel outside this state in performance of their duties; and

(C)

(I) the base of operations is in this state; or

(II) if there is no base of operations, the place from which the service is directed or controlled is in this state.

(ii) Services covered by an election under *Subsection 35A-4-310(3)*, and services covered by an arrangement under *Section 35A-4-106* between the division and the agency charged with the administration of any other state or federal unemployment compensation law, under which all services performed by an individual for an employing unit are considered to be performed entirely within this state, are considered to be employment if the division has approved an election of the employing unit for whom the services are performed, under which the entire service of the individual during the period covered by the election is considered to be insured work.

(d)

(i) The service is performed in the employ of the state, a county, city, town, school district, or other political subdivision of the state, or in the employ of an Indian tribe or tribal unit or an instrumentality of any one or more of the foregoing which is wholly owned by the state or one of its political subdivisions or Indian tribes or tribal units if:

(A) the service is excluded from employment as defined in the Federal Unemployment Tax Act, *26 U.S.C. 3306(c)(7)*;

(B) the service is not excluded from employment by *Section 35A-4-205*; and

(C) as to any county, city, town, school district, or political subdivision of this state, or an instrumentality of the same or Indian tribes or tribal units, that service is either:

(I) required to be treated as covered employment as a condition of eligibility of employers in this state for Federal Unemployment Tax Act employer tax credit;

(II) required to be treated as covered employment by any other requirement of the Federal Unemployment Tax Act, as amended; or

(III) not required to be treated as covered employment by any requirement of the Federal Unemployment Tax Act, but coverage of the service is elected by a majority of the members of the governing body of the political subdivision or instrumentality or tribal unit in accordance with *Section 35A-4-310*.

(ii) Benefits paid on the basis of service performed in the employ of this state shall be financed by payments to the division instead of contributions in the manner and amounts prescribed by *Subsections 35A-4-311(2)(a)* and (4).

(iii) Benefits paid on the basis of service performed in the employ of any other governmental entity or tribal unit described in this Subsection (2) shall be financed by payments to the division in the manner and amount prescribed by the applicable provisions of *Section 35A-4-311*.

(e) The service is performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if:

(i) the service is excluded from employment as defined in the Federal Unemployment Tax Act, *26 U.S.C. 3306(c)(8)*, solely by reason of Section 3306(c)(8) of that act; and

(ii) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(f)

(i) The service is performed outside the United States, except in Canada, in the employ of an American employer, other than service that is considered employment under the provisions of this Subsection (2) or the parallel provisions of another state's law if:

(A) the employer's principal place of business in the United States is located in this state;

(B) the employer has no place of business in the United States but is:

(I) an individual who is a resident of this state;

(II) a corporation that is organized under the laws of this state; or

(III) a partnership or trust in which the number of partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(C) none of the criteria of Subsections (2)(f)(i)(A) and (B) is met but:

(I) the employer has elected coverage in this state; or

(II) the employer fails to elect coverage in any state and the individual has filed a claim for benefits based on that service under the law of this state.

(ii) "American employer" for purposes of this Subsection (2) means a person who is:

(A) an individual who is a resident of the United States;

(B) a partnership if 2/3 or more of the partners are residents of the United States;

(C) a trust if all of the trustees are residents of the United States;

(D) a corporation organized under the laws of the United States or of any state;

(E) a limited liability company organized under the laws of the United States or of a state;

(F) a limited liability partnership organized under the laws of the United States or of any state; or

(G) a joint venture if 2/3 or more of the members are individuals, partnerships, corporations, limited liability companies, or limited liability partnerships that qualify as American employers.

(g) The service is performed:

(i) by an officer or member of the crew of an American vessel on or in connection with the vessel; and

(ii) the operating office from which the operations of the vessel, operating on navigable waters within, or within and without, the United States, is ordinarily and regularly supervised, managed, directed, and controlled within this state.

(h) A tax with respect to the service in this state is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or that, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this chapter.

(i)

(i) Notwithstanding *Subsection 35A-4-205(1)(p)*, the service is performed:

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry cleaning services, for the driver's principal; or

(B) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and the transmission to the salesman's principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(ii) The term "employment" as used in this Subsection (2) includes services described in Subsection (2)(i)(i) performed only if:

(A) the contract of service contemplates that substantially all of the services are to be performed personally by the individual;

(B) the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation; and

(C) the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(j) The service is performed by an individual in agricultural labor as defined in *Section 35A-4-206*.

(k) The service is domestic service performed in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of $1,000 or more during any calendar quarter in either the current calendar year or the preceding calendar year to individuals employed in the domestic service.

(3) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, unless it is shown to the satisfaction of the division that:

(a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire for services; and

(b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact.

(4) If an employer, consistent with a prior declaratory ruling or other formal determination by the division, has treated an individual as independently established and it is later determined that the individual is in fact an employee, the department may by rule provide for waiver of the employer's retroactive liability for contributions with respect to wages paid to the individual prior to the date of the division's later determination, except to the extent the individual has filed a claim for benefits.

History

C. 1953, 35-4-22.3, enacted by L. 1991, ch. 174, § *18*; 1993, ch. 241, § *9*; renumbered by L. 1994, ch. 169, § *12*; 1995, ch. 45, § *1*; C. 1953, 35-4-204; renumbered by L. 1996, ch. 240, § *216*; 1997, ch. 375, § *245*; 2001, ch. 265, § *3*; *2005, ch. 12, § 1*; 2006, ch. 22, § *2*.

Annotations

Notes

Federal Law.

The Federal Unemployment Tax Act, cited throughout Subsection (2), is *26 USCS §§ 3301* through *3311*.

NOTES TO DECISIONS

Construction.

Contract defining relationship.

Contract for hire.

Employee.

Employment.

Independent contractors.

—Demonstrators.

—Factors considered.

—Nurses.

—Pollster.

Independently established trade or occupation.

—Truck drivers.

Performance of services.

Service relationships.

Construction.

The terms "employment," "personal services" and "wages" are much broader in meaning and application than their common-law counterparts, and encompass in their coverage many persons and relationships not included in the common-law relationship of master and servant. *Singer Sewing Mach. Co. v. Industrial Comm'n, 104 Utah 175, 134 P.2d 479, 1943 Utah LEXIS 55 (Utah 1943)*.

Contract defining relationship.

In determining if a relationship is within the act, the commission and the court will look behind the contract to the status in which the parties are placed by the relationship that exists between them. *Singer Sewing Mach. Co. v. Industrial Comm'n, 104 Utah 175, 134 P.2d 479, 1943 Utah LEXIS 55 (Utah 1943)*.

Although the plaintiff's agreements with dealers and installers specified that the dealers and installers were independent contractors and not agents or employees of the plaintiff, such an agreement is ineffective in keeping an individual outside the purview of the Employment Security Act when by his activity he brings himself within it. *Leach v. Board of Review, 123 Utah 423, 260 P.2d 744, 1953 Utah LEXIS 206 (Utah 1953)*.

In determining whether a relationship is included within the act, the actual status of the persons rather than the contract entered into between them determines that question. *Salt Lake Transp. Co. v. Board of Review, 296 P.2d 983, 5 Utah 2d 87, 1956 Utah LEXIS 174 (Utah 1956)*.

Contract for hire.

Contract for hire includes any agreement under which one performs personal services at request of another who pays for services; installer of television cable was under contract for hire where he signed contract to install television cable and was entitled to regular remuneration based on number of installations he performed. *Superior Cablevision Installers, Inc. v. Industrial Comm'n, 688 P.2d 444 (Utah 1984)*.

Employee.

Definition of employee in Workmen's Compensation Act does not extend to all persons performing personal service for pay, as does that in Unemployment Compensation Act. *Intermountain Speedways, Inc. v. Industrial Comm'n, 101 Utah 573, 126 P.2d 22 (1942)*.

Workforce Appeals Board's decision that a spa's workers were employees rather than independent contractors for purposes of the Employment Security Act was affirmed where one massage therapist's advertisement and the workers' responses to the Department of Workforce Services questionnaires were not legally competent for purposes of the residuum rule, and thus, the spa had not demonstrated that its workers were independently established or that the Board's decision was not supported by legally sufficient evidence. *Aura Spa & Boutique v. Dep't of Workforce Servs., 2017 UT App 152, 845 Utah Adv. 32, 2017 Utah App. LEXIS 153 (Utah Ct. App. 2017)*.

Employment.

"Employment" under the act is not confined to common-law concepts, or to the relationship of master and servant, but is expanded to embrace all services rendered for another for wages. *Singer Sewing Mach. Co. v. Industrial Comm'n, 104 Utah 175, 134 P.2d 479, 1943 Utah LEXIS 55 (Utah 1943)*.

Salesman operating on strictly commission basis, with authority to make collections on installment contracts, to trade in goods to be applied on commissions, the salesman himself determining amount of time he devoted to company's business and where he maintained his place of business, is an "employee" within the act because he performed "services for wages" as defined by the act. *Singer Sewing Mach. Co. v. Industrial Comm'n, 104 Utah 175, 134 P.2d 479, 1943 Utah LEXIS 55 (Utah 1943)*.

Since act makes no distinction between part-time or casual employment and full-time employment, when the work done is within the business of the employing unit, commission is correct in finding solicitors to be "in employment" under the act. *Northern Oil Co. v. Industrial Comm'n, 104 Utah 353, 140 P.2d 329, 1943 Utah LEXIS 72 (Utah 1943)*.

The scope or definition of "employment" within the Utah Unemployment Compensation Law, as amended in 1949, follows the federal act. *Cache Valley Turkey Growers Ass'n v. Industrial Comm'n, 106 Utah 1, 144 P.2d 537, 1943 Utah LEXIS 139 (Utah 1943)*.

Where drivers of taxicabs "leased" cabs from taxicab company for a specific amount, had to take the cab assigned to them, had to buy gas from the company, had no control over which shift they were to work, and had two-way radios, dispatchers, switchboard services, etc., provided by the company, the drivers were covered by this chapter. *Salt Lake Transp. Co. v. Board of Review, 296 P.2d 983, 5 Utah 2d 87, 1956 Utah LEXIS 174 (Utah 1956)*.

"Distributors" who agreed to solicit orders for the sale of the company's products, to return catalogues, price lists, and order forms furnished at the end of the agreement, and to furnish a bond to secure money due the company, who were entitled to discounts on cash sales and conditional sales, who suffered no loss on sales and were under no duty to repossess goods, were in "employment" within the meaning of the law. *Wear-Ever Aluminum, Inc. v. Board of Review, 358 P.2d 340, 11 Utah 2d 283 (1961)*.

Private club which hired band for six-week engagement through its booking agent, paid the band leader a lump sum for distribution among the members, and had no right to hire, fire or otherwise control individual musicians except to enforce house rules about smoking and drinking on stage, was nonetheless their employer under the terms of this section, and therefore required to contribute to the Unemployment Compensation Fund. *Black Bull, Inc. v. Industrial Comm'n, Dep't of Employment Sec., 547 P.2d 1334, 1976 Utah LEXIS 786 (Utah 1976)*.

Where contractor did not exercise control over drywall nailers and finishers, and where nailers and finishers maintained home offices and continued to work at other locations, they were not performing services "in employment." *Barney v. Department of Employment Sec., 681 P.2d 1273, 1984 Utah LEXIS 833 (Utah 1984)*.

Installer of cable television wire who worked under written contract for hire was an employee covered by Employment Security Act, and was not excluded from coverage under the independent contractor exclusion of this section, where, although contract specified that he was an independent contractor, evidence clearly showed that he was not independently established in television cable installation business; fact that installer had acquired training which he could thereafter parlay into employment with another installation company did not make him something other than an employee. *Superior Cablevision Installers, Inc. v. Industrial Comm'n, 688 P.2d 444 (Utah 1984)*.

Services performed by two truck drivers hired as driving team constituted "employment" where services were performed for wages and neither individual drivers nor driving team as an entity satisfied "ABC" exclusionary test. *Nielsen v. Department of Employment Sec., 692 P.2d 774, 1984 Utah LEXIS 957 (Utah 1984)*.

Even if workers do not consider themselves employees and have signed statements to that effect, they may nevertheless be considered employees, and therefore not excluded from coverage, if other factors point to the conclusion that they are employees. *New Sleep, Inc. v. Department of Emp. Sec., 703 P.2d 289 (Utah 1985)*.

Independent contractors.

Itinerant bands and entertainers performing at bars and private clubs are not independent contractors. *Bigfoot's, Inc. v. Board of Review, 710 P.2d 180, 1985 Utah LEXIS 971 (Utah 1985)*.

Sales personnel who made direct contact with local businesses to solicit memberships for the chamber of commerce were not "independent contractors" but were covered under this chapter, where the sales employees' services were not all performed outside of the business office and the employees were not shown to be engaged in independently established sales businesses. *Allen & Assocs. v. Bd. of Review, 50 Utah Adv. 16, 732 P.2d 508, 1987 Utah LEXIS 636 (Utah 1987)*.

The appropriate inquiry is whether the person engaged in covered employment actually has an independent business, occupation, or profession, not whether he or she could have one. *McGuire v. Department of Employment Sec., 101 Utah Adv. 62, 768 P.2d 985, 1989 Utah App. LEXIS 15 (Utah Ct. App. 1989)*, cert. denied, *109 Utah Adv. 39 (Utah 1989)*.

Employer did not show an unemployment benefits claimant was an independent contractor because the employer did not show the claimant's substantial investment in the claimant's own tools beyond ordinary household expenses. *Evolocity, Inc. v. Dep't of Workforce Servs., 2015 UT App 61, 782 Utah Adv. 62, 347 P.3d 406, 2015 Utah App. LEXIS 62 (Utah Ct. App. 2015)*.

Employer did not show an unemployment benefits claimant was an independent contractor because the claimant did not work for others as (1) the claimant's census work was not the same as the employer's work, and (2) the claimant's ability to work for others was irrelevant. *Evolocity, Inc. v. Dep't of Workforce Servs., 2015 UT App 61, 782 Utah Adv. 62, 347 P.3d 406, 2015 Utah App. LEXIS 62 (Utah Ct. App. 2015)*.

—Demonstrators.

Demonstrators of various products in grocery and department stores, working through organizing agency, were independent contractors because of the overwhelming balance of factors found in favor of independent contractor status, including individual control over tools, schedules, supervision, and location. *Tasters, Ltd. v. Department of Employment Sec., 222 Utah Adv. 63, 863 P.2d 12, 1993 Utah App. LEXIS 172 (Utah Ct. App. 1993)*.

—Factors considered.

To establish that an individual was an independent contractor, the employer had to show both that the employee was engaged in an independently established trade and that she was free from control or direction over her services; because the Utah Workforce Appeals Board concluded that the employer failed to establish that the employee was engaged in an independently established trade, the Appeals Board was not required to analyze whether the employee was free from control or direction. *Petro-Hunt, LLC v. Dep't of Workforce Servs., 2008 UT App 391, 616 Utah Adv. 7, 197 P.3d 107, 2008 Utah App. LEXIS 380 (Utah Ct. App. 2008)*, cert. denied, *205 P.3d 103, 2009 Utah LEXIS 32 (Utah 2009)*.

Workforce Appeals Board properly denied unemployment benefits to a process server on the basis that he was an independent contractor because the process server represented himself as the owner of his own business when he solicited the employer as a client, informed the employer that he was doing process service for other companies, and provided a worksheet listing his services in order to be paid by the employer. *Stauffer v. Dep't of Workforce Servs., 2014 UT App 63, 757 Utah Adv. 32, 325 P.3d 109, 2014 Utah App. LEXIS 61 (Utah Ct. App. 2014)*.

—Nurses.

Quadriplegic's private-duty licensed practical nurses, who worked shifts at his apartment, could not be treated as independent contractors, where they did not hold themselves out to the general public as individual providers of private nursing care, and most of them had other jobs working in other areas of employment. *McGuire v. Department of Employment Sec., 101 Utah Adv. 62, 768 P.2d 985, 1989 Utah App. LEXIS 15 (Utah Ct. App. 1989)*, cert. denied, *109 Utah Adv. 39 (Utah 1989)*.

—Pollster.

Commission's conclusion that interviewers who conducted consumer surveys and opinion polls for a proprietorship, which supplied polling services for national research companies, did not meet the independent contractor exception was upheld, where there was substantial evidence to support the commission's finding that the proprietorship directed and controlled the interviewers. *Gay Hill Field Serv. v. Board of Review, 750 P.2d 606 (Utah Ct. App. 1988)* (decided before 1988 amendment).

Independently established trade or occupation.

Siding company was exempt from contributing to unemployment compensation fund for payments to installers of company's siding since the installers were held to be self-employed craftsmen who performed their services for siding company and its competitors while in pursuit of an independently established trade in which they were customarily engaged. *North Am. Bldrs., Inc. v. Unemployment Comp. Div., 453 P.2d 142, 22 Utah 2d 338 (1969)*.

Individual who was trained as an emergency medical technician and was performing physical exams for a medical examination company in his own home or office without any control by the company except for fees charged was not engaged in an independently established trade, occupation, profession or business, because an emergency medical technician or physical examiner was not a trade, occupation, profession, or business, and the individual was not customarily engaged as a physical examiner in an independently established occupation. *Blamires v. Board of Review, 584 P.2d 889, 1978 Utah LEXIS 1416 (Utah 1978)*.

An independently established business is one that is created and exists apart from a relationship with a particular employer and that survives termination of that relationship; its continued existence does not depend on a relationship with any one employer. *Superior Cablevision Installers, Inc. v. Industrial Comm'n, 688 P.2d 444 (Utah 1984)*.

—Truck drivers.

Substantial evidence supported commission's finding that truck drivers were not independently established in the truck driving business, notwithstanding written contracts designating them as independent contractors, where none of the drivers owned their own trucks, they did not hold themselves out to the public as independent trucking concerns, and they did not have a place of business or a clientele. *Ellison, Inc. v. Board of Review, 76 Utah Adv. 13, 749 P.2d 1280, 1988 Utah App. LEXIS 19 (Utah Ct. App. 1988)*, cert. denied, *98 Utah Adv. 3, 765 P.2d 1278, 1988 Utah LEXIS 171 (Utah 1988)*.

Claimant for unemployment benefits, who delivered parts for a logistics business to automotive dealers, was an employee of the business, rather than an independent contractor, because the business did not show that the claimant was both independently established and free from the control and direction of the business. *BMS Ltd. 1999, Inc. v. Dep't of Workforce Servs., 2014 UT App 111, 761 Utah Adv. 44, 327 P.3d 578, 2014 Utah App. LEXIS 114 (Utah Ct. App. 2014)*, cert. denied, *337 P.3d 295, 2014 Utah LEXIS 196 (Utah 2014)*, cert. denied, *337 P.3d 295, 2014 Utah LEXIS 189 (Utah 2014)*.

Performance of services.

One granted exclusive right to sell products of milk company within defined area, who was not entitled to acquire customers for himself, and whose income was difference between what he received from customers and what he paid the company, was performing services and receiving wages so as to be subject to compensation under Unemployment Compensation Law. *Creameries of Am. Inc. v. Industrial Comm'n, 98 Utah 571, 102 P.2d 300 (1940)*.

Claimant had to show performance of services localized in state to recover compensation. *Logan-Cache Knitting Mills v. Industrial Comm'n, 99 Utah 1, 102 P.2d 495, 1940 Utah LEXIS 34 (Utah 1940)*.

Fuller brush salesman, to whom employer furnished sample case and sold goods for resale at suggested prices, was held not to have rendered "personal service" under contract of hire or for wages. *Fuller Brush Co. v. Industrial Comm'n, 99 Utah 97, 104 P.2d 201, 1940 Utah LEXIS 41 (Utah 1940)*.

Newspaper carrier engaged to distribute newspapers to subscribers at price fixed by employer, under terms of contract running from month to month, which provided for payment of sums collected on monthly basis, was performing "personal services" for "wages." *Salt Lake Tribune Publishing Co. v. Industrial Comm'n, 99 Utah 259, 102 P.2d 307 (1940)*.

Evidence supported finding of commission that newspaper carrier was not free from control and direction of publisher, and justified award of benefits. *Salt Lake Tribune Publishing Co. v. Industrial Comm'n, 99 Utah 259, 102 P.2d 307 (1940)*.

Workers of organization formed for purpose of performing and undertaking contracts for bricklaying jobs were not engaged in a partnership or joint enterprise, since workers had no authority to make contracts for organization, were not entitled to share in profits equally or on any fixed percentage basis, and were not chargeable for losses nor permitted to determine means or methods of operating; workers were performing personal services for individual, and unemployment contributions were properly owing for wages paid such workers. *Johanson Bros. Bldrs. v. Board of Review, 118 Utah 384, 222 P.2d 563 (1950)*.

Service relationships.

The absence of direction and control does not necessarily exclude the parties, or the relationship, from the operation or scope of the act. *Singer Sewing Mach. Co. v. Industrial Comm'n, 104 Utah 175, 134 P.2d 479, 1943 Utah LEXIS 55 (Utah 1943)*.

When one rendering services to another for wages is under the direction and control of the other, the relationship is a service relationship, although the absence of direction and control does not necessarily exclude the relationship from the operation of the act. The relationship is to be examined in its broadest aspect, on a purely factual basis, and the existence of a definite, formal contract is not conclusive in determining whether the relationship is within this act. *Northern Oil Co. v. Industrial Comm'n, 104 Utah 353, 140 P.2d 329, 1943 Utah LEXIS 72 (Utah 1943)*.

Relationship between solicitor of stock subscriptions and employee of company is a service relationship, and such solicitors are rendering services to the company for remuneration or "wages." *Northern Oil Co. v. Industrial Comm'n, 104 Utah 353, 140 P.2d 329, 1943 Utah LEXIS 72 (Utah 1943)*.

Evidence supported finding of industrial commission that service relationship, rather than a bona fide lessor-lessee relationship, existed between plaintiff and alleged "lessees" who operated mine for plaintiff. *Powell v. Industrial Comm'n, 116 Utah 385, 210 P.2d 1006, 1949 Utah LEXIS 233 (Utah 1949)*.

Service relationship existing between plaintiff and alleged "lessees" who operated coal mine for plaintiff was not excluded from operation of Unemployment Compensation Act, and plaintiff was subject to payment of percentage

contributions to Unemployment Compensation Fund, where plaintiff, in a general way, had direct control of the complete mining operation; and service performed for plaintiff by alleged "lessees" was not performed as a part of a business in which they were independently established. *Powell v. Industrial Comm'n, 116 Utah 385, 210 P.2d 1006, 1949 Utah LEXIS 233 (Utah 1949)*.

In proceedings to review decision of Industrial Commission holding that mining corporation was subject to payment of contributions to Unemployment Compensation Fund for wages paid to its president, to truckers, and to lessees, while in employment of corporation, although commission could reasonably have found from the evidence that truck drivers were in employment of corporation since they performed services for corporation, decision with respect to truck drivers was reversed because confidential report concerning them, submitted to commission by Department of Employment Security, had not been furnished corporation so it could have opportunity to meet evidence therein. *Snyder Mines, Inc. v. Industrial Comm'n, 117 Utah 471, 217 P.2d 560 (1950)*.

President of mining corporation, who had nothing to do with administration and direction of corporation, but served it only in a professional capacity with respect to metallurgy and geological aspects of its operations, receiving regular monthly salary, rendered services for wages as defined by the act, constituting employment; therefore, Industrial Commission was warranted in finding that corporation owed contributions for wages paid to president. *Snyder Mines, Inc. v. Industrial Comm'n, 117 Utah 471, 217 P.2d 560 (1950)*.

If a plan of operation is devised which the creators believe will exclude them from act, there is no reason why Department of Employment Security cannot look behind the plan or scheme and determine the actual relationship. If it is found that plan does not accomplish its purpose and that contributions are due because of the method of operation, they must be paid regardless of the motives of the creator. *Johanson Bros. Bldrs. v. Board of Review, 118 Utah 384, 222 P.2d 563 (1950)*.

Employment relationship between a housekeeping service and housekeepers was not shown, where the service advertised for both housekeepers and homeowners, but the homeowners requested and paid for the housekeepers' services, and the homeowners were free to pay either the service or the housekeepers directly subject to a referral commission for the service. *Adele's Housekeeping, Inc. v. Department of Emp. Sec., 757 P.2d 480 (Utah Ct. App. 1988)*.

A corporation that provided personnel-related services to small business clients, in return for a fee calculated as a percentage of the total payroll, was not an "employer" for purposes of this chapter, because it was the clients who benefitted by the employees' services and who provided the business purpose for which they worked. *Pro-Benefit Staffing, Inc. v. Board of Review, 771 P.2d 1110 (Utah Ct. App. 1989)*.

Research References & Practice Aids

Research References and Practice Aids

A.L.R. —

What constitutes "agricultural" or "farm" labor within social-security or unemployment-compensation acts, *60 A.L.R.5th 459*.

Hierarchy Notes:

Utah Code Ann. Title 35A

Utah Code Ann. Title 35A, Ch. 4

Utah Code Ann. Title 35A, Ch. 4, Pt. 2

End of Document

LexisNexis®

User Name: tbayres98
Date and Time: Wednesday, February 7, 2018 3:49:00 PM EST
Job Number: 60974257

Document (1)

1. *U.A.C. R994-204-303*
   Client/Matter: -None-
   Search Terms: Utah Admin. Code § 994-204-303
   Search Type: Natural Language

R994-204-303. Factors for Determining Independent Contractor Status.

Services will be excluded under Section 35A-4-204 if the service meets the requirements of this rule. Special scrutiny of the facts is required to assure that the form of a service relationship does not obscure its substance, that is, whether the worker is independently established in a like trade, occupation, profession or business and is free from control and direction. The factors listed in Subsections R994-204-303(1)(b) and R994-204-303(2)(b) of this section are intended only as aids in the analysis of the facts of each case. The degree of importance of each factor varies depending on the service and the factual context in which it is performed. Additionally, some factors do not apply to certain services and, therefore, should not be considered.

(1) Independently Established.

(a) An individual will be considered customarily engaged in an independently established trade, occupation, profession, or business if the individual is, at the time the service is performed, regularly engaged in a trade, occupation, profession, or business of the same nature as the service performed, and the trade, occupation, profession, or business is established independently of the alleged employer. In other words, an independently established trade, occupation, profession, or business is created and exists apart from a relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence.

(b) The following factors, if applicable, will determine whether a worker is customarily engaged in an independently established trade or business:

(i) Separate Place of Business. The worker has a place of business separate from that of the employer.

(ii) Tools and Equipment. The worker has a substantial investment in the tools, equipment, or facilities customarily required to perform the services. However, "tools of the trade" used by certain trades or crafts do not necessarily demonstrate independence.

(iii) Other Clients. The worker regularly performs services of the same nature for other customers or clients and is not required to work exclusively for one employer.

(iv) Profit or Loss. The worker can realize a profit or risks a loss from expenses and debts incurred through an independently established business activity.

(v) Advertising. The worker advertises services in telephone directories, newspapers, magazines, the Internet, or by other methods clearly demonstrating an effort to generate business.

(vi) Licenses. The worker has obtained any required and customary business, trade, or professional licenses.

(vii) Business Records and Tax Forms. The worker maintains records or documents that validate expenses, business asset valuation or income earned so he or she may file self-employment and other business tax forms with the Internal Revenue Service and other agencies.

(c) If an employer proves to the satisfaction of the Department that the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as

the service in question, there will be a rebuttable presumption that the employer did not have the right of or exercise direction or control over the service.

(2) Control and Direction.

(a) When an employer retains the right to control and direct the performance of a service, or actually exercises control and direction over the worker who performs the service, not only as to the result to be accomplished by the work but also as to the manner and means by which that result is to be accomplished, the worker is an employee of the employer for the purposes of the Act.

(b) The following factors, if applicable, will be used as aids in determining whether an employer has the right of or exercises control and direction over the service of a worker:

(i) Instructions. A worker who is required to comply with other persons' instructions about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions.

(ii) Training. Training a worker by requiring or expecting an experienced person to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the employer for whom the service is performed expects the service to be performed in a particular method or manner.

(iii) Pace or Sequence. A requirement that the service must be provided at a pace or ordered sequence of duties imposed by the employer indicates control or direction. The coordinating and scheduling of the services of more than one worker does not indicate control and direction.

(iv) Work on Employer's Premises. A requirement that the service be performed on the employer's premises indicates that the employer for whom the service is performed has retained a right to supervise and oversee the manner in which the service is performed, especially if the service could be performed elsewhere.

(v) Personal Service. A requirement that the service must be performed personally and may not be assigned to others indicates the right to control or direct the manner in which the work is performed.

(vi) Continuous Relationship. A continuous service relationship between the worker and the employer indicates that an employer-employee relationship exists. A continuous relationship may exist where work is performed regularly or at frequently recurring although irregular intervals. A continuous relationship does not exist where the worker is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.

(vii) Set Hours of Work. The establishment of set hours or a specific number of hours of work by the employer indicates control.

(viii) Method of Payment. Payment by the hour, week, or month points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying progress billings as part of a fixed price agreed upon as the cost of a job. Control may also exist when the employer determines the method of payment.

Statutory Authority

AUTHORITY:

Utah Code Section 35A-4-204

History

HISTORY:

9533, NEW, 10/18/88; 11129, AMD, 11/02/90; 11310, NSC, 12/10/90; 11567, NSC, 02/15/91; 13887, NSC, 12/15/92; 15296, NSC, 01/01/94; 17355, 5YR, 11/15/95; 18037, AMD, 11/18/96; 18102, AMD, 11/18/96; 19155, NSC, 07/01/97; 22721, 5YR, 04/04/2000; 22825, NSC, 05/25/2000; 24408, NSC, 04/01/2002; 27789, 5YR, 04/01/2005; 28009, NSC, 08/01/2005; 29680, R&R, 07/01/2007; 32242, NSC, 01/22/2009; 33521, 5YR, 03/31/2010; 36755, NSC, 10/01/2012; 39239, 5YR, 03/25/2015.

Annotations

Notes

NOTES CONSTRUING PORTIONS OF THIS RULE OR FORMER, SIMILAR RULE

INDEPENDENT CONTRACTORS.

To establish that an individual was an independent contractor, the employer had to show, under *Utah Code Ann. § 35A-4-204*, both that the employee was engaged in an independently established trade and that she was free from control or direction over her services; because the Utah Workforce Appeals Board concluded that the employer failed to establish that the employee was engaged in an independently established trade, the Appeals Board was not required to analyze whether the employee was free from control or direction. (R994-204-303.) *Petro-Hunt, LLC v. Dep't of Workforce Servs., 2008 UT App 391, 197 P.3d 107.*

Claimant for unemployment benefits, who delivered parts for a logistics business to automotive dealers, was an employee of the business, rather than an independent contractor, because the business did not show that the claimant was both independently established and free from the control and direction of the business. (R994-204-303.) *BMS Ltd. 1999, Inc. v. Dep't of Workforce Servs., 2014 UT App 111, 327 P.3d 578.*

End of Document