

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 6, 1996

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.

NOTICE

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

No. 95-3464

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MARTIN A. EVANS,

Plaintiff,

v.

**BUTLER MANUFACTURING
COMPANY, a Delaware
Corporation,**

Defendant-Third Party Plaintiff-Appellant,

**DOUGLAS COUNTY
WELFARE DEPARTMENT
OF SOCIAL SERVICES,**

Nominal-Defendant,

v.

DAVE EVANS TRANSPORTS, INC.,

Third Party Defendant-Respondent.

APPEAL from a judgment of the circuit court for Douglas County:
JOSEPH A. MC DONALD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Butler Manufacturing Company appeals a summary judgment dismissing its third-party action against Dave Evans Transports, Inc. (the company). The trial court concluded that the company was immune from suit under the worker's compensation law for injuries suffered by its employee, Martin Evans, the owner's brother. Butler contends that Martin was an independent contractor rather than an employee. It argues that outstanding issues of material fact preclude summary judgment and that the company either waived or should be estopped from raising the exclusive remedy defense. We reject these arguments and affirm the judgment.

Uncontradicted evidence establishes that Martin Evans was a statutory employee of the company rather than an independent contractor. Under § 102.07(8)(b), STATS., a person who is an independent contractor for other purposes is still considered an employee for purposes of the worker's compensation act unless he meets nine specified criteria.¹ Because Evans is considered an employee if he fails to meet any of the statutory conditions, issues of fact regarding some of these conditions are immaterial if there is no issue of fact regarding any condition that makes Martin an employee.

¹ Section 102.07(8)(b), STATS., provides:

An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment materials and other facilities.
2. Holds or has applied for a federal employer identification number.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or services performed under a contract

Martin is an employee for worker's compensation purposes because he fails to meet at least three of the conditions required to make him an independent contractor. Martin never maintained a separate business office or location. He owned the truck in question, but leased it to the company and all servicing and repairs were done by company employees. He never drove for any hauler other than the company. Uncontradicted evidence establishes that Martin Evans did not maintain a separate business with his own office, equipment, materials or other facilities.

There is also no evidence that Martin Evans had a federal employer identification number or had ever applied for one. Dave Evans testified that "to the best of [his] knowledge," Martin did not have a federal employer identification number. While this evidence is somewhat equivocal, as Martin's employer and his brother, Dave's testimony creates prima facie evidence that Martin did not hold a federal identification number. In the absence of any contradictory evidence, Dave's testimony is sufficient to support the judgment.

Uncontroverted evidence also establishes that the company controlled Martin's day-to-day tasks in a manner that is inconsistent with his being an independent contractor. He was directed when and where to pick up and deliver loads, what route to take and how the job was to be done. He was required to adhere to the company's driver's manual which prohibited passengers, regulated weekend work, installed a call-in policy, regulated log book entries, regulated cleanliness, mandated tools and safety equipment, regulated paperwork, regulated the use of blowers, blow-down valves, dolly downing, and accident procedure, established driver performance and safety standards and rules of conduct, and regulated maintenance and seat belt use. Butler argues that, as the owner of the tractor, Martin controlled the means of performing his work. Any control that Martin had over the tractor was lost

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on a commission or per job or competitive bid basis and not on any other basis.

7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

when he leased it to the company. Ownership of the tractor gave Martin no control over his day-to-day duties to the company.

The company did not waive and is not estopped from raising the exclusive remedy defense. An employer may forego the exclusive remedy defense by express contract. See *Young v. Anaconda Am. Brass Co.*, 43 Wis.2d 36, 54, 168 N.W.2d 112, 122 (1969). There is no such contract in this case. Butler has not established any basis for equitable estoppel because it has identified no detrimental reliance. See *M & I Bank v. First Am. Nat'l Bank*, 75 Wis.2d 168, 176, 248 N.W.2d 475, 480 (1970).

Butler notes that both the company and Martin Evans previously took the position that Evans was an independent contractor. Section 102.07(8)(b), STATS., applies its own definition of "employee" regardless of whether the employee is an independent contractor for other purposes. Their belief that he was an independent contractor, even if they had § 102.07(8)(b) in mind, is irrelevant. The legislature, not the parties, has determined the factors that create an "employee" for worker's compensation purposes.

Butler argues that the worker's compensation act should not be construed to permit an employer who has failed to provide worker's compensation benefits to avoid all liability by invoking the exclusive remedy defense. The exclusive remedy provision bars an action against an employer for contribution regardless of whether the employee ever requested compensation from his employer. Because an employee cannot maintain a tort action against his employer, there is no tort liability between the employer and a third party. See *Mulder v. Acme-Cleveland Corp.*, 95 Wis.2d 173, 177, 290 N.W.2d 276, 278 (1980). Section 102.03(2), STATS., excludes all other actions against the employer.

Finally, Butler argues that the company did not raise the exclusive remedy defense in a timely manner. The trial court's scheduling order of August 26, 1994 required that the pleadings be amended by February 15, 1995. The company's amended answer raising the exclusive remedy defense was timely filed and served.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.