

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CIVIL ACTION NO. 4:01CV-106-M

BITUMINOUS CASUALTY CORPORATION

PLAINTIFF

v.

JUDGMENT

J&L LUMBER COMPANY, INC.

DEFENDANT

This matter having come before the Court on cross Motions for Summary Judgment filed by the Plaintiff, Bituminous Casualty Corporation, and the Defendant, J&L Lumber Company, Inc., and the Court on this date having issued a Memorandum Opinion and Order addressing said Motions,

IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is GRANTED and the Defendant's Motion for Summary Judgment is DENIED.

THIS IS A FINAL AND APPEALABLE ORDER AND THERE IS NO JUST CAUSE FOR DELAY.

This the 15th day of October, 2002.

JEFFREY A. APPERSON, CLERK

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Copies to all counsel

JEFFREY A. APPERSON, CLERK
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Deputy Clerk

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CIVIL ACTION NO. 4:01-CV-106-M

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MEMORANDUM OPINION AND ORDER

J&L LUMBER COMPANY, INC.

DEFENDANT

This matter is before the Court on cross Motions for Summary Judgment filed by the Plaintiff, Bituminous Casualty Corporation ("Bituminous") [DN 21], and the Defendant, J&L Lumber Company, Inc. ("J&L") [DN 25]. Having been fully briefed, the matter now stands ripe for decision. For the reasons discussed below, the Plaintiff's Motion for Summary Judgment is **GRANTED**, and the Defendant's Motion for Summary Judgment is **DENIED**.

STANDARD OF REVIEW

In order to grant a motion for summary judgment, the Court must find that the pleadings, together with the depositions, interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v. Liberty

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Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Although the Court must review the evidence in the light most favorable to the non-moving party, the non-moving party is required to do more than simply show that there is some “metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Co., 475 U.S. 574, 586 (1986). The Rule requires the non-moving party to present “*specific facts* showing there is a *genuine* issue for trial.” Fed. R. Civ. P. 56(e) (emphasis added). Moreover, the “mere existence of a scintilla of evidence” in support of the non-moving party’s position is insufficient; there must be evidence on which a reasonable fact finder could find for the non-moving party.” Anderson, 477 U.S. at 252.

STATEMENT OF FACTS

This is a declaratory judgment action brought by Bituminous against its insured, J&L, seeking a determination of whether the commercial insurance policies issued by Bituminous to J&L obligate Bituminous to defend and indemnify J&L for injuries sustained by one of J&L’s log haulers, Philip Duncan Shields (“Shields”).

In November 1998, Shields was struck by a falling log during the loading of a J&L truck and suffered severe leg injuries. In July 1999, Shields brought a negligence action against J&L in Ohio County Circuit Court seeking compensatory damages. In addition, on October 23, 2000, Shields filed an Application for Resolution of Injury Claim with the Kentucky Department of Workers’ Claims.

At the time of the accident, J&L did not carry workers’ compensation insurance,

but did maintain two commercial insurance policies issued by Bituminous: a “general liability” policy and an “automobile” policy. In accordance with those policies, J&L requested that Bituminous provide a defense against, and indemnification for, the claims asserted by Shields.

Although Bituminous has provided J&L with a defense under a reservation of rights, Bituminous maintains that it has no obligations under the policies, since neither of those policies covers injuries sustained by “employees” of the insured. J&L, on the other hand, contends that Shields was *not* an employee at the time of his injury, and that Bituminous is therefore obligated to provide coverage, including a defense, of Shields’s negligence action. Thus, the primary issue before the Court is whether or not Shields was an employee of J&L at the time of the accident.

DISCUSSION

I. SHIELDS WAS A J&L EMPLOYEE AT THE TIME OF THE ACCIDENT AND, THEREFORE, BITUMINOUS HAS NO DUTY TO DEFEND OR INDEMNIFY J&L FOR CLAIMS ARISING FROM SHIELDS’S INJURIES.

It is undisputed that, if Shields was an employee of J&L at the time of the accident, then Bituminous has no duty to defend or indemnify J&L for any losses arising from Shields’s negligence claim.¹ Kentucky courts have adopted a nine factor test for determining whether one acting for another is a servant or an independent contractor:

¹ Both policies issued by Bituminous to J&L specifically exclude “‘bodily injury’ to an ‘employee’ of the ‘insured’ arising out of and in the course of: (1) employment by the ‘insured’; or (2) performing the duties related to the conduct of the ‘insured’s’ business.”

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer; and
- (i) whether or not the parties believe they are creating the relationship of master and servant.

Ratliff v. Redmon, 396 S.W.2d 320, 324-25 (Ky. 1965).²

The Kentucky Supreme Court has determined that four of the nine factors are of paramount importance: (1) the nature of the work being performed as it relates to the business of the employer; (2) the extent of control which is exercised by the employer; (3) the professional skill which is required of the worker; and (4) the true intentions of the

² Although originally applied in the workers' compensation context, this test has been subsequently extended to other contexts, including cases where, as here, the issue was whether a person was an employee or independent contractor for purposes coverage under a commercial insurance policy. See Mullins v. Western Pioneer Life Ins. Co., 472 S.W.2d 494 (Ky. 1971).

parties. Chambers v. Wooten's IGA Foodliner, 436 S.W.2d 265, 266 (Ky. 1969); Accord Purchase Transp. Services v. Estate of Wilson, 39 S.W.3d 816, 818 (Ky. 2001). Whether an individual is an employee or an independent contractor is a question of law where, as here, the facts below are substantially undisputed. See Brewer v. Millich, 276 S.W.2d 12 (Ky. 1955).

The peculiar facts of this case do not make the resolution of the issue an easy one. Applying the Ratliff / Chambers factors as set forth below, however, the Court finds that Shields was a J&L employee at the time of the accident. Accordingly, Bituminous is not obligated to defend or indemnify J&L for damages arising from Shields's negligence claim.

A. Ratliff / Chambers Analysis.

- 1. The extent of control which, by the agreement, the master may exercise over the details of the work.**

The "extent of control" test is generally considered the most important of the Ratliff / Chambers tests, although it is seldom a demonstrable fact. This test is, and must be, based on the *right* to control, rather than the *exercise* of the right. See 3 Larson's Workers' Compensation Law § 61.02. Larson notes that:

Most often the distinction is of importance when a skilled or experienced worker appears to be doing his or her job without supervision or interference. By an exercise test, he or she would seem to be uncontrolled; yet it will often be found that the employer, in any showdown, would have *the ultimate right to dictate the method of work* if there were any occasion to do so.

Id. (emphasis added).

The relationship between Shields and J&L was one in which J&L had the right to control Shields' performance in some respects, but not in others. Shields hauled lumber primarily, but not exclusively, for J&L. Although Shields owned and maintained his own trucks, he occasionally drove J&L trucks, and was driving a J&L truck at the time of his accident. Shields enjoyed substantial flexibility in scheduling and was paid primarily "by the load," although he also received a salary from J&L.³

Proof of the "extent of control" which J&L exercised over the details of Shields's work is set forth in the deposition testimony of Wilma Myers, J&L's dispatcher and "general flunky." Myers testified that she "[told] Mr. Shields what to do," including where to pick up the lumber, where to deliver it, and which truck to use (either his own or one owned by J&L). (Myers Depo, p.69). Further, the evidence shows that certain aspects of the job, such as loading, required close cooperation between Shields and other J&L employees. Finally, J&L regularly employed its own drivers, and there is no evidence that Shields was subjected to less "control" than any other J&L driver. Therefore, although Shields enjoyed considerable independence, it appears that in any showdown, J&L had the ultimate right to dictate the method of work if there were any occasion to do so.

³ See discussion of "method of payment," *infra*.

2. **Whether or not the one employed is engaged in a distinct occupation or business.**

J&L is in the business of cutting and hauling lumber. J&L employs crews to cut the lumber, and also owns trucks and employs drivers to deliver the lumber to its buyers. Thus, Shields's occupation, hauling lumber, was not distinct from that carried on by J&L.

3. **The kind of occupation, with reference to whether, in the locality, work is usually done under the direction of the employer or by a specialist without supervision.**

The parties have not presented evidence as to the general practice of lumber companies in the locality. It is undisputed, however, that J&L employed its own drivers and owned its own trucks. Further, the testimony of Wilma Myers reveals that J&L directed its drivers, including Shields, as to where to pick up the lumber, where to deliver the lumber, and which truck to use. Therefore, regardless of the general practice in the locality, it appears that J&L directed its own lumber hauling operations and did not rely on "specialist[s] without supervision."

4. **The skill required in the particular occupation.**

Although commercial truck driving requires a CDL license and some degree of skill, it is not the type of skill that is, in and of itself, indicative of independent contractor status. For example, in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), the Supreme Court held that truck driver positions required no special qualifications because "the job skill there involved ... is one that many persons possess or can fairly

readily acquire." Id. at 309 n. 13. Thus, the minimal skill required to drive a J&L lumber truck does not indicate that Shields was an independent contractor.

5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.

Although Shields usually used his own trucks to haul lumber for J&L, he would "occasionally" drive a truck owned by J&L, as was the case on the day of the accident. Even though Shields's truck ownership would seem to cut in favor of independent contractor status, there is a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business. See 3 Larson's Workers' Compensation Law § 61:07.

The "place of work," on the other hand, was clearly supplied by J&L. The evidence shows that Shields was physically present on the premises of J&L "about every day," picked up his loads from J&L work sites and delivered them to J&L customers. Therefore, on the whole, this factor appears to cut in favor of employee status.

6. The length of time for which the person is employed.

Shields has been continuously "employed" by J&L, in various capacities, since the late 1980s. During that time, Shields was present at the premises of J&L almost every day and hauled lumber exclusively for J&L two to five days per week. Thus, Shields's length of employment with J&L – roughly ten years – suggests that he was an employee.

7. **The method of payment, whether by the time or by the job.**

Shields's method of payment was somewhat perplexing. Shields was paid a set amount for each load that he hauled for J&L. In addition, Shields was listed on the payroll of J&L and received a regular salary of \$250.00 per week. According to J&L, however, this was not a true "salary," but merely a mechanism for providing tax assistance and health insurance for Shields, who had only a second grade education. Under this system, Shields would receive a weekly check of \$250.00, from which taxes and health insurance premiums were deducted. Then, the remaining amount would be credited against whatever amount Shields was owed for hauling.

However noble J&L's intentions might have been, the fact remains that Shields received a regular salary of \$250 per week from J&L, was listed on the J&L payroll, filed his tax forms through J&L, and was included on J&L's health insurance policy. That Shields was also compensated based on the amount that he hauled does nothing to negate his status as an employee. Employees in many industries are paid by the "piece," rather than by the hour, yet are not considered independent contractors. Shields received his salary, without exception, for every week that he worked, including the week of his injury. Thus, J&L's method of payment clearly indicates that Shields was an employee.

8. **Whether or not the work is a part of the regular business of the employer.**

In his treatise on Workers' Compensation Law, Larson states that:

The hauling and loading of logs, ties, and the like have usually been classified as part of the employer's business so as to bring within the act trucker-owners who are paid by quantity and who are free to hire their own assistants and, in some cases, to work on their own time. . . . [T]his is particularly true when the activities of the truckers must be integrated and coordinated with the employer's overall production pattern.

3 Larson's Workers' Compensation Law § 62.04. J&L owned its own trucks, including "one or two eighteen wheelers," and also employed its own drivers. Therefore, hauling timber unquestionably formed an essential and regular part of J&L's enterprise.

9. Whether or not the parties believe they are creating the relationship of master and servant.

Both Shields and J&L assert that they intended for Shields to be an independent contractor and did not believe they were creating an employer-employee relationship. Their actions, however, are entirely inconsistent with their assertions. Had J&L truly intended to avoid the creation of an employer-employee relationship, it should not have allowed Shields to: (1) appear on J&L's payroll; (2) receive a regular salary from J&L's bank account with deductions for taxes and health insurance taken out; (3) procure health insurance through J&L; (4) be listed as a driver on J&L's automobile insurance policy; and (5) file his W-2 tax forms through J&L.

Moreover, although Shields now denies that he is a J&L employee, he was eager to represent himself as such in order to procure health insurance through J&L and to file for

benefits with the Kentucky Department of Workers' Claims. Unfortunately, one cannot claim the benefits of employee status without also accepting the corresponding burdens. Therefore, based on their conduct, rather than their assertions, the Court finds that Shields and J&L intended to create a relationship of master and servant.

Applying the factors set forth in Ratliff and Chambers to the present case, the Court finds that Shields was an employee of J&L at the time of the accident and, therefore, Bituminous has no duty to defend or indemnify J&L for any losses arising from Shields's negligence claim.

II. BITUMINOUS IS NOT PRECLUDED FROM SEEKING A DECLARATORY JUDGMENT ON THE ISSUE OF SHIELDS' EMPLOYMENT STATUS.

In April 2002, the Ohio Circuit Court granted partial summary judgment in favor of Shields in the underlying negligence action. In that action, J&L had asserted the Workers' Compensation Act as a defense. After setting forth its findings of fact, the Court concluded that Shields was *not* an employee of J&L at the time of the accident and, as a result, J&L's defense based on the Workers' Compensation Act was stricken. Significantly, Shields's motion for partial summary judgment was not opposed by J&L. In fact, the Court found that "there is no dispute regarding the facts as to whether or not Shields was an employee of J&L Lumber on November 13, 1998."

Clearly, both Shields and J&L desired this result. From Shields's perspective, the Court's determination that he was not an employee allowed his negligence action to

proceed, with any recovery to be paid by Bituminous, rather than Shields's long-time friends at J&L. Similarly, from J&L's perspective, the Court's decision meant that Bituminous would be obligated to defend and indemnify J&L for any damages arising from Shields's lawsuit. This was especially important in light of the fact that J&L did not carry workers' compensation insurance. Although the nature of the partial summary judgment motion was hardly adversarial, J&L now asserts that the Ohio Circuit Court judgment bars the relitigation of Shields' employment status under the doctrines of res judicata and collateral estoppel.⁴ The Court does not agree.

A. Claim Preclusion (Res Judicata).

Res judicata, or claim preclusion, prohibits parties from relitigating a claim that was or could have been raised in a prior action, when there is an identity of parties, identity of causes of action, and the first action is decided on the merits. George v. United Kentucky Bank, Inc., 753 F.2d 50 (6th Cir. 1985). In the case at hand, there is clearly no identity of parties, since Bituminous was not a party to the state court action. Further, the state court cause of action was based on a negligence claim, whereas the present cause of action is for a declaratory judgment to determine whether or not Shields was an "employee" for purposes of liability coverage under two commercial insurance policies. Finally, the first "action," namely the negligence claim, has not been decided on the merits and is wholly irrelevant here. Therefore, claim preclusion is inapplicable.

⁴ In modern practice, "res judicata" and "collateral estoppel" are properly referred to as "claim preclusion" and "issue preclusion," respectively.

B. Issue Preclusion (Collateral Estoppel).

Collateral estoppel, or issue preclusion, provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action *involving a party to the prior litigation.*" United States v. Mendoza, 464 U.S. 154, 158 (1984) (emphasis added). The doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue *with the same party or his privy* and of promoting judicial economy by preventing needless litigation." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (emphasis added).

The Sixth Circuit has established a well known general standard for applying collateral estoppel: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had full and fair opportunity to litigate the issue in the prior proceeding. Detroit Police Officers Ass'n. v. Young, 824 F.2d 512, 515 (6th Cir.1987).

In the case at hand, the first three tests are satisfied. As to the fourth test, however, it is clear that Bituminous did not have a full and fair opportunity to litigate the issue in the state court proceeding. Neither Bituminous, nor any party qualifying as its privy, participated in or was a party to that action. Although issue preclusion can apply where the parties in the prior action were not identical, it is well-established that the party

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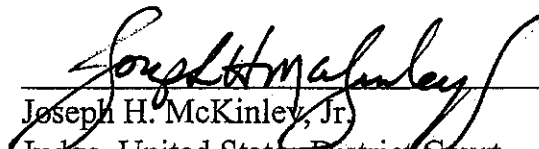
against whom issue preclusion is invoked, or his privy, must have been a party. See Parklane, 439 U.S. at 326.

Although Bituminous provided a defense to J&L in the state court action under a reservation of rights, J&L was not in privity with Bituminous. In this context, "privity" means such identity of interest that the party to the judgment represented the same legal right as the party against whom the doctrine is being asserted. See Corzin v. Fordu (In re Fordu), 201 F.3d 693, 705 (6th Cir. 1999).

The state court's order granting partial summary judgment to Shields was not the result of a good-faith and vigorous adversary relationship. J&L did not oppose Shields' motion for partial summary judgment because, as stated earlier, both Shields and J&L benefitted from the state court's conclusion that Shields was an independent contractor. The Court finds that Bituminous did not have a full and fair opportunity to litigate the issue of Shields' employment status in the state court action; nor was J&L in privity with Bituminous. Therefore, the state court judgment does not preclude Bituminous from litigating the issue of Shields' employment status.

For the foregoing reasons, **IT IS HEREBY ORDERED** that the Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is **DENIED**.

This the 15th day of October, 2002.




Joseph H. McKinley, Jr.
Judge, United States District Court

cc: counsel of record
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ENTERED

OCT 16 2002

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