COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1078

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ROBERT E. ERVIN,

PLAINTIFF-APPELLANT,

WEST BEND MUTUAL INSURANCE COMPANY, A WISCONSIN INSURANCE CORPORATION,

PLAINTIFF,

V.

GREAT WEST CASUALTY COMPANY, A FOREIGN INSURANCE CORPORATION, GRANT L. GUILDNER D/B/A GUILDNER TRANSPORT, AND DAVID W. STITZER,

DEFENDANTS-RESPONDENTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A WISCONSIN INSURANCE CORPORATION, AND MARLIN E. HENSLER III,

DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: MICHAEL B. TORPHY, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

ROGGENSACK, J. Robert Ervin appeals from an order of the circuit court granting summary judgment dismissing his suit against a trucking company, Grant Guildner d/b/a Guildner Transport (Guildner); its driver, David Stitzer; and its insurer, Great West Casualty Company (Great West). The circuit court concluded that Stitzer was a loaned employee of Ervin's employer, Kaltenberg Seed Farms, Inc. (Kaltenberg), and therefore, Guilder, Stitzer and Great West were not liable as a matter of law for injuries Ervin sustained as a result of Stitzer's alleged negligence. We agree with the circuit court that Stitzer was a loaned employee of Kaltenberg because he consented to perform Kaltenberg's work pursuant to a prior agreement between Guildner and Kaltenberg, which allowed Kaltenberg to control the details of that work done primarily for the benefit of Kaltenberg. Therefore, because Stitzer was a co-worker of Ervin, to whom the worker's compensation exclusivity provision applies, he, Guildner and Great West were properly dismissed on summary judgment. Accordingly, we affirm.

BACKGROUND

In 1994, prior to the harvest season, Guildner agreed to provide Kaltenberg with two truck tractors and drivers to haul harvested seed corn in Kaltenberg trailers from Kaltenberg fields. Guildner had previously contracted with Kaltenberg to supply tractors and drivers during the 1992 and 1993 harvest seasons.

Under the agreement between Guilder and Kaltenberg, the tractors and drivers were reserved exclusively for Kaltenberg's use during the entire harvest season. Kaltenberg kept track of the drivers' hours and paid Guildner for the use of its tractors and drivers. Kaltenberg was also responsible for any overweight violations incurred by the truck drivers while they were driving for Kaltenberg. Guildner continued to pay the drivers' wages and benefits. Although Guildner had the ultimate power to discipline or dismiss the drivers, Kaltenberg could request that a driver be taken off the job. And, on at least one occasion prior to 1994, Kaltenberg requested that a driver be taken off the job, and Guildner complied with that request.

Before the 1994 harvest season began, Grant Guildner asked two of his truck drivers, David Stitzer and Robert Pokorny, if they wanted to drive for Kaltenberg during the harvest season. Stitzer accepted the job because he thought the work would be more regular and the pay greater than over-the-road hauling. Each day of the harvest season, Kaltenberg provided Stitzer with directions to a specific field to which he took an empty Kaltenberg trailer. Kaltenberg often instructed Stitzer on where and how to enter the field and park the truck. Once the trailer was loaded, Stitzer hauled the load to a location specified by Kaltenberg. It had no employees of its own to drive the semi-tractors. Stitzer had been driving for Kaltenberg using this operating procedure for about three weeks before the accident occurred.

On September 22, 1994, Kaltenberg's field supervisor decided that entries into the field that day would be made by approaching from the south and then backing the truck into the field's driveway by crossing the northbound lane of the highway. As Stitzer backed the truck into the cornfield as instructed, a northbound automobile driven by Marlin Hensler attempted to avoid hitting the

truck and skidded off the road into the field, striking Ervin and causing him serious injury.

On February 14, 1997, Ervin and his insurer, West Bend Mutual Insurance Company, filed a complaint against Stitzer, Guildner, Great West, Hensler and his insurer, American Family Mutual Insurance Company (American Family), alleging that Ervin received injuries as a result of the negligence of Stitzer and Hensler. On June 9, 1997, Stitzer, Guildner and Great West filed a motion for summary judgment, alleging that Stitzer was a loaned employee of Kaltenberg; and therefore, they were not liable to Ervin due to the exclusivity provisions of the worker's compensation law.[1] Ervin also filed a motion for partial summary judgment, requesting an order declaring that Stitzer was the general employee of Guildner and was not a loaned employee as a matter of law. On January 20, 1998, the circuit court granted summary judgment in favor of Stitzer, Guildner and Great West and dismissed those defendants from the lawsuit. This appeal followed.

DISCUSSION

Standard of Review.

This court reviews summary judgment decisions *de novo*, applying the same standards employed by the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). We first examine

[1] Section 102.03(2), STATS., states in relevant part:

> Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employe of the same employer and the worker's compensation insurance carrier….

the complaint to determine whether it states a claim, and then review the answer, to determine whether it joins issues of fact or law. ***Id.*** If we determine that the complaint and answer are sufficient to join issue, we proceed to examine the moving party's affidavits, to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** at 232-33, 568 N.W.2d at 34. If they do, we look to the opposing party's affidavits, to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** at 233, 568 N.W.2d at 34.

Although there are some facts in dispute in this case, all the material facts necessary to a resolution of the loaned employee defense are undisputed. When the material facts are undisputed, the determination of whether an employee is a loaned employee is a question of law which we determine independent of the circuit court. ***Borneman v. Corwyn Transp., Ltd.***, 219 Wis.2d 346, 352, 580 N.W.2d 253, 256 (1998) (hereinafter ***Borneman II***).

Loaned Employee Doctrine.

Under the loaned employee doctrine, an employee of one employer, referred to as the general employer, may under certain circumstances become the employee of another employer, referred to as the special employer. ***Id.*** at 352-53, 580 N.W.2d at 256. However, an employee is presumed to remain in the employ of the general employer, absent evidence to the contrary. ***Id.*** at 357, 580 N.W.2d at 258.

The test to determine whether an employee remains in the employ of the general employer or becomes the loaned employee of the special employer was first set forth in ***Seaman Body Corp. v. Industrial Comm'n,*** 204 Wis. 157, 163, 235 N.W. 433, 435-36 (1931). The ***Seaman*** loaned employee test involves three elements and four vital questions. The three elements are:

> (a) Consent on the part of the employee to work for a special employer; (b) Actual entry by the employee upon the work of and for the special employer pursuant to an express or implied contract so to do; (c) Power of the special employer to control the details of the work to be performed and to determine how the work shall be done and whether it shall stop or continue.

Id. at 163, 235 N.W. at 435. The four vital questions are:

> (1) Did the employee actually or impliedly consent to work for a special employer? (2) Whose was the work he was performing at the time of injury? (3) Whose was the right to control the details of the work being performed? (4) For whose benefit primarily was the work being done?

Id. at 163, 235 N.W. at 436. Although the three elements and the four vital questions are intertwined and closely related, the four vital questions are intended to facilitate the analysis of the three elements. ***Borneman II***, 219 Wis.2d at 355-58, 580 N.W.2d at 257-58. Therefore, as we address the issues raised in the case at hand, we will address the three elements[2] using the appropriate vital questions to assist our consideration of each element.

1. Employee consent.

The element of employee consent and the related vital question (Did the employee actually or impliedly consent to work for a special employer?) are the most important aspects of the ***Seaman*** test. ***Borneman II***, 219 Wis.2d at 357, 580 N.W.2d at 258. Consent of an employee to perform certain acts on behalf of

[2] Some appellate courts have broken the three elements of ***Seaman Body Corp. v. Industrial Comm'n***, 204 Wis. 157, 163, 235 N.W. 433, 435-36 (1931), into four questions. *See* ***Meka v. Falk Corp.***, 102 Wis.2d 148, 151, 306 N.W.2d 65, 68 (1981); ***Bauernfeind v. Zell***, 190 Wis.2d 701, 714-15, 528 N.W.2d 1, 6 (1995). However, in its most recent consideration of the loaned employee doctrine, the supreme court has returned to stating the ***Seaman*** test with three elements. ***Borneman v. Corwyn Transp., Ltd.***, 219 Wis.2d 346, 358, 580 N.W.2d 253, 258 (1998). Therefore, we do so as well.

or for the benefit of the another employer is not enough to establish this element. Rather, the employee must consent to leave his general employment and enter into a new employment relationship with the special employer, if only temporarily. ***Id.*** at 357-58, 580 N.W.2d at 258.

The element of employee consent may be established in several ways. First, the existence of an arrangement between the general employer and the special employer is relevant to the issue of an employee's consent to enter into a new employment relationship with the special employer. ***Id.*** at 360, 580 N.W.2d at 259. A formal contract between the two employers is not required, but an express or implied agreement between them establishes the status of the employee as between the two employers and it is a factor bearing on the issue of whether the employee consented to work for the special employer. ***Id.*** at 359, 580 N.W.2d at 258-59. Another factor which may tend to show that an employee consented to work for a special employer is whether the employee received any new consideration or benefit by doing so. ***Borneman v. Corwyn Transport, Ltd.***, 212 Wis.2d 25, 36, 567 N.W.2d 887, 893 (Ct. App. 1997) (hereinafter ***Borneman I***). Finally, the employee's consent can be inferred from his words or acts which evince his state of mind. Consent cannot be implied merely from an employee's obedience to the commands of the general employer in performing work for another employer; however, an employee who works willingly under the direction and control of another employer impliedly consents to that working relationship. ***Bauernfeind v. Zell***, 190 Wis.2d 701, 715, 528 N.W.2d 1, 6 (1995).

Guildner entered into an agreement with Kaltenberg to provide two tractors with drivers for the duration of the 1994 harvest season. Guildner asked Stitzer if he wanted to drive for Kaltenberg, and Stitzer said that he did. Stitzer

did not merely obey his general employer's order to drive for Kaltenberg; rather, he entered into the new employment relationship because he thought he would receive the benefits of better pay and more regular hours by virtue of the work he would perform for Kaltenberg. Additionally, Stitzer willingly worked for Kaltenberg for three weeks before the accident occurred, during which time all of the on-the-job activities were subject to Kaltenberg's direction and control, thereby establishing implied consent to work for Kaltenberg. Therefore, based on the above factors, we conclude Stitzer consented to enter into a temporary employment relationship with Kaltenberg.

2. Work of and for another employer.

Subsumed in this element are two of the vital questions: Whose work was the employee performing at the time of the injury and for whose primary benefit was that work being done? ***Borneman I***, 212 Wis.2d at 40, 567 N.W.2d at 895. An employee can perform casual, uncompensated work which benefits another employer, without establishing this element. ***Id.*** Although a formal contract is not required, an arrangement between the general employer and the special employer must exist before the employee commences work because if the employee was performing work contemplated by an agreement between the general employer and the special employer, that work is likely to directly benefit the special employer.

For example, in ***Borneman I***, we concluded that a truck driver who voluntarily helped another employer's employees load his trailer, without any prior agreement to do so, without compensation, and when that employer had sufficient employees of its own to do the work, was not performing work primarily for the benefit of the other employer. ***Id.*** at 40-41, 567 N.W.2d at 895. Assisting

in loading the trailer was not required to fulfill any prior agreement and although the work certainly benefited the other employer, it also benefited the driver and his general employer because the driver could not get on the road until the load was in the truck. ***Id.***

In the case at hand, the work Stitzer was performing at the time of the accident, backing the truck into the cornfield, benefited Kaltenberg, who required the truck be placed so as to facilitate loading it with seed corn and exiting from the field after loading. Backing the truck into the field was a component of Stitzer's work for Kaltenberg, as Stitzer was required to follow Kaltenberg's directions when working in the seed corn harvest. It furthered Kaltenberg's regular business of harvesting seed corn. Guildner and Kaltenberg agreed Stitzer would be subject to Kaltenberg's direction and control. Therefore, Stitzer was performing Kaltenberg's work, undertaken primarily for the benefit of Kaltenberg at the time of the accident.

3. Power to control the details of the work.

This element and the relevant vital question (Whose right was it to control the details of the work being performed?) concerns the authority of the employer to direct and control the work of the specific employee, as opposed to the employer's general control of work activity. ***Id.*** at 42, 567 N.W.2d at 895. Although this element permits the special employer to control the day-to-day activities of the loaned employee, a special employer may have the power to exercise the requisite control over a loaned employee even if the general employer retains certain rights and responsibilities with respect to the loaned employee. ***Meka v. Falk Corp.***, 102 Wis.2d 148, 157-58, 306 N.W.2d 65, 71 (1981). For example, the general employer may continue to pay the loaned employee's wages

and benefits, and it may have the ultimate authority to discipline or discharge the employee; however, for a loaned employment relationship to exist, the employers must establish these rights and responsibilities by prior agreement. ***Id.***

In ***Meka***, Nugent supplied a temporary employee to Falk pursuant to a prior agreement between the two employers. Falk supervised the employee's work and could remove him from employment at Falk, while Nugent retained the right to terminate the employee and the responsibility of paying his wages and benefits. ***Id.*** at 156-158, 306 N.W.2d at 70-71. The supreme court concluded that the critical issue was whether Falk became the special employer, which could occur while Nugent remained the general employer. ***Id.*** at 157, 306 N.W.2d at 71. And when examining the issue of control of the employee's day-to-day activities, Falk could treat the employee differently from its general employees and still be held to be a special employer. ***Id.*** at 158, 306 N.W.2d at 71.

Here, there was an agreement between Guildner and Kaltenberg that during the 1994 harvest season Guildner retained the responsibility of paying Stitzer's wages and benefits and had the ultimate authority to terminate Stitzer's employment. Kaltenberg was to keep track of Stitzer's hours and pay Guildner for his work, pay for any overweight violations, and could recommend discipline or dismissal if Stitzer's work did not fulfill Guildner and Kaltenberg's agreement. Most importantly, Kaltenberg controlled Stitzer's day-to-day activities during the harvest season. Each day Kaltenberg instructed Stitzer to drive to a specific field; Kaltenberg directed Stitzer to the specific location in the field and Kaltenberg directed Stitzer where and how to enter the field and where to park the truck. Furthermore, at the time of the accident, Stitzer was backing the truck into the field as Kaltenberg specifically instructed. Kaltenberg directed the details of Stitzer's work both on the day of the accident and throughout the harvest season,

thereby establishing the element of control. Therefore, based on the factors identified in ***Seaman*** and re-affirmed in ***Borneman II***, we conclude Stitzer was a special employee of Kaltenberg at the time of the accident and Ervin's remedy as to Guildner, Stitzer and Great West is limited by the provisions of the Worker's Compensation Act.

CONCLUSION

Stitzer consented to perform Kaltenberg's work pursuant to a prior agreement between Guildner and Kaltenberg, when he worked for Kaltenberg for three weeks. At the time of the accident, he was performing Kaltenberg's work which was primarily for the benefit of Kaltenberg, who had the right to control the details of that work. Therefore, Stitzer was an employee loaned to Kaltenberg for the duration of the harvest season, and as to Guildner, Stitzer and Great West, Ervin's claims are limited by the exclusive remedy provision of worker's compensation. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Order affirmed.

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