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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DEBRA J. KELLER, as Executor of the Estate of Harold LeRoy Keller, Jr., Deceased,

Plaintiff-Appellant,

vs.

CLINTON CORN PROCESSING COMPANY, INC., a Delaware corporation,

Defendant-Appellee.

Filed February 26, 1985

4-545
84-652

Appeal from the Iowa District Court for Clinton County, L. D.Carstensen, Judge.

Plaintiff appeals from summary judgment dismissing her petition in a negligence action arising out of a construction accident. REVERSED AND REMANDED.

Michael J. Motto and John J. Carlin of John J. Carlin, P.C., Davenport, for plaintiff-appellant.

John D. Stonebraker of McDonald, Stonebraker & Cepican, P.C., Davenport, for defendant-appellee.

Considered by Oxberger, C.J., Donielson, and Snell, JJ.

OXBERGER, C.J.

Summary judgment was granted in favor of the defendants and plaintiff has appealed, saying a genuine issue of fact exists to be decided by the fact finder. We agree and reverse the trial court.

Summary judgment in this action is on appeal to this court for the second time. The first summary judgment was filed in April 1982, two and one-half years after the action was first filed by the plaintiff, Debra Keller. The plaintiff's decedent, Harold Keller, died on April 25, 1979, when he fell through a canopy on the premises of Clinton Corn Processing Company. He had been working for Davis Constructors at the plant when the accident occurred. The summary judgment alleged that Davis Constructors was an independent contractor hired by defendants to perform various construction work at the Clinton plant, and Davis and not Clinton Corn was liable for negligence. Summary judgment was granted by the court, stating Davis was an independent contractor and that the doctrine of peculiar risk did not apply to indicate liability. On appeal, this court reversed, finding that a genuine issue of material fact existed as to whether Davis was an independent contractor or employee of Clinton Corn. Keller v. Clinton Corn Processing Company, Inc., No. 3-61 (filed May 31, 1983). In that opinion we noted the following comment of Vincent Mascagni, the defendant's project engineer, made during his deposition:

> Q. The—in the projects you've designed in the last four or five years, have you ever gone out for bids where a bid was successful other than for Davis constructors? A. We—let me put it this way: We can't in our capacity use other contractors other than Davis Constructors, Incorporated. (emphasis added)

This court noted also, "The contract, however, was never in evidence before the trial court. It could not be known by the court, therefore, if the contract had any impact on the allocation of risk or on the definition of the relationship between defendant and Davis." Id. at 3. We remanded the case for further action. Id.

Another motion for summary judgment was filed November 11, 1983, this time accompanied by copies of the contracts between the parties. The court granted this motion, again finding Davis to be an independent contractor. Therefore, the specific question on appeal is whether these contracts show that, as a matter of law, no other conclusion may be reached than Davis was an independent contractor of Clinton Corn.

The standard applied in determining if summary judgment should be granted imposes a difficult burden on the defendant here. Iowa Rule of Civil Procedure 237(c) provides such a motion will be granted, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." All the record is viewed in the light most favorable to the party opposing the motion. Barnhill v. Davis, 300 N.W.2d 104, 105 (Iowa 1981). The burden is on the movant to show the undisputed facts indicate no genuine issue exists, and summary judgment will not be granted when reasonable minds might draw different inferences from those facts. Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979).

The question of whether an individual or company is an independent contractor is normally a question of fact. Hassebroch v. Weaver Construction Co., 246 Iowa 622, 67 N.W.2d 549 (1954). Eight factors have been delineated as important considerations in determining if an independent contractor or employer-employee relationship exists:

> (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.

Volkswagen Iowa City, Inc. v. Scott's Incorporated, 165 N.W.2d 789, 793 (Iowa 1969). The key question upon which the case may turn, is where control was

vested. Kaus v. Unemployment Compensation Comm'n, 230 Iowa 860, 864, 229 N.W. 415, 418 (1941). If the defendant exerts control over the plaintiff, then an employer-employee relationship may be found. Id. When the agreement is written, reservation of the right to control is presumed unless an indication to the contrary appears. Id. at 864-65, 229 N.W.2d at 418. A statement often repeated by the courts in making the distinction is that an independent contractor relationship exists if the hiring party exerts control over the results only; but where that party exerts control over the means as well as the result, the party is an employer. Sanford v. Goodridge, 234 Iowa 1936, 1042, 13 N.W.2d 40, 43 (1944).

We also recognize that a party may be an agent or employee regarding some parts of the work performed, and not an employee in other services provided. Cowles v. J.C. Mardis Co., 192 Iowa 890, 919, 181 N.W. 872, 884 (1921). Here, three contracts are involved. The first is entitled an "Agency" agreement and states that Davis will be the agent for Clinton Corn in acquiring machinery, equipment, and materials to be used in performing work on the construction project. The agency contract is specifically limited to purchase of these items. The second agreement is a "Cost Plus Fixed Fee" contract concerning the specific construction work to be performed, and the last is a similarly worded maintenance and general services contract.

Clinton Corn argues there is ample evidence to support a finding that Davis is an independent contractor. This includes the fact Clinton Corn was in the business of processing grain and related products, not construction of buildings. Davis was allowed to hire subcontractors, and supplied the necessary equipment and tools. We do not dispute that there is considerable evidence that might support such a finding. This is not the question presented to this court, however. Rather, we are to decide if there is no other conclusion that may be reached and that the court, not the jury, should decide that Davis is an independent contractor of Clinton Corn.

Several references in the contract raise questions in this area. The agency agreement, although limited to the acts described within it, designates Davis the agent to buy certain items for the construction. Second, the cost-plus contract sets a salary schedule for the people hired by Davis. It also dictates that the employees shall receive employee benefit policies such as vacations and holidays at a specific level. No bonus or overtime pay would be reimbursed without the approval of Clinton Corn. Subcontracts were to be awarded only upon procedures Clinton Corn and Davis agreed upon. A long list of costs would be reimbursed only upon the approval of the plaintiff. Clinton Corn could make changes at any time, and could make payments directly to the vendors of materials rather than to Davis. In an appendix to the contract regarding salaries, it is stated, "at no time should a helper be hired at a rate higher than his experience warrants, and this experience must be investigated by the personnel department." It is not clear whose department is referred to here. Another appendix indicates Clinton Corn could tell Davis the company from which it should rent machinery.

In holding that contractors were independent contractors, the supreme court has found significant, "Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed, or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it." Humpton v. Unterkircher & Sons, 97 Iowa 509, 515, 66 N.W. 776, 778 (1896). In this situation, the defendant has control over the salaries, rental of equipment, costs, and subcontracting procedures. In another case involving a somewhat similar fact situation, the court found a contractor was an employee because the employer had the right to fix prices and approve labor done and material furnished. Hughbanks v. Boston Investment Co., 92 Iowa 267, 274, 60 N.W. 640, 644 (1894). Also of importance to the court, was that the contract indicated the company must approve certain subcontracts and other costs, "it being the intention hereof that the party of the first part shall have the right to determine the prices to be

paid for all material and labor for said buildings." Id. at 271, 60 N.W. at 612. In another similar fact situation, this holding was followed by the court. Manton v. H.L. Stevens & Co., 170 Iowa 495, 501, 153 N.W. 87, 89 (1915). Where a contractor was required to report certain acts and expenditures to the owner, an employer-employee relationship was found. Wright v. Goldheim, 184 Iowa 1041, 1046, 169 N.W. 343, 345 (1918).

In light of the relevant cases and in viewing the entire record, we cannot agree that, as a matter of law, Davis is an independent contractor. We emphasize we are not holding that Davis is an employee of Clinton Corn. We have no doubt Clinton may argue that the above restrictions may be explained as cost containment procedures, or present other evidence showing Davis is an independent contractor. Rather, we find that reasonable minds could reach a different result from the record presented, and that a genuine issue of fact remains to be resolved by a fact finder. We reverse and remand for further proceedings.

REVERSED AND REMANDED.