

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

| | | |
|-----------------------------|---|-------------------------|
| WAYNE KOCH, | : | No. CV-17-613 |
| Plaintiff, | : | |
| | : | |
| vs. | : | CIVIL ACTION |
| | : | |
| TROY MUSSER <i>et al.</i> , | : | |
| Defendants. | : | <i>Motion in Limine</i> |

ORDER

AND NOW, after consideration and argument on the Plaintiff's Motion *in Limine* to Preclude Any Reference to Wayne Koch as an Independent Contractor ("Motion *in Limine*"), the Court hereby issues the following Order.¹

Plaintiff's Motion *in Limine* argues that the Court should issue an order finding that Mr. Koch qualified as an employee of Defendant Troy Musser, as opposed to an independent contractor. Plaintiff proposed at argument that reference to Mr. Koch as an independent contractor could be prejudicial as to the issues of liability and damages, as a jury may predetermine that an independent contractor should be responsible for carrying his own occupational accident insurance. Additionally, the distinction may be relevant to the issue of Mr. Musser's alleged negligence, as the jury could conclude that an employer has a higher duty to supervise a jobsite than does a contractor.

In support of Plaintiff's proposition that Mr. Koch qualified as an employee, the Motion *in Limine* cites the factors that the Pennsylvania Supreme Court outlined in *Valles v. Albert Einstein Medical Center* as relevant to the determination of whether an individual is an employee or an independent contractor:

- (1) Control of manner work is to be done;
- (2) Responsibility for result only;
- (3) Terms of agreement between the parties;
- (4) The nature of the work or occupation;
- (5) Skill required for performance;

¹ Plaintiff's Motion *In Limine* was filed on October 16, 2019. Defendant's Answer was filed on October 28, 2019. The Court held argument on the Motion *in Limine* on October 30, 2019.

- (6) Whether one employed is engaged in a distinct occupation or business;
- (7) Which party supplies the tools;
- (8) Whether payment is by the time or by the job;
- (9) Whether work is part of the regular business of the employer;
- (10) The right to terminate the employment at any time.²

The Motion *in Limine* asserts that the undisputed facts established through the deposition testimony of Mr. Musser, Mr. Koch, Brian Watkins, and Dennis Waltz demonstrate that Mr. Musser met a sufficient number of the *Valles* factors to qualify as Mr. Koch's employer. Specifically, it is noted that Mr. Musser's deposition testimony establishes that he had complete authority and control over the jobsite, that he retained the right to ask any individual to leave the jobsite at any time, and that he paid his workers on an hourly basis.³ The Motion *in Limine* also cites as support the Pennsylvania Construction Workplace Misclassification Act's definition of who qualifies as an independent contractor for the purposes of the Workers' Compensation Act:

For purposes of workers' compensation, unemployment compensation and improper classification of employees provided herein, an individual who performs services in the construction industry for remuneration is an independent contractor only if:

- (1) The individual has a written contract to perform such services.
- (2) The individual is free from control or direction over performance of such services both under the contract of service and in fact.
- (3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.⁴

² *Valles v. Albert Einstein Med. Center*, 805 A.2d 1232, 1237 (Pa. 2002).

³ *Koch v. Musser, et al.*, CV-17-0613, Brief in Support of Plaintiff's Motion *in Limine* to Preclude Any Reference to Wayne Koch as an Independent Contractor Rather Than an Employee of T.A. Musser Incorporated d/b/a Musser Construction 9-10 (Oct. 16, 2019) ("Plaintiff's Brief").

⁴ 43 P.S. § 933.3(a).

Particularly relevant under this formulation is Mr. Musser's deposition testimony that he did not have a written contract with any of his workers.⁵ However, as Plaintiff is not pursuing a Workers' Compensation action, the absence of a written contract is not determinative.

It is within the jury's exclusive domain to define the precise contours of a working relationship, "except where the facts are not in dispute, in which latter event the question becomes one for determination by the court."⁶ The Court finds that several key facts remain substantially in dispute in the instant matter. For example, while the Motion *in Limine* attempts to establish Mr. Musser's control over the jobsite by citing a passage of his deposition testimony in which he stated that, in concerns to the jobsite, "I have the authority, nobody else[.]"⁷ other relevant testimony from Mr. Musser and Mr. Waltz indicates that Mr. Musser frequently delegated authority.⁸ Similarly, Mr. Musser's deposition testimony does not support the proposition that he had an *unlimited* right to terminate an "employment" relationship.⁹ Furthermore, Mr. Musser did not concede in his deposition testimony that he paid Mr. Koch on an hourly basis for his work on the Shore Diner; he instead testified that he did not remember the specific payment agreement.¹⁰

Moreover, the Motion *in Limine* fails to address several of the *Valle* factors. Certain deposition testimony and other relevant evidence, such as Mr. Musser's

⁵ See Troy Musser Deposition Page 59 (Nov. 20, 2018).

⁶ *Feller v. New Amsterdam Cas. Co.*, 70 A.2d 299, 300-01 (Pa. 1950).

⁷ Plaintiff's Brief at 9 (quoting Troy Musser Deposition Page 284, Line 23 (Nov. 20, 2018)).

⁸ Troy Musser Deposition Page 32, Lines 21-25 (Nov. 20, 2018) ("Q: Okay. So who is it on your job site that tells various individuals who is going to be on the wall, who is going to be in the middle, who is doing what? A: They just communicate between themselves."); see also Dennis Waltz Deposition Page 11, Lines 9-17 (Jan. 21, 2019) ("Q: Okay. So in terms of like who's making sure the job continues to run, like you said, smoothly, who was that typically on a job when you were working for Mr. Musser? . . . [A:] We actually done things on our own. I mean, Troy [Musser], he would tell us what he wanted, but we would do it our way usually.").

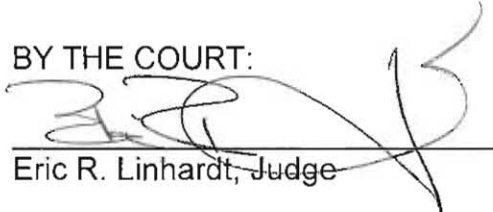
⁹ Troy Musser Deposition Page 78, Lines 4-8 (Nov. 20, 2018) ("Q: Okay. And on that particular site, do you agree with me that you have the power to tell people that are working under your control, *you may leave now*? . . . [A:] If you're doing something illegal, I'm going to ask you to leave the premises. If the homeowner comes and says, *you have to leave, you're trespassing*, I will do whatever I have to do if the homeowner tells me.").

testimony that his workers brought their own tools to the jobsite,¹¹ that Mr. Musser issued his workers 1099 forms,¹² that Mr. Koch was responsible for his own taxes,¹³ and Defendant's acknowledgement that Mr. Musser did not carry worker's compensation insurance¹⁴ would support a finding that Mr. Koch functioned as an *independent contractor* under the *Valle* factors.

As the Court finds that essential facts remain in dispute, it DENIES Plaintiff's Motion *in Limine* and declines to rule on whether Mr. Koch was in fact an employee or independent contractor. However, to the extent that such a determination is relevant to the issues of liability or damages, the parties remain free to make such arguments to the jury.

IT IS SO ORDERED this 15 day of November, 2019.

BY THE COURT:


Eric R. Linhardt, Judge

ERL/cp

cc: Gregory A. Stapp, Esq.
Gary L. Weber, Esq.
James F. Malloy, Esq.

327 North Washington Ave., Ste 606, Scranton, PA 18503

Anthony P. Trozzolillio, Esq.

125 North Washington Ave., Ste. 240, Scranton, PA 18503

¹⁰ See Troy Musser Deposition Pages 26-27 (Nov. 20, 2018).

¹¹ Troy Musser Deposition Page 22, Line 21 (Nov. 20, 2018).

¹² Troy Musser Deposition Page 76, Lines 3-10 (Nov. 20, 2018) (Q: Okay. So are you saying – so I understand it, you let [Mr. Waltz and Mr. Koch] go and then you rehired them, or what is it you proceeded to do? A: I did not hire them. I brought them back as a subcontractor. Just so we're on the same page. Q: Okay. A: I 1099'd him.”).

¹³ See Wayne Koch Deposition Pages 217-18 (April 4, 2018) (testifying that Troy Musser never issued him a W-2 form).

¹⁴ See Brief in Support of Response of Defendant T.A. Musser, Inc. d/b/a Musser Construction to Motion *in Limine* of Plaintiff on the Employment Issue 1 (Oct. 28, 2019).