11-1-2019

State v. Sky Down Skydiving LLC Appellant's Reply Brief Dckt. 47077

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, *ex rel.* INDUSTRIAL COMMISSION, Plaintiff/Appellant, vs. SKY DOWN SKYDIVING, LLC, an Idaho, Limited Liability Company; PAUL ALBERT, JANES, Member; and DENISE JANES, Member; in their official and individual capacities, Defendants/Respondents.	)	**Supreme Court No. 47077-2019**

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Third Judicial District
of the State of Idaho, in and for Canyon County

Honorable Senior Judge D. Duff McKee, Presiding

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I. ARGUMENT

A. The magistrate court was incorrect to find the furnishing of major items of equipment a neutral factor when applying the right to control test.

The magistrate and district courts have improperly applied the four factors of the right to control test to the evidence in this case. In their brief, Respondents attempt to gloss over a major error in that analysis that is pointed out in Appellant's Brief. Respondents assert that the magistrate properly found that the furnishing of major items of equipment part of the right to control test to be "neutral or otherwise known as 'a wash.'" (**R. Brief**, p. 12.) This factor, having been deemed to be "neutral" was, therefore, not important in the magistrate court's determination that Sky Down did not control its workers under the right to control test.

However, the record clearly shows that the magistrate judge only reached that erroneous conclusion by improperly equating "the body" of the tandem instructor to "the airplane" of Sky Down in its analysis of this part of the right to control test.[1]

Lest there be any doubt that the magistrate improperly considered the body of a worker to be a major piece of equipment equal to the airplane provided by Sky Down when making his finding with respect to this part of the right to control test, it is informative to review that entire finding in context and see the reasoning of the magistrate judge that led to his obviously improper "neutral" finding:

> The next factor is furnishing major items of equipment. This factor has already been discussed to some extent in the right to control discussion. However, to make it clear, this court does understand and appreciates the fact that an airplane and a customer are major items of [equipment] operating a business of this sort.

[1] "[I]n a case involving personal services, in deciding whether or not the worker is an employee or an independent contractor, the worker's body is not a major item of equipment within the meaning of the third element of the 'right to control' test." In Matter of Hanson, 114 Idaho 131, 134, 747 P2d 444, 447 (1988).

> However, the experience a customer pays for is not the airplane ride up into the sky. Obviously the airplane ride is necessary to gain the altitude; however, the fun, the excitement, the terror of the overall experience, and memories that come in those few minutes between 16,000 feet and the ground are what those people are paying for. Without the human being who straps on the tandem equipment there is no ride.
>
> It is this court's responsibility to determine the relative weight and importance of each of these factors. The ride for the customer could not occur without the equipment provided by each of the instructors and Sky Down. The human bodies of the instructors are no less a piece of equipment than the airplane that took them up to the appropriate altitude.
>
> When comparing the importance of each of these major items of equipment, the weight of each could very well be neutral.

(Transcript of Findings of Fact and Conclusions of Law, p. 15, Ls. 5-25; p. 16, Ls. 1-3.)

It is important to note that while the magistrate judge found the "body" provided by the tandem instructor and the "airplane" and "customer" provided by Sky Down to be major items of equipment and that the "body" to be "no less a piece of equipment than the airplane," the other major item of equipment obviously provided by Sky Down, the parachute equipment also supplied by Sky Down and "strapped on" for each such jump, was not addressed. The magistrate's incorrect weighing of only two alleged major items of equipment – the body of the worker on one side and the airplane (with, perhaps, the customer thrown into the balance) on Sky Down's side of the scale, led to the magistrate improperly finding this critical part of the right to control test to be "neutral." Without using the body of the worker as a piece of equipment to counterbalance the airplane, customer and parachute system – all provided by Sky Down, the magistrate would not have any basis on which to find this factor to be neutral. His improper weighing of this equipment factor and finding it to be neutral made it possible for the magistrate to declare, incorrectly, that Sky Down's workers are independent contractors under the right to control test.

Furthermore, this incorrect finding highlights another error made below and identified in Appellant's Brief, but which was not addressed by Respondents' Brief. The magistrate did not weigh any of the right to control test factors, including the furnishing of major items of equipment, with respect to those Sky Down workers who do not contribute their "body" to any task more glamorous than re-packing Sky Down's parachutes in Sky Down's hanger. That omission is also reversible error. The district court's unsupported, but creative attempt to fill in this gap in the magistrate's findings was addressed in Appellant's Brief.

B. The magistrate court incorrectly applied the right to control test to conclude that all of Sky Down's workers were independent contractors.

Respondents argue that "[n]either of the lower court's [sic] erred in finding the workers at issue to be independent contractors." (**R. Brief**, p. 14.) However, under the right to control test reiterated in *Kiele v. Steve Henderson Logging*, 127 Idaho 681, 905 P.2d 82 (1995), the key inquiry is whether the employer has or exercises "the right to control the time, manner and method of executing the work, as distinguished from the right to merely require certain definite results (citation omitted)." *Kiele*, 127 Idaho at 683 (emphasis added).

In this case, the magistrate determined that the only work a tandem instructor is required to perform by Sky Down (ignoring, as has been pointed out, the entirely different work of Sky Down's uncertified parachute packers) is to fly through the sky with Sky Down's customer and land safely – an activity over which no control is allegedly exercised by the employer. But, the error in that narrow view of the work actually being done by Sky Down's tandem instructors and the control exercised by Sky Down can be easily illustrated by the following example, which sets

out facts concerning the right to control similar to those provided by the evidence in this case, but just changes the type of work being done by the workers.

> An employer needs to have a large wall erected and he must hire some workers to construct this wall who are already licensed carpenters and trained to operate a nail gun. The employer calls some workers he knows who are so qualified and willing to do this work. Some of these workers also sign a contract with the employer that they will only do wall building work for him. He tells these qualified and interested workers that he is going to start erecting this large wall the next day and that they will need to be at the designated job site by 8 a.m. each day if they want to work. If they do show up, each worker will be paid a fixed fee every day that they work on building this wall. A worker who arrives at the appointed time the next day and is properly dressed, including safety shoes, goggles and gloves, is put to work. The employer points out to the worker where the wall is being erected by his other workers and provides him with all of the building materials the worker needs to work on the wall. The employer also gives that worker a nail gun that the worker must use (for safety and maintenance reasons) when he is working on the employer's wall. The employer then leaves the workers alone to start work nailing up the wall according to the specifications set by the employer. While the employer is gone, the carpenters continue to work on the wall without the need for any oversight or other control by the employer while they are operating their nail guns and building the wall. The employer returns later and declares their day's work to be satisfactory and pays each worker the agreed upon sum for their work that day. This scenario is repeated with each worker who chooses to show up at the next work day at the start time appointed by the employer; which can vary, but which is always set by the employer, until the wall is completed.

Are the workers in this scenario employees or independent contractors? No one could credibly argue that simply because the workers don't punch a time clock or have to accept the offered job or even work for this employer on a regular basis, or that just because the employer wasn't present and controlling every aspect of a worker's task while he was operating the provided nail gun, that these workers could not be considered to be employees under a proper analysis of the right to control test. But, that is just what the lower courts did in this case and what the Respondents attempt to justify in their Brief. In this example, like the facts in this case, the employer controlled the time, manner and method of how and when workers did their work,

as opposed to merely requiring certain definite results without dictating the time, manner and method of achieving the result desired by the employer. They were employees; not independent contractors.

Under *Kiele*, in order for a worker to be a truly independent contractor the employer can only require that the work contracted for be completed; without controlling the time, manner and method of how those results are accomplished. As illustrated in the above scenario, the facts show that did not happen in this case. Sky Down was using employees who worked at the time and in manner and according to the methods dictated by Sky Down.

If, for example, Sky Down truly was using independent contractors, Sky Down would tell their tandem instructors that they had five customers who have paid Sky Down for a chance to experience a tandem parachute jump and if a tandem instructor wanted to provide any of their customers with that experience for a fixed compensation per jump, then the instructor must simply ensure that those jumps are completed sometime within the next thirty days at the time and in the manner and method chosen solely by the instructor; using the instructor's or some other third party's airplane and tandem parachute system. Similarly, if Sky Down told their parachute packers (who, of course would have to be F.A.A. certified riggers) that they had ten parachutes that needed to be picked up and repacked at the time, place and in the manner and method chosen by the packer and returned to Sky Down sometime within the next ten days, then, under these facts with respect to who had the right to control the time, manner and method of the work, one might consider these workers to be truly independent contractors. Under those circumstances, Sky Down truly would only be requiring certain definite results and would not be controlling the time, manner and method of the worker executing that accepted work.

However, we know from evidence in the record that is not what happens at Sky Down. Sky Down controls the time, manner and method of when and how their workers are performing their assigned work, whether scheduling a tandem jump with its customers or requiring the repacking of parachutes when they are busy. (See Trial Testimony of Denise Janes, **Tr. T.** p. 48, Ls. 12-25; p. 49, Ls. 1-2; p. 53, Ls. 14-25; pp. 54-55; p. 56, Ls. 1-10; p. 73, Ls. 4-25; p. 74, Ls. 1-6; P. 81, Ls. 21-25; p. 82, Ls. 1-15; p. 85, Ls. 13-16; & Trial Testimony of Allen Danes, **Tr. T.** p. 132, Ls. 4-20. See also **P. Tr. Ex.** Nos. 4 & 5.)

The fact that Sky Down's workers don't punch a time clock or work 8 hours a day or 40 hours a week is not relevant to the issue of the amount of control exercised by Sky Down when a tandem instructor or parachute packer is actually on Sky Down's site and performing work in accordance with the timing, manner and method dictated by Sky Down. Under a proper analysis of all four factors of the right to control test to the facts in the record; including the providing of major items of equipment part of that test, all of Sky Down's workers would certainly be found to be employees and not independent contractors.

C. The denial of Appellant's request for a new trial due to a lack of corroborating evidence is without support in the record or cases cited.

Appellant was improperly denied a new trial. Respondents cite to the district court decision to support their claim that Appellant's Motion for a New Trial was properly denied because it was not supported by anything in the record "other than the bare, uncorroborated statements in the affidavit of a recanting witness." (**R. Brief**, pp. 15-16.) Appellant has already addressed the corroborating evidence in the record that was, in fact, provided to the lower courts in Appellant's Brief. In their brief, Respondents then repeat a citation to a case used by the

district court to support this position. That citation, taken from the district court's decision, is: "See *McKim v. Horner,* 143 Idaho 568 (2006) (When a case turns on the witnesses' credibility, a motion for a new trial may be properly denied when there is a lack of corroborating evidence.)" (**R. Brief**, p. 16.) Unfortunately, there is no such quotation, holding, proposition or even dicta to that effect to be found anywhere in that case. Neither could a search find any case containing such a proposition.

The *McKim* case was a tort case tried before a jury for injuries allegedly arising out of an automobile accident. While there was a motion filed by the plaintiff for a new trial in that case, she failed to support her motion with oral or written argument and the district court properly denied the motion because she failed to set forth any grounds for a new trial under I.R.C.P. 59(1). *McKim v. Horner,* 143 Idaho 568, 571, 149 P.3d 843, 846 (2006).

There is also a footnote in that case which refers to the district court having considered overturning the jury verdict based on insufficiency of the evidence to justify the verdict. The Supreme Court, in that footnote, stated that "[t]he district court found that the jury verdict was not against the clear weight of the evidence because the case turned on the parties credibility, considering the lack of outside evidence to corroborate either side." *McKim*, 143 Idaho at 573, n.2.

Neither of these references from the *McKim* case can support the proposition set out in Respondent's Brief, even though quoted from the district court's decision, that "when a case turns on the witnesses' credibility, a motion for a new trial may be properly denied when there is a lack of corroborating evidence."

Respondents also claim that Cody Butikofer, an individual who worked for Sky Down, was someone who had offered "perjured testimony," not only at his deposition and trial, but in his affidavit. (**R. Brief**, p. 16.) How do they know that Mr. Butikofer committed perjury? He has not had an opportunity to explain his prior trial or deposition testimony in light of the further evidence he says he is now willing to provide to the court. Respondents are attempting to shift the focus of the questionable actions of Sky Down in this regard to Mr. Butikofer, a witness whose credibility was not questioned at trial and who, after trial, has decided, for whatever reason, that he wishes to recant some or part of his prior testimony.

If, as Respondents allege, Mr. Butikofer committed perjury at trial and if everyone else at trial, including one of the Defendants, told the same story as Mr. Butikofer, does that not make them all perjurers? How can we know for sure without the opportunity to examine all of these witnesses under oath in light of this newly discovered evidence? Without an opportunity for a new trial we cannot know if their prior trial testimony was or was not inconsistent or perjured.

Respondents claim that the district court was correct to deny Appellant's motion for a new trial because this new evidence would not make any difference in the outcome if there were a new trial. (**R. Brief**, p. 16.) However, the only reason that the magistrate judge said that this newly discovered evidence would not likely change the result is because "the witness, Mr. Butikofer, has little or no credibility left at this time." (See Decision on Plaintiff's Motion for a New Trial, entered October 9, 2018, p. 4.)

Appellant submits that Mr. Butikofer's ultimate credibility is yet to be determined. That can only be done at a new trial. To do otherwise admits the possibility that the magistrate's decision was based on perjured testimony. This is especially true when that affidavit is

considered in light of the corroborating evidence in the record that was pointed out to the courts below and is set out in Appellant's Brief. It is not easy for an employee to take an adverse position with his employer when his livelihood depends upon going along with an employer's request, even if it is to sign a back-dated agreement claiming he has always been an independent contractor. That is why Idaho Code § 72-318 invalidates any agreement, like those Sky Down had their workers sign, that is simply a device designed to relieve an employer from the burdens put upon them by the Idaho Workers' Compensation Law.

Logic and common sense would lead one to conclude that this new evidence could very likely change the outcome if it were permitted to be presented at a new trial and the Trier of fact, after viewing all of the evidence and hearing all of the testimony of witnesses presented at that new trial, determined this new evidence and testimony to be credible.

The magistrate concluded that Mr. Butikofer is not credible solely because his affidavit contradicts certain aspects of his testimony at trial. However, this conclusion is premature and unsupported. In order to honor the precept that it is the business of a court to ascertain the truth of a matter, Mr. Butikofer's credibility must actually be tested. That is an exercise that may only be accomplished at a new trial.

II. CONCLUSION

Having addressed the relevant responses of Respondents Brief, and for the reasons and on the grounds set forth above and in Appellant's Brief, Appellant again respectfully requests that the Supreme Court reverse the *Memorandum Decision* of the district court in the appeal of the magistrate court's *Judgment* as well as its *Decision on Plaintiff's Motion for a New Trial.*

DATED this 1ST day of November, 2019

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

Blair D. Jaynes
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1ST day of November, 2019, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF upon the following by the method identified below and addressed to:

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