

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**OCTOBER 10, 1995**

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. 95-0599**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**RICHARD J. SCHLEIFE and  
DEBORAH A. SCHLEIFE,**

**Plaintiffs-Respondents,**

**v.**

**MARQUIP, INC., a domestic  
business corporation and  
ODYSSEY TRAVEL, INC., a  
domestic business corporation,**

**Defendants-Appellants.**

APPEAL from a judgment of the circuit court for Price County:  
GARY L. CARLSON, Judge. *Affirmed.*

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

PER CURIAM. Marquip, Inc., and Odyssey Travel, Inc., (collectively Marquip) appeal a judgment awarding Richard Schleife \$9,000 for five months back wages. The trial court found that an employment contract

between the parties commenced October 14, 1991, and that Schleife did not waive his right to back wages between that date and March 23, 1992. Marquip argues that Schleife was not employed during that time because Schleife failed to fulfill preconditions of the contract, did not meet the IRS definition of an employee, provided no services or benefit to his employer and because Odyssey Travel, Inc. was not able to conduct business during the dates in question. Marquip further argues that Schleife waived his right to wages for the months in question by failing to make a demand for payment until he filed this lawsuit. We reject these arguments and affirm the judgment.

Schleife was a travel agent operating his own business known as Odyssey Travel out of his home. Marquip bought Odyssey Travel from Schleife and, in a single transaction, agreed to hire him to work for the new entity, Odyssey Travel, Inc. The employment contract indicated that Schleife's employment would begin October 14, 1991. After the contracts were signed, new quarters were constructed to house the new business. In the interim, Schleife maintained the business out of his home until March 1992.

It is for the trial court and not this court to resolve conflicting inferences and to determine the weight of the evidence and the credibility of witnesses. *Fidelity & Deposit Co. v. First National Bank*, 98 Wis.2d 474, 485, 297 N.W.2d 46, 51 (Ct. App. 1980). When reviewing a trial court's factual findings, this court's duty is to affirm those findings unless they are clearly erroneous. Section 805.17(2), STATS. Here, the contract contained various preconditions to the employment including a medical exam, a request for an educational history and references, and a confidential disclosure statement. Schleife presented sufficient evidence to show that Marquip waived the preconditions. Schleife indicated to Marquip that he was willing to take a medical exam and was told that Marquip would let him know when to have the exam. Schleife complied in March 1992 when a medical exam was requested. Schleife complied with the preconditions of an educational history and references by submitting his resume. Schleife was told by Marquip that he did not need to comply with the reference requirement because they knew him as a local person. No confidentiality statement was prepared for Schleife to sign until March 1992, at which time he signed it. This evidence supports the trial court's finding that Marquip waived the preconditions stated in the contract.

The IRS test for determining whether a person is an employee is not dispositive. Marquip provides no authority for its assertion that this court is required to review the IRS standards in determining the date the employment began. Whether the IRS recognized Schleife as an employee rather than an independent contractor for tax purposes is not the same question as whether the employment contract between these parties commenced on October 14, 1991.

The record does not support Marquip's argument that Schleife did not perform services or provide any benefits to Marquip under the terms of the contract. The trial court found that Schleife was asked to perform services and did perform all services asked of him on the dates in question. He maintained the business of Odyssey Travel for the benefit of Odyssey Travel, Inc., the successor corporation, and transferred the accounts to Odyssey Travel, Inc., when requested to do so. He signed a document for his employer as the "ticket qualifier" of the new entity. Odyssey Travel, Inc., needed Schleife to sign this document because only Schleife qualified as a ticket qualifier by virtue of having two years experience selling to the public. Schleife also attended a meeting on behalf of Odyssey Travel, Inc., at his employer's request.

Marquip contends that it was economically impossible for it to employ Schleife during this time because it was not yet in business. Odyssey Travel, Inc., was conducting business through its employee, Schleife, who maintained the client base for his employer until the new offices were completed. Odyssey Travel, Inc., was formally incorporated one month before the employment contract came into effect. Although Odyssey Travel, Inc., was not licensed at that time, the employment contract did not require licensing as a precondition.<sup>1</sup> It is not unusual for a new business to employ people before it is open for business and to experience negative cash flow during the early months of its existence. Marquip was eventually able to conduct business. Its temporary inability to conduct business when the new entity was created does not establish that it was unable to conduct the business for which Schleife was hired.

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<sup>1</sup> Marquip also argues that Schleife delayed the licensing process. Because licensing was not a precondition, any delay caused by Schleife is not relevant to the question of whether he was employed during this time.

Finally, sufficient evidence supports the trial court's finding that Schleife did not waive his right to wages during the time in question. A waiver is an intentional relinquishment of a known right. *Bank of Sun Prairie v. Opstein*, 86 Wis.2d 669, 681, 273 N.W.2d 279, 284 (1979). Intent to waive is an essential element of waiver. *Id.* Schleife's conduct does not indicate any intent to waive compensation for months of work. Relying on a partial quotation from *Davies v. J.D. Wilson Co.*, 1 Wis.2d 443, 467, 85 N.W.2d 459, 471 (1957), Marquip argues that acceptance of wage payments without objection constitutes a waiver of any right to previous compensation. The statement in *Davies*, in its entirety, holds that the waiver applies if the payments are accepted "knowing that the employer regards them as payment in full." The trial court's finding that Schleife did not waive his right to compensation is not clearly erroneous. See § 805.17(2), STATS.

*By the Court.*--Judgment affirmed.

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