

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JOHN S. BELL,
Plaintiff,

Shelby Circuit
No. 44193 T.D. & 46804 T.D.
C.A. No. 02A01-9405-CV-00114

VS.

Hon. D'Army Bailey
Judge

WILLIE C. HARRELL, ROBERT S.
SCHAEFFER, individually, and in
his capacity as the principal of
ROBERT SCHAEFFER MOTORS,
INC., and ROBERT SCHAEFFER
MOTORS, INC.,

Defendants/Third-Party
Plaintiffs/Appellees,

FILED

October 20, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

VS.

LIBERTY MUTUAL INSURANCE
COMPANY,

Third-Party Defendant/Appellant.

JAMES MARION FOSTER,
Plaintiff/Appellants,

VS.

WILLIE C. HARRELL and ROBERT
SCHAEFFER MOTORS, INC.,

Defendants/Appellees.

JAMES R. McGARRH, JR., Memphis, Attorney for Appellant Bell.

ROBERT L. GREEN, Memphis, Attorney for Appellant Foster.

RICHARD D. CLICK, Bateman and Childers, Memphis, Attorney for Appellant Liberty
Mutual Insurance Company.

DOUGLAS A. McTYIER, Wilson, McRae, Ivy, Sevier, McTyier and Strain, Memphis,
Attorney for Appellee Harrell.

JOHN D. RICHARDSON and DEBORAH P. FORD, The Richardson Law Firm, Memphis,
Attorney for Appellee Robert S. Schaeffer and Robert Schaeffer Motors, Inc.

AFFIRMED

Opinion filed:

TOMLIN, S.J.

John S. Bell and James Marion Foster ("Plaintiffs" or by name) each filed a complaint in the Circuit Court of Shelby County seeking damages in tort for personal injuries against Willie C. Harrell, Robert S. Schaeffer, and Robert Schaeffer Motors, Inc. ("RSM") ("Defendants" or by name) as a result of an accident in which Plaintiffs were injured. Answers were filed in each suit alleging that the tort suits were barred and that Plaintiffs' exclusive remedy was under the Tennessee Workers' Compensation statutes. In addition, in the suit filed by Bell, RSM filed a third-party complaint against his workers' compensation insurance carrier, Liberty Mutual. Liberty Mutual denied the applicability of the workers' compensation law to the case. By consent of the parties the cases were consolidated for all purposes. Also by agreement it was determined that the court would try separately the issue of whether the claims were governed by the workers' compensation statutes. Following a bench trial, the court found that the Workers' Compensation Act governed plaintiff's claims and dismissed the tort claims. Both plaintiffs and Liberty Mutual have appealed, asserting two issues: The trial court erred in (1) holding that plaintiffs were employees of RSM and Wyatt Cummings, RSM's salesman, and (2) that they were statutory employees within the scope of T.C.A. § 50-6-113 (Supp. 1995). For the reasons hereinafter stated, we affirm.

The basic facts are not in dispute. At all times relevant to this case, RSM operated as a wholesale automobile dealership in Memphis. Wyatt Cummings¹ was a salesman for RSM, engaged principally in the buying and selling of used cars from auctions and dealers and then selling them to other dealers. Cummings worked out of RSM's office and lot on Elmore Road, using office equipment and supplies furnished by RSM. Cummings purchased these used cars through RSM's

¹Cummings was not named as a defendant in these suits.

dealer license, using either RSM's credit or his own funds. The cars purchased by Cummings were titled in the name of RSM, and RSM was the vendor in the sale of each of these cars.

For each car Cummings bought and sold he would pay RSM a flat fee of approximately \$100. This fee covered the expense of the office space RSM provided Cummings and insurance on the cars Cummings bought and sold. Each time Cummings purchased a car he was responsible for the expenses associated with the purchase and resale of the car, including auction costs, repair costs, cleanup costs, and the cost of providing drivers to transport the cars from its purchase point to its final destination. Cummings determined what repairs were to be done to the cars, if any, and who would pickup and deliver the cars. Cummings' gross profit from the sale of a car in this scenario was determined by subtracting the cost of the car and the flat fee paid to RSM from its sales price. His net profit on the car was his gross profit less the resale and purchase expenses previously mentioned.

In January 1991, RSM and Cummings signed an agreement that designated Cummings as an independent contractor. Although the agreement provided that RSM was to advance the funds necessary to transport the cars Cummings purchased, Robert Schaeffer, Jr., RSM's sales manager, testified that RSM allowed Cummings to pay the drivers from his own funds. Cummings obtained drivers from a pool of regular drivers that came to the Elmore Road lot almost daily looking for delivery jobs. They would usually come on days when they were familiar with the buying schedules of the salesmen. Cummings would either select a driver from those waiting for a job or make prior arrangements with one of these drivers to be on the lot a specific day for delivery. Plaintiff Foster had been a regular driver for Cummings and for other RSM salesmen for five or six years.

In August 1991, at Cummings direction, Foster, Bell, Harrell and a fourth driver picked up four cars at the RSM lot and delivered them to Clarksdale, Mississippi. Upon returning to Memphis in the "chase" car—a vehicle owned by RSM and used to transport the drivers after a delivery—the drivers went to an automobile repair shop to pick up other cars belonging to RSM destined for delivery. While on the premises, Plaintiffs were injured when a truck owned by RSM and driven by Harrell struck them. This suit ultimately followed.

At the conclusion of the hearing below, the trial court entered the following as part of its judgment:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the judgment be and hereby is entered in the Third Party Complaint of Robert S. Schaeffer Motors, Inc. against Liberty Mutual Insurance Company, and that judgment be entered that Wyatt Cummings was an independent contractor of Robert Schaeffer Motors, Inc.; that plaintiffs, John S. Bell and James Marion Foster, were employees of Robert Schaeffer Motors, Inc; that plaintiffs, John S. Bell and James Marion Foster, were employees of Wyatt Cummings; that the parties were operating under and subject to the terms and provisions of the Tennessee Workers' Compensation Act; and, therefore, the tort claims of plaintiffs, John S. Bell and James Marion Foster, shall be hereby dismissed.

I. Employee vs. Independent Contractor

The basis of liability under the Workers' Compensation Act is the employer-employee relationship. Stratton v. United Inter-Mountain Tel. Co., 695 S.W.2d 947, 950 (Tenn. 1985). While a plaintiff in a workers' compensation action has the burden of proving each element of his case by a preponderance of the evidence, once it is established that an employment relationship exists, the burden is on the employer to prove the worker was an independent contractor rather than an employee. Galloway v. Memphis Drum Serv., 822 S.W.2d 584, 586 (Tenn. 1991).

Because "[t]he Workers' Compensation Law must be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage," Hodge v. Diamond Container General, Inc., 759 S.W.2d 659, 664 (Tenn. 1980), we are constrained to resolve doubts in favor of the finding that a worker is an employee rather than an independent contractor. Galloway, 822 S.W.2d at 586.

T.C.A. § 50-6-102(9) sets out seven factors which are to be considered by a trier of fact in determining whether a work relationship is that of employer-employee or independent contractor. They are as follows:

- (A) The right to control the conduct of the work;
- (B) The right of termination;
- (C) The method of payment;
- (D) The freedom to select and hire helpers;
- (E) The furnishing of tools and equipment;
- (F) Self scheduling of working hours; and
- (G) The freedom to offer services to other entities.

T.C.A. § 50-6-102(9) (Supp. 1995). See also Galloway, 822 S.W.2d at 586. While no single factor is determinative, our supreme court has repeatedly emphasized the importance of the right to control. The relevant inquiry is whether the right to control existed, not whether it was exercised. Id. at 586 (citing Stratton v. Inter-Mountain Tel. Co., 695 S.W.2d 947, 950 (Tenn. 1985)). Another important factor is the right of termination. The power of a party to an employment contract to terminate the relationship at will is contrary to the full control of work activities usually enjoyed by an independent contractor. Masiers v. Arrow Transfer & Storage Co., 639 S.W.2d 654, 656 (Tenn. 1982).

The standard of review by this Court is de novo upon the record, accompanied by a presumption of the correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. T.R.A.P. 13(d).

Having carefully reviewed the record, several considerations lead us to conclude that the trial court was correct in finding that plaintiffs were employees and not independent contractors while furthering the business of RSM. First, RSM provided the automobiles that were the "tools and equipment necessary for Plaintiffs' work." RSM's vehicles were the object to be transported and delivered, and RSM's vehicles were used to return the drivers to RSM's place of business in Memphis. In addition, RSM controlled the destination of the deliveries, the dates of the deliveries, and the time of arrival at the various locations. Although RSM did not exercise the complete right of control in every respect, they had the right to control the conduct of the work. Had they so elected, RSM could have directed the routes by which the drivers traveled from one destination to another.

In addition, the record reflects that plaintiff Bell made a claim for workers' compensation benefits. RSM wrote Liberty Mutual concerning "John Bell's claim" on December 18, 1991. The letter stated that Bell was hired for the "purpose of driving and delivering vehicles" for RSM in various locations, including "different body shops." The letter also indicated that Bell was "transporting a vehicle for Mr. Cummings when the accident occurred." Bell testified that if Schaeffer had given him an order, he "certainly" would have obeyed it so long as he knew it was a direction from Schaeffer.

Schaeffer testified without contradiction that he had the authority to fire the drivers for reasons such as unsafe driving. Willie Harrell, the driver at the time of the accident, testified that during the course of his employment, Mr. Schaeffer had given him orders and he had obeyed them. He believed that both Schaeffer and Cummings had the authority to fire him. Cummings also testified that Robert Schaeffer was looked upon as "the boss"; because the operation involved Schaeffer's money and cars, he had the power to fire the drivers.

II. RSM As A Principal Employer

The trial court found that RSM's salesman, Wyatt Cummings, was an independent contractor of RSM. The court also found that plaintiffs Bell and Foster were employees of both RSM and Wyatt Cummings. The record reflects that Wyatt Cummings, as an independent contractor-salesman for RSM, carried no workers' compensation insurance, but that RSM did.

T.C.A. § 50-6-113 expands the responsibility for workers' compensation benefits beyond the traditional employer-employee relationship to principal and intermediate contractors and subcontractors. That section provides as follows:

Liability of principal, intermediate contractor or subcontractor.—(a) A principal, or intermediate contractor, or subcontractor shall be liable for compensation to any employee injured while in the employ of any of the subcontractors of the principal, intermediate contractor, or subcontractor and engaged upon the subject matter of the contract to the same extent as the immediate employer.

(b) Any principal, or intermediate contractor, or subcontractor who pays compensation under the foregoing provisions may recover the amount paid, from any person who, independently of this section, would have been liable to pay compensation to the injured employee, or from any intermediate contractor.

(c) Every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, but such proceedings shall not constitute a waiver of the employee's rights to recover compensation under this chapter from the principal or intermediate contractor; provided, that the collection of full compensation from one (1) employer shall bar recovery by the employee against any others, nor shall the employee collect from all a total compensation in excess of the amount for which any of the contractors is liable.

(d) This section applies only in cases where the injury occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under the principal contractor's control or management.

T.C.A. § 50-6-113(a)-(d) (Supp. 1995).

The intent of this statute is to ensure payment of benefits as far as possible to

all workers when they are injured in the course of their employment. This section passes coverage from employers who might not have coverage to intermediate or principal contractors who do have coverage. Stratton v. United Inter-Mountain Tel. Co., 695 S.W.2d 947, 951 (Tenn. 1985).

Under this section, a principal contractor is made liable for injuries sustained by an employee of a subcontractor, provided that at the time of injury, the employee was engaged upon the subject matter of the general contract, and the injury occurs on, in, or about the premises under the management of the principal contractor. See Acklie v. Carrier, 785 S.W.2d 355, 357 (1990).

Two tests are generally used to ascertain if an entity is a statutory employer: (1) whether the work being carried out by the contractor in question (Wyatt Cummings) is the same type of work usually performed by the company (RSM) or as part of the regular business of the company (RSM); and (2) whether the company (RSM) has the right to control employees of the contractor (Wyatt Cummings). Barber v. Ralston Purina, 825 S.W.2d 96, 99 (Tenn. App. 1991).

From reviewing this record, plaintiffs were performing work for RSM which was "the regular business of the company." In addition, the record reflects that RSM had the right to control plaintiffs conduct in completing the work.

Liberty Mutual further contends that because the injuries occurred on the premises of a body shop that were in no way owned or controlled by RSM, this part of the statute cannot be satisfied. Section 50-6-113(d) provides that, for the entire code section to apply, the injury must have "occurred on, in, or about the premises on which the principal contractor has undertaken to execute work or which are otherwise under the principal contractor's control or management." T.C.A. § 50-6-113(d).

This narrow construction of this section of the Workers' Compensation Act has been long since rejected by the courts of this state. Plaintiffs were employed for the purpose of driving these vehicles wherever they might be located— on the streets and highways of Tennessee or any other state, or in and around the premises of body shops or the lots of RSM or other automobile dealers. In addition, RSM owned the automobiles being transported. The supreme court in Davis v. J & B Motor Lines, 245 S.W.2d 769, 770 (Tenn. 1951) rejected the narrow construction contended for by Liberty Mutual and established the basis for our conclusion that the "premises" were under the use and control of RSM. Davis was a truck driver who was employed to haul freight by truck on the highways. The owner of the truck which he was driving had leased it to the defendant, who had a contract to haul tobacco for a North Carolina company. In the course of this employment, he received injuries from which he died. In reversing the trial court's dismissal of a suit under the Workmens' Compensation Act by the employee's widow, the supreme court said:

To the extent necessary to execute that contract, the J & B Motor Lines had use and control of the highways for the purpose of the contract, and to the extent necessary for the performance, the highways were "premises on which the principal contractor has undertaken to execute work"

. . . It has never been suggested, and cannot successfully be suggested, under a proper construction of the Act, that because the "premises" are the property of the Government, as are the highways, that that should defeat the operation of the Workmen's Compensation Act growing out of a private contract to be performed on Government property.

Id. (citation omitted). This issue is accordingly without merit.

Lastly, we feel constrained to address a secondary issue raised by RSM in its brief as Appellee. RSM contends that this appeal should be dismissed on procedural grounds because the judgment from which Liberty Mutual appealed

is not a final judgment. Although we do not have the complete record of the pleadings before us, it appears that in addition to the tort claim filed against the various defendants, along with the third-party claim brought by the defendants against Liberty Mutual, one if not both of the plaintiffs also filed a workers' compensation suit. At some point in time it appears that the cases were consolidated for the sake of disposition. Later, it appears from the transcript that counsel, with approval of the court, in essence agreed that the third-party claim against Liberty Mutual would be dispositive as to how the claims would be disposed of against the parties. Counsel for RSM adequately described the scenario in remarks made in open court prior to the hearing. We quote in part as follows:

MR. RICHARDSON: Judge, that's not exactly correct. That's why I want to make an opening statement so we don't get confused when I proceed. To me the large issue is whether or not this case is governed by the Workers' Comp Act and therefore subject to its exclusive remedy rule. If Your Honor rules that way, the tort claims are out the door. If Your Honor rules that it's not subject to the Comp Act, then it now falls in tort and we go back and try the tort case to a jury. That's basically what we do.

....

Well, Judge, if you rule that it was tort, then we have to have a jury in the box. We have to have all the medical proof taken and spend a lot of money to try it to the jury. If you rule that it's Workers' Comp, the only thing that has to happen thereafter is the lawyers come before you with doctors' depositions to establish how much. And that's why we all got together and decided, and I thought we talked to the Court in chambers at one time about that and sort of reached a consensus that that was -

Furthermore, RSM repeated in its answer, that in the alternative, the provisions of the Tennessee Workers' Compensation Act provided the exclusive remedy and thus was a bar to the tort action. In its third-party complaint against Liberty Mutual, RSM also sought a determination as to whether the Tennessee Workers' Compensation Act provided exclusive remedy in this case. The judgment of the trial court that the provisions of the Tennessee Workers' Compensation Act apply provided a basis for the dismissal of the Plaintiffs' tort action and is a final judgment from which this

appeal may be taken.

Accordingly, the judgment of the trial court is affirmed in all respects. Costs in this cause on appeal are taxed to Liberty Mutual, for which execution may issue if necessary.

TOMLIN, S.J.

CRAWFORD, J. (CONCURS)

SUMMERS, S.J. (CONCURS)