

Byerly v. Mermin (Dec. 9, 1997)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Jennifer Byerly)	State File No. J-18111
)	
v.)	By: Margaret A. Mangan
)	Hearing Officer
)	
Rob Mermin)	For: Steve Janson
d/b/a Circus Smirkus)	Commissioner
)	
)	Opinion No. 39-97WC

Hearing held on August 25, 1997
Record Closed on September 24, 1997

APPEARANCES:

Attorney Ronald A. Fox for the Claimant
Attorney Richard H. Saudek for the Defendant

ISSUE:

Was Rob Mermin, individually, liable under Vermont's Workers' Compensation Act for an employee's work-related injury sustained on June 18, 1995?

EXHIBITS:

Claimant's: 1. Staff Contract 1995
2. Letter dated May 20, 1996 from Rob Mermin to Jennifer and Garnett
3. Trade name Registration for Circus Smirkus
4. Corporate Registration Circus Barn, Inc.
5. Warranty Deed to Rob Mermin
6. Letter dated April 15, 1996 from Attorney Saudek to the Workers' Compensation Division

Defendant's: A. Certificate of Merger
B. Paychecks with endorsements
C. Application Form
D. Circus Smirkus Book by Rob Mermin

UNCONTESTED FACTS:

1. Rob Mermin met with claimant before June 1995 to discuss claimant's coming to Vermont and working for Circus Smirkus that summer.
2. "Circus Smirkus" is a trade name registered by Rob Mermin with the Vermont Secretary of State to conduct a business to teach circus arts.
3. Circus Smirkus has two parts to its operation: a camp for children interested in learning about the circus ("campers") and a touring company of older children who traveled the State of Vermont presenting performances for audiences ("troupers").
4. At Mermin's request, claimant arrived in Greensboro, Vermont on June 14, 1995.
5. Troupers prepared their program in Greensboro. In 1995 they were scheduled to begin their preparations on Sunday, June 18. The camp was based in Bolton Valley where staff were to begin on July 9.
6. On Saturday, June 17, 1995 claimant injured her leg while playing ping-pong with one of the troupers in the barn adjoining the Greensboro house.

ADDITIONAL FINDINGS OF FACT:

1. In July 1987 Rob Mermin registered the name Circus Smirkus with the Vermont Secretary of State's Office. He identified himself as the only member of the business which was intended to "Teach/Circus Arts."
2. The Circus Barn, Inc. is a Vermont non-profit corporation that was created on February 21, 1989 by the merger of two corporations, The Two Penny Circus, Inc. and The Circus Barn. The Plan of Merger filed with the Vermont Secretary of State notes that The Circus Barn's function was "to produce a children's residency program and touring circus known as Circus Smirkus'...." The purposes of The Circus Barn, Inc., as set forth in the Plan of Merger are: "(i) to operate a community center for the performing arts; (ii) to provide training and practical experience to youngsters in circus techniques and other performance skills; (iii) to produce a touring circus of, and support for and involvement in circus and other community arts events; (iv) to provide educational materials and services related to the circus and other performance art."
3. Rob Mermin is the President and Registered Agent of the Circus Barn.
4. From 1987 to the present, Mermin allowed the organization producing the circus (which in 1995 was The Circus Barn) to use the name "Circus Smirkus." He did not use it individually.

5. The principal place of business and offices of The Circus Barn Inc. are in the same building as the residence of Rob Mermin in Greensboro. In 1995 the adjoining barn was used as a training facility for Circus Smirkus troupers. A ping-pong table used by troupers and staff for recreational purposes was in the barn.
6. Mermin rented his house to The Circus Barn, Inc. to use as its headquarters and let rent go unpaid when the circus could not pay all expenses.
7. In 1995 Rob Mermin was a co-director and instructor of the Clown College of Ringling Brothers and Barnum & Bailey Circus, performer and instructor in the Artists in the Schools program of the Vermont Council on the Arts, and director of Circus Smirkus.
8. In the Spring of 1995 he met claimant while working for Ringling Brothers in Virginia and invited her to Vermont to work with the circus for the summer. At the time claimant worked in an office for Ringling Brothers. The two discussed claimant's helping in the Circus Smirkus office and working as a counselor. Mermin did not say that claimant would be working only for him, nor did he negotiate any part of a contract with her at that time.
9. Mermin asked claimant to arrive in Vermont a few days before the troupers. Her responsibilities were not clearly delineated before her arrival, but she expected to be a counselor. Claimant understood that an early arrival would help her get settled, meet people who were part of the tour, and familiarize herself with the operation.
10. On June 14, 1995, claimant flew to Burlington where a head counselor met her and drove her to the house in Greensboro. Claimant settled herself in the room provided to her and had her meals prepared in a kitchen in that house.
11. On the day of her arrival, claimant worked with the office manager for The Circus Barn. For the next few days, claimant reviewed files on the campers to assure that all paper work was in order.
12. Application forms for the camp have a CIRCUS SMIRKUS letterhead on the first page; the words THE CIRCUS BARN appear six times on the next two pages. Campers were directed to make checks payable to Circus Smirkus. Releases went to The Circus Barn, Inc.
13. In the morning of Saturday, June 17, 1995, while claimant was reviewing medical information and biographies for the campers, a trouper asked her to play ping-pong. The two walked from the house where claimant was working to the adjoining barn where they played ping-pong at a table made available for use by staff and troupers. During that game, claimant fell and injured her knee.

14. Claimant testified that she thought playing ping-pong and talking with a trouper would help her with her counselor work.

15. After her injury, claimant was presented with a contract of employment with "The Circus Barn, Inc. d/b/a Circus Smirkus." Although she signed the form, the words "Assistant to Office Manager in Greensboro, Assistant to Director at Bolton Valley as well as counselor" were not on the form when she signed it. However, she remembers expressing concern about the part of the contract that reads, "staff person understands that The Circus Barn will not be held liable for injury or loss associated with performances and activities associated with the Circus Smirkus."

16. Claimant believed she was working for Circus Smirkus. She was paid \$200 per week plus room and board.

17. Claimant's employer had a duty to provide workers' compensation insurance, but no such insurance was in effect at the time of claimant's injury.

18. Mermin knew that there was no workers' compensation insurance in place in June 1995. He had the authority to shut down the circus based on the absence of insurance and had done so in the past for lack of liability insurance.

19. After her accident, claimant continued her work in Greensboro. In early July she transferred to the camp in Bolton Valley where she worked as a counselor until her knee injury forced an early departure.

20. In Greensboro, claimant worked under the supervision of Mermin and at least three others. At Bolton Valley, she worked under the supervision of the head counselors. Mermin at that time was on tour.

CONCLUSIONS OF LAW:

1. Given the staff contract between claimant and the Circus Barn and wages paid by the Barn, no doubt exists regarding the employer-employee relationship between claimant and the Barn. The question raised by this case, however, is whether claimant was also an employee of Rob Mermin.

2. Mermin argues that the corporate status of The Circus Barn shields him from individual responsibility for this claim. He argues further that claimant was well aware from the contract she signed, the paychecks she received and the numerous campers' forms she reviewed, that her employer was The Circus Barn, not Rob Mermin.

3. Claimant focuses on claimant's understanding that she worked for Circus Smirkus, and the ubiquitous use of the "Circus Smirkus" name at Greensboro. Because Mermin was the director of Circus Smirkus, owned the Greensboro house and was the person who invited her to Vermont, she argues further that Mermin is liable for this claim.

4. If this case had arisen after the July 1, 1997 amendments to the Workers' Compensation Act, Rob Mermin's personal liability would be clear. That statute reads in pertinent part:

In the event an employer fails to secure workers' compensation as required by this section and an employee reasonably believes that he or she has received a personal injury by accident arising out of and in the course of employment with that employer, then:

If the employer is a corporation the officers ... shall be personally liable for any benefits owed to the injured employee under this chapter.

21 V.S.A. § 687 (b) (1) (emphasis added)

5. When no workers' compensation insurance is in place, our legislators determined that the financial responsibility for work-related injuries must be born by corporate decision makers, not injured workers. Those officers decide whether to comply with the statutory mandate to carry workers' compensation insurance or to risk the consequences associated with lack of insurance. 6. The question whether Mermin, as an individual, is liable in this proceeding turns on whether 1) the 1997 amendment to 21 V.S.A. § 687 simply clarified the then existing state of the law which would make Mermin liable as an officer of the Circus Barn; or 2) whether he was claimant's "employer," as that term has been defined in 21 V.S.A. § 601 (3) and interpreted in case law.

7. Nothing in case law or in the legislative history of 21 V.S.A. § 687 suggests that the Workers' Compensation Act pierced the corporate veil for uninsured companies before the 1997 amendments. In fact, the wording of the statute suggests that it was a sharp departure from the generally accepted limited liability of individuals once they form a corporation. Consequently, Mermin cannot be held individually liable under § 687.

8. Can he, then, be held liable as an "employer" as that term is defined in the Act? An "employer" includes:

the owner or lessee of premises or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed.

21 V.S.A. § 601 (3) (emphasis added).

9. An "employee" or "worker" means a person who has entered into the employment of, or works under contract of service or apprenticeship with, an employer. 21 V.S.A. § 601 (14)

10. Under Vermont's statutory definitions, an employer-employee relationship can exist for workers' compensation purposes despite the absence of that relationship for tax or other purposes.

11. The broad statutory definitions are in keeping with the purposes for which workers' compensation acts were originally enacted. The exclusive remedy of workers' compensation payments is part of the quid pro quo in which the sacrifices and gains of employers and employees are balanced. 6 Larson's Workers' Law § 65.11, at 12-1, 12-12 (1996). An injured employee is provided "expeditious and certain payments" without having to prove fault. *St. Paul Fire & Marine Ins. Co. v. Surdam*, 156 Vt. 585, 589-90, 595 A.2d 264, 266 (1991). In return, the worker gives up the right to sue the employer. *Libercent v. Aldrich*, 149 Vt. 76, 80, 539 A.2d 981, 983 (1987); *Candido v. Polymers, Inc.*, No. 95-590 (Vt. Supreme Ct., Nov. 8, 1996)

12. The Vermont Supreme Court held that the claimant in *Candido*, hired by Polymers through a temporary employment agency, could not collect workers' compensation benefits from the temporary agency then sue Polymers in tort because both were "employers" within the meaning of the Act and immune from tort liability. The Court clearly stated that the word "employer" covers multiple-employer business situations where for any reason an employee working for a business has an indirect, as well as a direct employer. *Id.* Claimant relies on *Candido* in arguing that her staff contract with the Circus Barn, Inc. does not preclude a finding that Mermin is also a statutory employer.

13. This case is markedly different from *Candido* which dealt with two distinct entities--a manufacturer of commercial brush fibers and a temporary employment agency. The agency hired the claimant, set the rate of pay and wrote the paychecks. The manufacturer established work schedules, provided job and safety training, supervised the temporary workers, and could request replacement of an unsatisfactory worker.

14. Claimant emphasizes the fact that like the manufacturer in *Candido*, Mermin was "owner of premises" where the business was being carried on. 21 V.S.A. § 601 (3) But it must be noted that the Circus Barn, not Mermin, was the "lessee" of those premises. *Id.* And the business was a single one, run by the Circus Barn. It had a single employer. The Circus Barn leased the premises. The Circus Barn entered into contracts with employees. The Circus Barn paid those employees. Its use of the Circus Smirkus trade name does not change the corporate nature of the business. Claimant cannot achieve through an interpretation of § 601 what the legislature did not do until it amended § 687 in 1997.

15. The corporate status of the Circus Barn shields Mermin in this case.

ORDER:

Rob Mermin was not an employer of claimant, within the meaning of the Workers' Compensation Act, on June 18, 1995.

Dated at Montpelier, Vermont, this 9th day of December, 1997.

Steve Janson
Commissioner