FILED
SEP - 6 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

Filed September 6, 1984

380

4-297
83-1500

JERRY STOTTS,

Plaintiff-Appellant,

vs.

NOEL W. CARLSON,

Defendant,

and SHARE CORPORATION d/b/a BIDALL,

Defendant-Appellee.

Appeal from the Iowa District Court for Pottawattamie County—Glen M. McGee, Judge.

Plaintiff appeals from a directed verdict on the issue of Carlson's employment by the defendant Share. REVERSED AND REMANDED.

Lyle A. Rodenburg, Council Bluffs, Iowa, for plaintiff-appellant.

John D. Sens of Stuart, Tinley, Peters, Gregory L. Waggoner, Council Bluffs, Iowa, for defendant.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Plaintiff, Jerry Stotts, was driving a motorcycle which collided with a car owned and operated by defendant, Noel W. Carlson. Stotts filed suit alleging that Carlson was negligent in the operation of his vehicle and that such negligence was a proximate cause of Stott's injuries.

Stotts further alleged that at the time of the accident Carlson was an agent and employee of the defendant Share Corporation and that Carlson was acting within the scope of his authority and employment at the time of the accident. Share denied that Carlson was their agent or employee.

The case was tried to a jury. At the close of Stotts' evidence Share moved for a directed verdict, alleging that plaintiff failed to establish facts upon which a jury could determine a master-servant relationship existed between Carlson and Share at the time of the accident. The trial court sustained the motion and directed a verdict in Share's favor, holding there was no dispute in the record as to the relationship of Share and Carlson and found as a matter of law that no master-servant or employer-employee relationship existed between Carlson and Share.

I

Stotts appeals from the granting of the directed verdict and also challenges certain evidentiary rulings relating to the employment status of Carlson.

Our review is on assigned error, and in considering the sufficiency of the evidence of a master-servant relationship or employer-employee relationship, as against the motion for directed verdict, we must view the evidence in the light most favorable to the plaintiff. Greenwell v. Meredith Corp., 189 N.W.2d 901, 904 (Iowa 1971); R.C.P. .344(f)(2)(1971) (rule revoked by order of the Iowa Supreme Court, June 1, 1977).

Carlson had been a salesman for Share since 1978. When Carlson went to work in 1978 he signed a representative's agreement which contained inter alia the following language: "The representative will be an employee of Bidall Division[1]

[1]Bidall is a division of defendant Share and both names are used throughout the record. Bidall and Share are one and the same.

subject to its benefits and policies." (Emphasis added). Carlson also received a letter from Bidall stating "This letter is to confirm your employment with Bidall effective April 3, 1978."

Originally, Carlson was paid a draw and had income and FICA taxes withheld from the draw. Prior to the accident Carlson went on a straight commission and income and FICA taxes were no longer withheld. Carlson testified that other than the manner in which Share paid him and a change in his territory, his position and duties with the company never changed. Share provided Carlson with a catalogue and sample kit. Share set the price and discount. Carlson sold Share's products exclusively. Share was in the business of selling industrial-type chemicals. Carlson worked in a defined sales area. Share set up certain policies and procedures that Carlson was expected to follow. Carlson was required by Share to make a minimum of twelve calls a week. He had a quota set. Carlson reported to a sales manager every Friday. Share had a toll-free number which Carlson used. When he contacted a customer Carlson introduced himself and indicated that he worked for Share. Carlson's business card carried the name and address of Share with his name and address directly below it. Carlson sold products from the catalogue and then Share delivered and billed for the products. The order blanks Carlson used showed his name and address and the name and address of Share. The order blanks were supplied by Share. Carlson contacted customers whose bills were not current. At the commencement of the employment, a supervisor accompanied Carlson for a week. Carlson was sent to school at Share's expense to learn about the products.

Carlson furnished his own automobile and paid all of his own transportation expenses. Carlson determined his own hours and routes subject to the minimum contact and territorial requirements of Share.

At the time of the accident Carlson had just completed a sale of Share products and was driving to see another customer.

Carlson was either an employee of Share or he was an independent contractor. "Ordinarily, the determination of the relationship of master and servant is a question of fact, ..." Hassebroch v. Weaver Construction Co., 246 Iowa 622, 627, 67 N.W.2d 549, 552 (1955). "[I]t is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relationship." Hassebroch at 628, 67 N.W.2d at 553. "[T]he tendency of courts has at all times been to resolve doubts against the employer in this class of cases to the extent, at least, of submitting the question as one of fact to the jury." Crum v. Walker, 241 Iowa 1173, 1179, 44 N.W.2d 701, 704 (1950).

An independent contractor may be defined as one who carries out an independent business, and contracts to do a piece of work according to his own method, subject to the employer's control only as to results. The commonly recognized tests of such a relationship are: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer, Mallinger v. Webster City Oil Co., 211 Iowa 847, 851 234 N.W. 254, 257 (1931), and (9) whether or not the parties believe they are creating the relationship of master-servant. Hassebroch at 628, 67 N.W.2d at 553.

The facts as presented by Stotts show that not only did Share exercise control over the means but also furnished means to Carlson to carry out his obligation to Share. Carlson had no other business or occupation nor did he sell

products other than those of Share. Carlson was not engaged in a distinct business or occupation. He was not independently in the business of selling chemicals. At the inception of his relationship with Share Carlson signed an agreement prepared by Share that he would be their employee, and he received a letter confirming his employment. Carlson testified that, except for payments and territories, his relationship remained the same. Carlson considered himself an employee of Share.

Share acknowledges that Carlson was a salesman for them and that Carlson agreed to give full time to Share's work. Share contends, however, that because Carlson furnished his own car, was paid by commission and could call on whom he pleased that the trial court was correct in directing a verdict. A master cannot, by limiting the servant's control to a certain degree of the methods and means by which results are to be accomplished, thereby place his servant in the status of an independent contractor. Mallinger v. Webster City Oil Co., 211 Iowa 847, 851, 234 N.W. 254, 259 (1931). The issue of control is an important element in determining whether a person is an employee or an independent contractor. This record contains sufficient evidence of control and direction when coupled with the evidence of other elements of an employer-employee relationship to warrant the submission of the issue to a trier of fact. Viewing these facts in the light most favorable to the plaintiff, a fact finder could determine that Carlson was an agent or employee of Share.

II

Stotts contends that the trial court erred in excluding Carlson's testimony on his employment status. The record contains evidence of the fact that Carlson considered himself an employee. However the trial court thwarted Stotts' attempt to ask Carlson directly about his employment status. Because this case will be retried, we must address the issue.

Carlson was asked several times whether he considered himself an employee of Share. Share objected to the question as calling for a legal conclusion and the objection was sustained. Carlson ultimately was asked:

> Question: Do you have a belief as to whether or not you are an employee of Bidall? Answer. Yes, I think I'm an employee.

Share objected to the answer as being immaterial. The trial court sustained a motion striking the answer. Share does not respond in their brief to Stotts' contention that Carlson's testimony on the issue is admissible.

Whether or not the parties believe they are creating a master-servant relationship is a factor to consider in determining whether such a relationship exists. Hassebroch at 628, 67 N.W.2d at 553. Carlson's belief of what his status is is material. Iowa Rules of Evidence 704 provides: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

We find no basis to exclude testimony of Carlson's belief that he was an employee and we determine the trial court erred in refusing to allow such testimony. Carlson should be allowed to so testify on retrial.

REVERSED AND REMANDED.