

1993

Joanna Mitchell, individually and Joanna Mitchell,
personal representative of the estate of Jerry
Mitchell, deceased v. Estate of Jerry L. Rice and
John Does I through V : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Mitchell v. Rice*, No. 930636 (Utah Court of Appeals, 1993).
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DOCKET NO. 930 636 CA

IN THE UTAH COURT OF APPEALS

JOANNA MITCHELL, individually : Court of Appeals No. 930636-CA
and JOANNA MITCHELL, personal :
representative of the estate : District Court No. 910902469
of Jerry Mitchell, deceased, :
Appellant, :
v. :
Estate of JERRY L. RICE and :
JOHN DOES I through V, :
Appellee. :

REPLY BRIEF OF APPELLANT

Appeal from the Second Judicial District Court
Weber County, State of Utah
The Honorable Michael J. Glasmann, District Judge

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FILED
Utah Court of Appeals

FEB 18 1994


Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JOANNA MITCHELL, individually	:	Court of Appeals No. 930296
and JOANNA MITCHELL, personal	:	District Court No. 910902469
representative of the estate	:	Priority No. 15
of Jerry Mitchell, deceased,	:	
Appellant,	:	
	:	
v.	:	
	:	
Estate of JERRY L. RICE and	:	
JOHN DOES I through V,	:	
Appellee.	:	

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REPLY BRIEF OF APPELLANT

Appellant JoAnna Mitchell, individually and Joanna Mitchell, personal representative of the estate of Jerry Mitchell, deceased, respectfully submits her reply brief in the appeal proceedings.

ARGUMENT

I. SUMMARY JUDGMENT WAS NOT PROPER BECAUSE RICE WAS AN INDEPENDENT CONTRACTOR OF MITCHELL.

The parties agree on the appropriate legal standard by which to assess Rice's relationship with Mitchell. Nevertheless, the application of the undisputed legal standards to this case show that Rice was not, as a matter of law, an employee of Mitchell.

Utah Code Annotated Section 35-1-42(2)(b) defines an

independent contractor as:

any person engaged in the performance of any work for another who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.

Rice's relationship with Mitchell falls squarely within the definition of independent contractor set forth above. Rice was subordinate to Mitchell "only in effecting a result in accordance with the employer's design." The appellee attempts to minimize the independence of Rice by characterizing Rice as a "less than perfect employee." (Brief of Appellee, p. 14). This characterization misses the point that the reason Rice acted the way he did was because he was an independent contractor. The result Rice had to achieve in his work with Mitchell was the delivery of goods to a specific location. Any independent contractor would have to comply with this type of delivery requirement. This does not make all truck drivers employees of companies for whom they drive. A more realistic way of viewing the relationship between Mitchell and Rice is to assess what degree of discretion that could be exercised, and then, whether such discretion was in fact exercised. In fact, a case cited by appellee recognizes the difficulty of employing the traditional independent contractor vs. employee test in the context of truck driving. "Since the factor of actual control of details, often relied upon by the courts in resolving this same issue, is not likely to be helpful here, the importance of other tests, such as power of termination and method of payment, is magnified."

Matkins v. Zero Refrigerated Lines, Inc., 602 P.2d 195, 199 (N.M. Ct. App. 1979). Appellant submits that this Court should focus on the degree of control exercised by Rice in a context that was not already predetermined by the nature of the job. These factors indicate that where discretion was permissible, Rice exercised an equal amount of discretion as did Mitchell.

The appellant, Mitchell, established in the proceedings at the trial court that Rice would engage in runs whenever he felt like it. When he would accept a run, he would exercise as much control or discretion as it was possible for a truck driver to exercise. Specifically, Rice would determine where, when and for how long to stop. (Appellant's Brief, p. 6). These facts were not contested by the appellee and are directly contrary to appellee's contention that "Mr Rice had no discretion on how to operate the vehicle." (Brief of Appellee, p. 17). The Utah Supreme Court noted that the fact an employee worked at his convenience was relevant to the Court's holding that the worker in that case was an independent contractor and not an employee. English v. Kienke, 848 P.2d 153, 158 (Utah 1993). Although the Kienke decision is distinguishable in other respects, the Court did find the worker's discretion as to when he would work relevant to its finding that the worker was an independent contractor and not an employee.

The appellee makes an erroneous factual assumption when he states that when Rice "did drive[,]" he was not allowed simply to take the vehicle and then be paid on his return by Mitchell." (Appellee's Brief, p. 14). In contrast, the appellant has cited to the record in her statement of facts that "Jerry Rice would

sometimes use Jerry Mitchell's truck to perform runs for Logistics Express by himself." (Appellant's Brief, p. 6 citing p. 200 of the record). This is yet another factor compelling the conclusion that Rice was an independent contractor of Mitchell.

Finally, the appellee contends in his brief that "the fact that the owner of the vehicle is in the truck shows he has a right to control the vehicle." (Brief of Appellee, p. 14). Although the appellee suggests that this contention finds support in Kinne v. Industrial Commission, 609 P.2d 926 (Utah 1980) appellant can find no such reference. The accident in Kinne addressed an accident in which the owner of the vehicle was not present. The mere presence or absence of the owner of a vehicle cannot change the legal relationship of the parties. Instead, courts typically look to the underlying facts and circumstances surrounding the disputed relationship in determining the character of that relationship. In the instant case, the weight of the evidence suggests Rice was an independent contractor of Mitchell.

Judge Glasmann held that the facts as presented to him permitted only reasonable conclusion under the law; that Rice was an employee of Mitchell. However, the array of facts before Judge Glasmann do not lend themselves to only one reasonable conclusion. This, by itself, precludes summary judgment under Gourdin By and Through Close v. Scera, 845 P.2d 242 (Utah 1992). The appellant therefore asks that this case be remanded for a determination of the independent contractor issue.

II. RICE IS NOT ENTITLED TO THE BENEFIT OF THE EXCLUSIVE REMEDY PROVISION, UTAH CODE ANNOTATED SECTION 35-1-60.

The appellee argues that Rice and Mitchell are statutory

co-employees and, therefore, Rice is immune from suit under Utah Code Annotated § 35-1-60, the exclusive remedy provision. Even if this Court characterizes Rice and Mitchell as statutory co-employees, the estate of Jerry Rice is not entitled to the benefits of the exclusive remedy provision. In Pate v. Marathon Steel Co., 777 P.2d 428 (Utah 1989) the Utah Supreme Court held that "a worker can sue a statutory employer who has not been required to pay workers compensation benefits and that the later does not partake of the immunity afforded by section 35-1-60." Bosch v. Busch Development, Inc., 777 P.2d 431, 432 (Utah 1989). Similarly, if a statutory employer, who remains contingently liable for workers compensation benefits cannot enjoy the immunity of the exclusive remedy provision, then a statutory co-employee, who will under no circumstances be liable for workers compensation benefits, cannot enjoy the immunity of Utah's exclusive remedy provision.

In addition, the concept of a statutory employer was created by statute in order to allow a worker to recover workers compensation benefits from contractors who "retain supervision and control" over a worker. Utah Code Annotated Section 35-1-42(2). The category of statutory employer is entirely a creature of statute which serves the specific and narrow purpose of providing an alternative source for an injured worker to receive workers compensation benefits. There is no corollary classification of a statutory co-employee. There is, therefore, no discernable legislative intent that workers who have a common statutory employer are immune from suit and may take advantage of the exclusive remedy provision.

The appellee cites Harry L. Young & Sons, Inc. v. Ashton, 538 P.2d 316 (Utah 1975) in support of his contention that Mitchell was an employee of Logistics Express. In so arguing, the appellee now seeks to evade the effects of the lease agreement he relied on in arguing that Rice was an employee of Mitchell. Specifically, the lease agreement entered into between Logistics Express and Mitchell explicitly states that Mitchell is an independent contractor of Logistics Express and not an employee. While this factor, by itself, is not controlling under Harry L. Young & Sons, it is relevant to this Court's determination. In addition, Mitchell, unlike the driver in Harry L. Young & Sons owned his own truck and hence furnished his own equipment. Whether a worker furnishes his own equipment is relevant in determining whether a worker is an employee or an independent contractor. Id. at 318. Other factors cited by appellee, such as the fact that Mitchell had a Logex sign on his truck, are of minimal legal significance and cannot change the relationship between Mitchell and Logistics Express.

Furthermore, Harry L. Young & Sons does not support the view that Rice was an employee of Logistics Express. The documentary evidence appellee relies upon explicitly states Rice is not an employee of Logistics Express. (Appellees Brief, p. 16). As little control as Mitchell had over Rice, Logistics Express had even less control over Rice. This fact alone compels the conclusion that Rice was not an employee of Logistics Express.

The appellee cites three out-of-state cases which are distinguishable; Schell v. Navajo Freight Lines, Inc., 693 P.2d 382

(Colo. App. 1984); Wilson v. Riley Whittle, Inc., 701 P.2d 575 (Az. Ct. App. 1984) and Matkins v. Zero Refrigerated Lines, Inc., 602 P.2d 195 (N.M. Ct. App. 1979).

The first two cases, Schell and Wilson, both hold that a trucking company with an ICC permit may not hire independent contractor drivers and thereby evade tort liability to injured members of the public under 49 U.S.C. §11107. The Schell court explained that:

The statute, which was enacted to prevent authorized interstate carriers from immunizing themselves from liability to the public, by leasing trucks from irresponsible third parties . . . Id. at 384.

Pursuant to this concern for the public "the ICC promulgated a regulatory scheme to effectuate Congress' intent to render carriers primarily liable to the public." Id. The effect of the ICC regulations is to hold companies such as Logex liable to members of the public for harm done by irresponsible truckers. The ICC regulations therefore eliminated the defense commonly raised by such trucking companies as Logex that it was immune from suit for the tortious acts of its drivers because those drivers were independent contractors. This defense was eliminated in a specific context; suits by injured members of the travelling public against truck companies.

For example, the Schell case involved an injured member of the public and the negligence of a trucker operating under an ICC permit. In this context, the court found the trucker an employee of the trucking company.

Similarly in Wilson, another member of the public was

injured when a truck driver negligently collided with another truck driver on a public road. Once again, in this context, the court would not hear the defense of the trucking company that the trucker was an independent contractor. For purposes of harm to the general public, the holder of the ICC permit was liable. The court noted that "[t]he federal statute and the federal regulations promulgated thereunder protect the motoring public by requiring the trucking company to have control of and to be responsible for the operation of the leased vehicles." Id. at 579. Further, the court noted that 49 U.S.C. § 11107 was enacted to "ensure that the motoring public was adequately protected." Id. at 578-79.

Jerry Mitchell was not a member of the public and hence was not protected under the ICC regulations upon which the appellee relies. The trial court in the proceedings below came to this conclusion and dismissed Mitchell's suit against Logistics Express. Therefore the ICC regulations cited by appellee and case law interpreting these regulations are not relevant in assessing whether under state workers compensation law the exclusive remedy provision bars a negligence suit against a co-driver. Mitchell was a fellow driver, and not a member of the travelling public. Therefore, the Schell and Wilson cases do not (1) make Mitchell and Rice employees of Logex under Utah's Workers Compensation Act; and (2) do not make Mitchell and Rice statutory co-employees under Utah's Workers Compensation Act.

Finally, in Matkins, two drivers worked for a trucking company who in turn, leased the truckers to a trucking company with a proper ICC permit. This case would be similar if Mitchell and

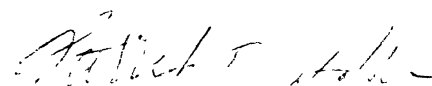
Rice had driven a truck of another company who in turn leased Mitchell and Rice out to Logex. Mitchell and Rice would clearly be employees in that context. However, the facts of this case are different. Mitchell owned his own vehicle. Rice worked with Logex through Mitchell. The company that was found to be the employer in Matkins "agreed to furnish a truck and two drivers" to the licensed ICC company. Id. at 196. In the instant case, no such company exists, and in the absence of such a company it cannot be said that Mitchell and Rice were employees of Logex.

CONCLUSION

Summary judgment in this instance was improper because the evidence presented creates a material issue of fact as to whether Rice was an independent contractor of Mitchell or whether he was an employee. In addition, Mitchell and Rice were not co-employees of Logex, either at common law or by statute. Further, even if they are characterized as statutory co-employees, such co-employees are not entitled to the immunity provided under the exclusive remedy provision found in U.C.A. § 35-1-60.

DATED this 20th day of February, 1994.

MARQUARDT, HASENYAGER & CUSTEN




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CERTIFICATE OF MAILING

I hereby certify that on this 16th day of February,
1994, I mailed 4 true and correct copies of the above and foregoing
Reply Brief of Appellant, postage prepaid, to the following:

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