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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. EWING, and NOREEN EWING,

Appellants,

vs.

STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION,

Respondent.

Supreme Court Docket No. 34541

Kootenai County Case No. CV 06-7599

FILED - COPY
LODGED
APR 21 2008
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

RESPONDENT/CROSS-APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

HONORABLE CHARLES W. HOSACK, PRESIDING

FILED - COPY
APR 21 2008
Supreme Court ____ Court of Appeals ____
Entered on ATS by: ____

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Attorneys for Appellants John E. Ewing and Noreen Ewing

Michael E. Kelly
Lopez & Kelly, PLLC
1100 Key Financial Center
702 W. Idaho Street
Post Office Box 856
Boise, ID 83701
Attorneys for Respondent/Cross-Appellant State of Idaho, Department of Transportation

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INTRODUCTION

In their Reply Brief, Appellants correctly point out that Respondent/Cross-Appellant's arguments are not radically different from arguments presented to the district court on the State's statutory employment Motion for Summary Judgment. This observation is accurate to the extent the State is emphasizing those applicable statutes and case law on statutory employment which should have lead the district court to the conclusion that Mr. Ewing was a statutory employee of the State at the time of his accident. Since this Court utilizes the same standard of review as the lower court on a motion for summary judgment, it is appropriate that the State's analysis of the statutory employer issue be presented to this Court in a similar context.

This same standard of review applies to this Court's review of the district court's decision granting summary judgment to the State under the recreational use statute issue, I. C. § 36-1604. From the State's perspective, the district court correctly analyzed the undisputed facts in this matter in conjunction with the statutory language of the recreational use statute and applied it appropriately.

The Appellants appear bewildered by the fact the lower court deemed Mr. Ewing to be "recreating" at the time of his incident. They seem equally perplexed by the fact that at the same time the State would argue Ewing is its statutory employee. Appellants would apparently ask this Court to ignore the fact that Mr. Ewing obtained worker's compensation benefits for the incident at issue from his employer, which was working under a subcontract with a party which had contracted with the State. Regardless of the Appellants' puzzlement, Mr. Ewing qualified as both a statutory

employee of the State of Idaho and was subject to the provisions of the recreational use statute when he was injured.

Thereby, it is respectfully submitted that this Court affirm the trial court's decision granting the State's motion for summary judgment on the recreational use issue. Should the Court deem Mr. Ewing's activities outside the scope of the recreational use statute, it is then requested that this Court find that Mr. Ewing was injured while a statutory employee of the State, making it immune from third party liability in this matter.

I.

THE STATE WAS A CATEGORY 1 STATUTORY EMPLOYER OF APPELLANT AT THE TIME OF HIS INCIDENT

As set forth in the Undisputed Facts of the Respondent/Cross-Appellant's Brief, Mr. Ewing was within the course and scope of his employment with North Star Enterprises, Inc. (North Star) on June 20, 2006, the day of his accident. North Star was a subcontractor to Scarsella Brothers (Scarsella), the contractor hired under a contract with the IDT to perform construction and realignment work on U. S. Highway 95. Respondent/Cross-Appellant's Brief, pp. 4-5.

At the time of his incident, Ewing was on a break from his employment with North Star when he fell at the Mineral Mountain Rest Area (Mineral Mountain). Mineral Mountain is located within the construction zone of the IDT contract with Scarsella. *Id.*, p. 5. As a result of his accident, Ewing filed for and received worker's compensation benefits from the State Insurance Fund. *Id.*, p. 6.

In their Reply, Appellants attempt to put a simplistic spin on the category 1 and category 2 definitions of a statutory employer, first enumerated in *Venters v. Sorrento Delaware, Inc.*, 141 Idaho 245, 180 P.3d 392 (2005). Appellants opined that "if an employer is injured on the job and his immediate employer has no worker's compensation and the **prime** contractor on the job has worker's compensation coverage, then that contractor becomes the statutory employer." Appellants' Reply Brief, p. 2. Thus, under Appellants' category 1 statutory employer analysis, a category 1 employer goes no further than the "prime" contractor. Since North Star is a subcontractor of Scarsella in this instance, Appellants would like this Court to stop its statutory employer analysis with Scarsella.

Appellants have either intentionally fashioned their argument to disregard or unintentionally overlooked the fact that *Venters* defined a category 1 statutory employer to extend to those who hire both contractors and subcontractors alike. This broader definition is contained within I. C. § 72-216(1) & (2) and is likewise confirmed in *Robinson v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003), in which this Court extended the statutory employer immunity to employers who subcontract services out.

As discussed extensively in the prior briefing, this Court clearly also extended the immunity under Idaho's worker's compensation statutes in the subcontractor context to the IDT in the *Fuhriman v. State, Dept. of Transp.*, 143 Idaho 800, 153 P.3d 480 (2007). As discussed in the Respondent/Cross-Appellant's Brief, p. 17, this Court stated it had summarized the I. C. § 72-223 category 1 protection for employers to include "employers who make use of a contractor's or

subcontractor's employers." *Fuhriman*, 153 P.3d at 485 (citations omitted). (Emphasis added).

Based on the foregoing, Appellant's category 1 argument is flawed under the concept that a statutory employment relationship cannot exist past the "prime" contractor. Clearly, Idaho's worker's compensation statutes reflect and appellate case law has held that a statutory employment relationship exists through entities, including the IDT, which utilized both contractors and subcontractors on construction projects.

Appellants also spend an inordinate amount of time arguing that the IDT is not a category 2 statutory employer. The State has never argued, neither to the district court nor during the course of this appeal, that it is a category 2 statutory employer of Mr. Ewing. Hence, Appellants' argument in this regard is inconsequential and their reliance on cases such as *Robinson v. Bateman-Hall, Inc., supra,* and *Cordova v. Bonneville County Joint School District No. 93*, 07.16 ISCR 666 (2007 Opinion No. 100) is misplaced.

As previously set forth in Respondent/Cross-Appellant's Brief, the true test in determining whether the State was the statutory employer of Mr. Ewing at the time of his accident is whether the State would have been called upon to provide worker's compensation benefits if either North Star or Scarsella failed to do so. The answer is an unequivocal and resounding yes.

II.

THE UNDISPUTED FACTS IN THIS CASE MAKE EWING SUBJECT TO BOTH THE RECREATIONAL USE STATUTE AND THE EXCLUSIVE REMEDY OF THE WORKER'S COMPENSATION STATUTES

While the end result may appear contradictory, the undisputed facts in this case show that Mr. Ewing was both recreating and working at the time of his incident. Thereby, he was subject to the provisions of both the recreational use statute and the exclusive remedy of the Idaho worker's compensation statutes as a statutory employee of the State when injured.

As the lower court correctly perceived, the Idaho recreational use statute encompasses a very broad spectrum of activities.[1] While Ewing was taking a break from his employment with North Star, he was injured by his own admission as he walked across the Mineral Mountain Rest Area to use a picnic table. At that point in time, the State of Idaho as the owner of the rest area owed no duty of care to Mr. Ewing to keep the premises safe or to give a warning of a dangerous condition, absent the showing of willful and wanton misconduct. The rest area is open to the public and it is open free of charge. Thus, the activity Mr. Ewing was engaged in at the specific time he was injured falls under the purview of the Idaho recreational use statute.

Should this Court upholds the lower court's decision to grant the State's summary judgment pursuant to I. C. § 36-1604, the analysis needs to go no further. However, while the State believes

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[1] Under the Appellants' "parallel universe" argument in their Reply Brief, it is conceivable that Mr. Ewing would be subject to the Idaho recreational use statute for his "birdwatching" activity.

the lower court correctly perceived and analyzed Mr. Ewing's activities under the recreational use statute, it likewise believes that Mr. Ewing is subject to the exclusive remedy of the Idaho worker's compensation laws pursuant to the undisputed facts of this case. While Mr. Ewing was recreating at the time of his incident, he was likewise within the course and scope of his employment at the time of the incident. Based on the analysis set forth in section I above, and previously discussed in Respondent/Cross-Appellant's Brief, should this Court decide to examine this matter beyond the trial court's decision granting the State's summary judgment as to the recreational use statute, the State believes the Appellants' complaint fails nonetheless pursuant to Mr. Ewing's status as a statutory employee of the State at the time of his accident.

III.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in Respondent/Cross-Appellant's Brief, the State of Idaho, Department of Transportation respectfully submits that the district court's order granting the State's motion for summary judgment be affirmed. In the alternative, the State respectfully submits that this Court reverse the district court's order denying the State's motion for summary judgment that the State is a category 1 statutory employer of the Plaintiff.

DATED this 21 day of April, 2008.

LOPEZ & KELLY, PLLC

By: _____
Michael E. Kelly, Of the Firm
Attorneys for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21 day of April, 2008, I served a true and correct copy of the foregoing by delivering the same to each of the following individuals, by the method indicated below, addressed as follows:

Michael J. Verbillis, P.A.
601 E. Sherman Avenue, Suite 3
Post Office Box 519
Coeur d'Alene, ID 83816-0519
Telephone: (208) 667-9475
Facsimile: (208) 664-1161

☒ U.S. Mail
☐ Hand-Delivered
☐ Overnight mail
☐ Facsimile

_____
Michael E. Kelly