3-31-2008

Ewing v. State, Dept. of Transp. Appellant's Reply Brief Dckt. 34541

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. EWING, and NOREEN EWING,

Appellants,

vs.

DOCKET NO. 34541

STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,

Respondent.

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the 1st Judicial District for Kootenai County.

Honorable Charles Hosack, District Judge presiding.

Michael J. Verbillis
Residing at Coeur d'Alene, ID for Appellants.

Michael E. Kelly
Residing at Boise, ID for Respondent.

TABLE OF AUTHORITIES

III.

INTRODUCTION

As anticipated, Respondent has attempted to walk the thin line between commending the Trial Court for it's wisdom in ushering Mr. Ewing to the exit door of the courthouse on the thin basis of the Recreational Use Statute, while simultaneously urging that the Trial Court committed error by not tossing the case out of court based upon the notion that Mr. Ewing was somehow a statutory employee of the State of Idaho when he was injured.

1. The Trial Court Incorrectly Ruled that the Recreational Use Statute is Applicable to the Case at Bar.

The Trial Court and Respondent before this Court take the position that Mr. Ewing was "recreating" when he was seriously injured falling in a poorly compacted area following underground plumbing activities at Mineral Mountain Rest Area. This holding and subsequent rhetoric of Respondent is singularly based upon the placement of a "picnic table" within the confines of the Mineral Mountain Rest Area property. The logic spins thus: even though Ewing was at work and taking a break from his work day to sit down and have quick bite of lunch or to use the public facilities, **at that precise moment,** he was "recreating." Thus, the State is shielded by the Recreational Use Statute. *Idaho Code §36-1604.* It appears as though the Trial Court and Respondent have analyzed the applicable case law as requiring an examination as to the purpose or intention of the user of the property at the moment of injury.

As Respondent states:

> This Court held that the Recreational Use Statute requires only that the recreational user use the owner's property for recreational purposes.

Respondent's Brief, pg. 9-10.

For the Trial Court to rule as a matter of law, that the momentary break from the day's toils to have a snack is "recreation," constitutes an end run on the role of the jury. Shouldn't Mr. Ewing be entitled to allow a jury to determine whether or not he was on the property for the purpose of recreating, rather than the Trial Court and the Deputy Attorney General?

Let us imagine, for a moment, a parallel universe in which a statute, not unlike Idaho's Recreational Use Statute, has a long laundry list of activities that are considered recreational in their basic purpose and this law includes "bird watching" as a listed activity. Let's suppose that a person, not unlike John Ewing, is working on a project, not unlike the one in the case at bar, and he leaves his work site to enter the adjacent property (coincidentally owned by the same property owner). Let us further suppose this person in this parallel universe spots a robin, a common first sign of Spring. Again, to carry this analogous fact pattern one step further, image that this person then, after briefly glancing at the robin, steps in a similar soft spot of land and has injuries, not unlike Ewing. Would the Trial Court and thus the Attorney General argue that since the purpose for which Mr. Ewing entered the property was to watch birds, he, therefore, is barred from bringing an action?

The Undersigned humbly submits that the answer to the preceding rather hyperbolic analogy is quite simple and straight forward. Barring Mr. Ewing from submitting his case to the jury in this case does violence to the purpose of the statute and elevates sophistry to jurisprudence.

Simply put, Mr. Ewing is entitled to let a jury determine for what purpose he was entering this property and not have improper inferences indulged by the Trial Court and Respondent.

2. John Ewing was not the Statutory Employee of the State of Idaho, Department of Transportation When He was Injured.

The briefing to this Court is not radically different than the briefing to the Trial Court on this question. Notwithstanding the skilled efforts of counsel for Respondent to mischaracterize the players in this drama, it's logic also fails.

The analysis of category 1 and category 2 statutory employer/employee status under Idaho Code §72-223 is really quite simple. If an employee is injured on the job and his immediate employer has no worker's compensation, but the **prime** contractor on the job has worker's compensation coverage, then that contractor becomes the statutory employer. It is an imputed relationship that the legislature has placed upon contractors to see to it that those subcontractors working under them have the financial responsibility to insure their workmen. In the event such

subcontractors do not provide such coverage, the law will impose that burden on the prime contractor. It is thus social policy enacted by the legislature to insure that injured workers will not go uncompensated by reason of the fiscal irresponsibility of their immediate employer. *Id.*

As indicated in previous briefing to this Court, before the 1996 Amendment to the Statute, an injured worker was free to sue his statutory employer whether or not there existed worker's compensation in the chain of contractors, if there was an independent basis in tort. *Runcorn v. Shearer Lumber Prods.*, 107 Idaho 389, 690 P.2d 324 (1984). The 1996 Amendment to the Statute changed all of that and made it clear that those prime contractors were deemed immune from suit, hence, the term category 1 statutory employer. *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 180 P.3d 392 (2005).

The definition of a category 2 statutory employer is a bit more elusive. The statute immunizes owners or lessees of premises who are virtually the proprietor, operator of the business there carried on, etc. Thus the question becomes, who is the owner, lessee, or virtual proprietor of the business endeavor.

Robison v. Bateman-Hall, Inc., 139 Idaho 207, 76 P.3d. 951 (2003) made it clear that a retail establishment not in the ordinary business of construction or roofing activities was not a virtual proprietor. As the Court articulated the test:

> To determine who is a virtual proprietor or operator, the Court must consider whether the work being done pertains to the business, trade, or occupation of the owner or proprietor and whether such business, trade, or occupation is being carried on by it for pecuniary gain. *Id.* "Generally, to find a business or person to be a statutory employer, the work being carried out by the independent contractor on the owner or proprietor's premises must have been the type that could have been carried out by employees of the owner or proprietor in the course of its usual trade or business." *Id.* In short, "if a person is normally equipped with manpower and tools to do a job and nevertheless contracts it to another employer, he is the statutory employer of the second employer's employees."

139 Idaho 207 at 212.

Thus one could say that a category 2 statutory employer is a "virtual" employer. This relationship is created by operation of the statute. Respondent has cited the same cases that

Appellant has cited on this topic and made an argument much like the one that was made to the Trial Court.

Missing from their briefing before the Trial Court and in the Trial Court's analysis was the recent case of *Cordova v. Bonneville County Joint School District No. 93*, Supreme Court docket no. 31188 (7/31/07). In *Cordova* the appellant was an employee of School District #91. She was assigned to a behavioral support division, which involved her traveling to various schools. During a school outing at a ski lodge, Ms. Cordova was injured while conducting a "rope/confidence" course designed to build cohesiveness and trust among the various students of School District #93.

Following her injury, Ms. Cordova sued School District 93. She had received worker's compensation from District 91, her direct employer. District 93 took the position that she was a statutory employee under Idaho Code §72-223 and, accordingly, could not sue the school district (93) for whom she was not a direct employee. The Court reasoned, she was clearly not a category 1 employee under a plain reading of the statute. With respect to whether or not she could be considered a **category 2** statutory employee, the Court said:

> We conclude that District 93 is not conducting a business; it is not engaged in activity for the purpose of "livelihood;" and operating a school is not a commercial activity. Furthermore, there is no evidence that District 93 is receiving any pecuniary gain in connection with operating the school. Thus, because District 93 is not a "business" in the ordinary meaning of the word, it cannot be Cordoba's category 2 statutory employer. *Id.*

Again, the Trial Court reasoned without citing this particular case as it was not pivotal.

Notably, it is not cited by Respondent in it's brief before this Court.

Simply stated, the Cordova case puts an end to any notion that John Ewing could in any way be considered the statutory employee of the Idaho Department of Transportation. Like the School District, the Highway District is not in the business of making money or even attempting to do so.

Absent *Cordova*, the analysis of Respondent still misses the mark. The notion, that the owner of the property who hires a prime contractor can be a category 2 statutory employer, does not hold water. The State of Idaho is no more the category 2 statutory employer of John Ewing than a

homeowner who hires a contractor to remodel his house, who, in turn, hires a painting subcontractor where the painting subcontractor's employee becomes injured. The homeowner, like the retailer in the *Robison* case does not typically engage in remodeling contracts. Thus, he cannot be deemed a category 2 statutory employer.

IV.

CONCLUSION

In conclusion, it is respectfully submitted for the reasons herein stated and in the prior briefing of Appellant, this case should be remanded for a jury trial on the merits so that Mr. Ewing can have his opportunity to prove that on the day that he fell due to faulty workmanship on a project **unrelated** to his work site he was not "recreating." There is no statutory employer relationship present in this case. He cannot be deemed as category 1 statutory employer by virtue of the plain ordinary meaning of the statute. Under the holding in *Cordova*, the State of Idaho cannot be deemed a category 2 statutory employer by virtue of the nonpecuniary nature of IDT's endeavors.

DATED this 25 day of March, 2008.

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CERTIFICATE OF SERVICE

I certify that on the 28 day of March, 2008, a true and correct copy of the foregoing was sent via U.S. mail to:

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