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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT LONG,)

Plaintiff-Appellant,)

vs.)

CITY OF WASHINGTON,)

Defendant-Appellee.)

Filed September 21, 1982

2-150
2-66869

Appeal from Washington District Court - Phillip R. Collett, Judge.

Plaintiff appeals from trial court's dismissal of his petition against the defendant-city on the grounds that the court lacked subject matter jurisdiction asserting trial court erred: 1) in finding he was defendant's employee at the time of his injury and that his exclusive remedy was for recovery of worker's compensation benefits from defendant; 2) in not finding that defendant was estopped from claiming him as an employee; and 3) in excluding opinion evidence of a fellow volunteer fireman. AFFIRMED.

John E. Baldrige of Baldrige, Baldrige & Boyd, Washington, Iowa; D. W. Harris & R. Kurt Swaim of Harris & Swaim, Bloomfield, Iowa; and W. T. Barnes, Ottumwa, Iowa, for plaintiff-appellant.

Robert L. Ferris of Nyemaster, Goode, McLaughlin, Emery & O'Brien, Des Moines, Iowa; and David H. Luginbill of Ahlers, Cooney, Dorweiler, Haynie & Smith, Des Moines, Iowa; for defendant-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell and Johnson, JJ.

JOHNSON, J.

Plaintiff, Robert Long, appeals from trial court's dismissal of his petition against the defendant, City of Washington, on the grounds that the court lacked subject matter jurisdiction. Plaintiff asserts that trial court erred: 1) in finding he was defendant's employee at the time of his injury and that his exclusive remedy was for recovery of worker's compensation benefits from defendant; 2) in not finding that defendant was estopped from claiming him as an employee; and 3) in excluding opinion evidence of a fellow volunteer fireman. We affirm trial court's judgment.

Plaintiff was a member of the volunteer fire department of defendant-City. While fighting a rural fire with the department, he climbed a utility pole using a safety belt he found in a fire truck. When the safety belt broke plaintiff fell and sustained injuries.

Plaintiff filed suit against defendant to recover for his injuries. In his petition, he alleged that defendant had been negligent by failing to inspect and maintain the safety belt. Defendant raised several affirmative defenses, including the defense that plaintiff was acting as an employee of the City at the time of his injury and therefore could recover from the City only workers' compensation benefits under Iowa Code chapter 85. Plaintiff denied that he was acting as an employee of defendant. He asserted that because he was fighting a rural fire at the time of his injury, he was acting as an employee of the Farmers Mutual Insurance Company (Farmers Mutual), which had contracted with defendant for fire protection in rural areas. Prior to this law suit against defendant, plaintiff had requested and received workers' compensation benefits from Farmers Mutual's workers' compensation carrier.

Trial court found that plaintiff was in fact an employee of defendant at the time of the injury. In reaching this conclusion, the court found that defendant, rather than Farmers Mutual, had exercised most of the rights and duties of an

employer with regard to volunteer fire fighters. The court noted that Farmers Mutual did appear to exercise one function of an employer (with respect to rural work only) by paying the firefighters for responding to rural calls, however, the court discounted this factor because there was no evidence that Farmers Mutual had a responsibility to pay such wages. The court also rejected plaintiff's argument that defendant was estopped from claiming to be his employer and from claiming to be free of any liability in excess of workers' compensation coverage. Trial court also excluded as irrelevant the proposed testimony of another firefighter that he considered himself to be an employee of Farmers Mutual rather than of defendant while fighting rural fires. From these findings and conclusions of trial court, plaintiff appeals.

I. Scope of Review. Since this is an action at law, appellate review is on assigned error only. Iowa R. App. P. 4.

II. Subject Matter Jurisdiction.

A. Employee-Employer Relationship. Plaintiff first asserts that trial court erred in finding he was an employee of defendant. We are governed by the following principles in the case tried to the court:

> [The] trial court's findings of fact have the force and effect of a special verdict, [citations] and are binding on us if supported by substantial evidence. [citation] Evidence reviewed for substantiality is to be viewed in the light most favorable to the judgment [citations]. We are not bound by the trial court's determinations of law, however, nor precluded from inquiring as to whether the trial court applied erroneous rules of law which materially effected its decision. [citations]

Blunt, Ellis & Loewi, Inc. v. Igram, 319 N.W.2d 189, 192 (Iowa 1982).

Our scope of review may well be dispositive of this matter. Plaintiff contends that trial court improperly construed the contract between defendant and Farmers Mutual and that this court is not bound by such an erroneous construction of a contract. Defendant argues that the existence of an

employment relationship is a question of fact and that our review is limited to whether there is substantial evidence to support trial court's findings. While we do not intimate that had this court been sitting as a trier of fact we would have reached the same conclusion as the trial court, we find there is substantial evidence to support the findings of trial court. Accordingly, we affirm its judgment.

Whether an employer-employee relationship exists is generally considered to be a question of fact. See Hassebroch v. Weaver, 246 Iowa 622, 627, 67 N.W.2d 549, 552 (1955). The court should consider the following factors in determining whether an employer-employee relationship exists:

> As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contracted service . . . for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for the payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties.

Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 505 (Iowa 1981). Construction of a contract, however, is a matter of law to be decided by the court. Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 25 (Iowa 1978).

The pertinent portion of the contract in question is as follows:

> It is specially understood and agreed that First Party [Farmers Mutual] does hereby designate and select as its duly authorized agent and employee, each and every member of the Washington Fire Department, for all purposes as herein provided, excepting as to the use of said truck on calls within the City Limits of Washington, Iowa, who is in any way connected with the maintenance, operation, use and control of First Party's truck and any of the times as herein above provided for, and futher, that Second Party [City] shall not in any way be liable for any damages from any source whatsoever that may result from the entering into of this contract, except as herein specifically provided for between First and Second Parties, and First Party

> expressly agrees to indemnify and hold harmless Second Party from any loss, liability or damages of any nature whatsoever that Second Party may be subjected to by reason of having entered into this contract, excepting only such liability as Second Party herein expressly assumes by reason of this contract with First Party, and by reason of the use of said truck within the City limits of Washington, Iowa.
>
> First Party further agrees to purchase and keep in force during the entire life of this contract, Workmen's Compensation and employer's liability insurance to indemnify itself against damage from injury, etc., which might be received by any member of the Washington City Fire Department while acting as an employee or agent of First Party in the maintenance and operation of said fire truck and its equipment, and further, to purchase and keep in force at all times during the life of this contract, adequate public liability and property damage insurance on said truck as will fully protect and indemnify Second Party against loss or damages arising from the use of said truck while being operated or used in the control of extinguishment of conflagrations without the City Limits of the City of Washington, Iowa.

Plaintiff argues that this contract between the City and Farmers Mutual, to which plaintiff was not a party, stating that volunteer firemen were to be considered employees of Farmers Mutual's at rural fires, conclusively establishes that he was an employee of Farmers Mutual and not of defendant at the time of the injury. Plaintiff stresses the trial court's erroneous construction of the contract because his major premise is that if he was an employee of Farmers Mutual when he was injured, he could not have been an employee of defendant at the same time. Plaintiff cites the general rule that a person cannot be the servant of two masters at the same time. 56 C.J.S. Master & Servant § 2 (1948).

It is important to note that the contract between defendant and Farmers Mutual does not state that plaintiff is not an employee of the City at rural fires, rather, it states that he may be considered an employee of Farmers Mutual at rural fires. Plaintiff elected to treat himself as an employee of Farmers Mutual on the basis of a contract to which he was not a party. He specifically selected

the remedy of workers' compensation against Farmers Mutual and we are not required to decide whether plaintiff would have been bound to the exclusivity of a workers' compensation remedy against Farmers Mutual. Assuming arguendo that the facts showed plaintiff to be an employee of Farmers Mutual, our inquiry does not end, for the court in Shook found that "an employee may have more than one employer." 313 N.W.2d at 505. Professor Larson further distinguishes "joint employment" from "dual employment." See 1 C A. Larson, The Law of Workmen's Compensation §§ 48.40, 48.50 (1980). Generally stated:

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other, in such a case, both employers are liable for workmen's compensation.
>
> Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each employer is largely unrelated to that for the other. In such a case, the employers may be liable for workmen's compensation separately or jointly, depending on the severability of the employee's activity at the time of the injury.

Id. Merely because a person is an acknowledged employee of one employer does not necessarily foreclose an inquiry into the relationship between the person and other alleged employers.

In determining whether there was an employee-employer relationship between plaintiff and defendant at the time of the injury, trial court weighed the evidence and determined that such a relationship existed. Examining the court's findings of facts in the context of the factors enunciated in Shook, we believe there is substantial evidence that: 1) the city council appointed volunteer firemen; 2) the City determined the pay scale for the department; 3) the mayor could discharge and the chief could suspend members of the department; 4) the fire

chief or assistant had sole control of the department members when fighting every fire; and 5) benefit inurred to defendant by having the department fight rural fires in that defendant received compensation from Farmers Mutual pursuant to the contract. *These are sufficient indicia of an employee-employer relationship* to warrant the trial court's findings.

Before leaving this issue, we note that plaintiff spends a considerable portion of his brief detailing reasons why we should find plaintiff was an employee of Farmers Mutual at the time of the accident. This argument presupposes the accuracy of plaintiff's premise that he could be an employee of only one employer at the time of the accident. However, it is not the relationship between plaintiff and Farmers Mutual that we must examine, because the uncontested Memorandum of Agreement filed with the Industrial Commissioner establishes that relationship. See Witters & Son, Inc. v. Karr, 180 N.W.2d 444 (Iowa 1970). Rather, we must determine the relationship that plaintiff had with defendant since "[t]he law looks to the substance and not to the form of the contract to determine the relationship. . . . An employer cannot insulate himself against the burdens of the employer-employee relationship by a contract that leaves him with the control benefits of that relationship." Sanford v. Goodrich, 234 Iowa 1036, 1042-43, 13 N.W.2d 40, 43 (1944). Accordingly, we affirm the trial court.

B. Estoppel. Plaintiff also claims that defendant was estopped to deny that plaintiff was an employee of Farmers Mutual at the time of the accident. Plaintiff, in his argument, again presupposes that the establishment of an employer-employee relationship with Farmers Mutual bars the finding of such a relationship with defendant. Plaintiff bases his estoppel arguments on the theories 1) that he relied on the contract between defendant and Farmers Mutual and 2) that defendant acquiesced in the payment of workers' compensation benefits to plaintiff by Farmers Mutual. We find no merit in plaintiff's contentions.

Equitable estoppel is composed of the following elements:

> A. False representation or concealment of material facts.
>
> B. Lack of knowledge of the true facts on the part of the person to whom the misrepresentation or concealment is made.
>
> C. Intent of the party making the representation that the party to whom it is made shall rely thereon.
>
> D. Reliance on such fraudulent statement or concealment by the party to whom made resulting in his prejudice.

Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 315 (Iowa 1977). The party asserting estoppel carries the burden to establish all essential elements by clear convincing and satisfactory proof. Id.

Plaintiff claims that defendant misrepresented the fact that he was an employee of defendant. This is not borne out by the record. On August 6, 1976, the defendant filed a report of injury with the Iowa Industrial Commissioner. A note dated August 7, 1976, to the Industrial Commissioner stated that "the reason for the lateness of this report is due to other coverage on the subject and the other company, Grinnell Mutual is asking the City to share in the expense through our workmen's comp." Plaintiff's only inquiry regarding defendant's workers' compensation coverage was directed to an insurance agent. He made no further inquiry and filed no claim for workers' compensation against defendant.

Plaintiff claims he was prejudiced by the defendant's actions when plaintiff determined not to sue Farmers Mutual. Plaintiff does not claim defendant represented that he could or could not sue Farmers Mutual. Trial court found it difficult to believe defendant intended to deceive plaintiff with the contract executed between defendant and Farmers Mutual 26 years previous.

Plaintiff's acquiescence argument is likewise unconvincing. The doctrine of estoppel by acquiescence is applicable where "a person knows or ought to know that [he] is entitled to enforce [his] right or impeach a transaction and neglects to

do so for such a time as would imply that [he] intended to waive or abandon [his] right." Davidson v. Van Lengen, 266 N.W.2d 436, 438 (Iowa 1978). Defendant did not impeach plaintiff's transaction with Farmers Mutual because that was what defendant had contracted for in 1950. Additionally, there is no evidence that defendant waived any rights since it filed the appropriate documents with the Industrial Commissioner soon after the accident.

The trial court concluded that "Plaintiff has failed to show by clear, convincing and satisfactory proof that the City should be estopped to assert plaintiff was their [sic] employee at the time of the accident." "[W]hen the court denies recovery in a law action because of a party's failure to carry the burden on an issue, we will not interfere on appeal unless we find the burden was carried as a matter of law." Eldridge v. Herman, 291 N.W.2d 319, 321 (Iowa 1981). "The evidence in the party's favor must be so overwhelming that no other reasonable inference could be drawn." See Kurtenbach v. TeKippe, 260 N.W.2d 53, 54 (Iowa 1977). We cannot state on the basis of the record before us that plaintiff carried his burden as a matter of law and, accordingly, affirm the trial court.

C. Exclusivity of Workers' Compensation Remedy for Employees.

Having determined that there was substantial evidence to warrant the trial court's finding of an employment relationship between plaintiff and defendant, we must determine whether the trial court properly dismissed the action for want of subject matter jurisdiction. The principles of subject matter jurisdiction of the Iowa courts were delineated in Powell v. Khodari-Intergreen Co., 303 N.W.2d 171, 173 (Iowa 1981), and we need not repeat them here.

Volunteer firemen are subject to the Workers' Compensation Act. See Iowa Code §§ 85.1(4), 85.36(10) (1981). See also Ia. Op. Att'y. Gen. No. 80-5-4 (May 6, 1980) (finding volunteer firemen are not municipal employees within the meaning of Iowa Code § 372.13(8), but stating that volunteer firemen are eligible for workers' compensation). It is evident the legislative enactment subsequent to the

court's decision in Heiliger v. City of Sheldon, 236 Iowa 146, 18 N.W.2d 182 (1942), evidenced an intent of the legislature to include volunteer firemen under chapter 85. See 1951 Iowa Acts ch. 75 (1945).

Iowa Code § 85.20 (1981) provides in part that: "The rights and remedies provided in this chapter . . . for an employee on account of injury . . . shall be the exclusive and the only rights and remedies of such employee . . . ." "[J]urisdiction of the subject matter of cases between employer and employee for injuries arising out of and in the course of employment is exclusively in the industrial commission and the district court has no jurisdiction of the subject matter of such cases." Steffens v. Proehl, 171 N.W.2d 297, 300 (Iowa 1969). We find that plaintiff's sole remedy against defendant was a claim for workers' compensation; accordingly, trial court did not err in finding it lacked subject matter jurisdiction.

III. Propriety of Trial Court's Exclusion of Opinion Testimony. Plaintiff contends that trial court erred in not allowing a fellow volunteer fireman to testify as to whom he considered his employer to be when fighting rural fires. We conclude that, even if the plaintiff is correct in this assignment of error, it would not vest trial court with the requisite subject matter jurisdiction. Accordingly, there is nothing before us to review on this issue.

AFFIRMED.