Affirmed and Opinion filed December 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-01335-CV

CENOBIO CORONADO and OFELIA CORONADO, Individually, and as Next Friends of Their Children, ARMANDO, ALICIA, JORGE, and ANNA CHRISTINA, Appellants

V.

SCHOENMANN PRODUCE CO., Appellee

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 96-03156

O P I N I O N

Appellants Cenobio Coronado and Ofelia Coronado, individually and as next friends of their children, Armando, Alicia, Jorge, and Anna Christina (the "Coronados"), appeal from the trial court's take-nothing judgment entered in favor of appellee Schoenmann Produce Co. We affirm.

I. BACKGROUND

FTI packages and sells potatoes through distributors under the registered trademark name of "MountainKing Potatoes." Schoenmann is a wholesale distributor of fruits and vegetables, including MountainKing Potatoes. FTI and Schoenmann are located in the same warehouse facility, along with several other businesses. FTI and Schoenmann are owned by the same holding company. It is undisputed that, during all times material to this case, Cenobio Coronado was an employee of Farming Technologies, Inc. ("FTI"). Cenobio was injured while replacing a conveyor belt on a potato cull tank. The tank was owned and located on premises maintained by FTI. The Coronados contend Saul Flores, a co-worker employed by FTI, abandoned his assigned duties and failed to timely turn the conveyor off before Cenobio was injured. Cenobio's arm was mangled when it was pulled between two rollers.

Relying on the Restatement (Second) of Agency, section 226, the Coronados maintain that Cenobio was an employee of both FTI and Schoenmann at the time of the accident. This contention is based mainly on the assertion that FTI and Schoenmann both had the right to control Cenobio's work.[1] *See* RESTATEMENT (SECOND) OF AGENCY § 226 (1958) (providing there can be service to two employers, not joint employers, at one time as to one act if service does not involve abandonment of service to other). The Coronados filed suit against Schoenmann alleging negligence and gross negligence based solely on breach of an employer's legal duties. Subsequently, the Coronados added FTI as a defendant. FTI filed and the trial court granted a motion for summary judgment based on limitations.[2] The issue at trial was whether Cenobio was an employee of both Schoenmann and FTI. The trial was bifurcated with the issue of whether Cenobio was an employee of Schoenmann at the time

[1] The Coronados pleaded that FTI and Schoenmann were engaged in a single business enterprise as an alternative theory under which to hold Schoenmann liable; however, this issue was not tried.

[2] FTI is not a party to this appeal.

of the accident to be tried first. FTI's status as Cenobio's employer was previously determined by another court.[3]

When the Coronados rested their case after presenting evidence on the joint control issue, Schoenmann moved for a directed verdict. The trial court granted Schoenmann's motion, finding no evidence in the record that (1) Schoenmann employed Cenobio at the time of the accident; (2) Cenobio was acting in the course and scope of employment with Schoenmann at the time of the accident; (3) Saul Flores was acting as an employee of Schoenmann at the time of the accident; and (4) Flores was acting in the course and scope of employment with Schoenmann at the time of the accident.

II. APPELLANT'S ISSUES

On appeal, the Coronados contend the evidence shows (1) Schoenmann and FTI exercised joint control over Cenobio and other FTI workers at the time of his work-related injury; (2) Schoenmann exercised persistent supervisory control over Cenobio and other FTI workers at the time of his work-related injury; and (3) there was a significant overlap in the supervisory ranks of Schoenmann and FTI at the time of his work-related injury. As a preliminary matter, Schoenmann contends the Coronados have waived on appeal three of the grounds on which the directed verdict was based. Schoenmann asserts the Coronados have only addressed the ground regarding whether Schoenmann employed Cenobio at the time of the accident, but did not address the other three grounds: (1) Cenobio was not acting in the course and scope of employment with Schoenmann at the time of the accident; (2) Flores was not acting as an employee of Schoenmann at the time of the accident; and (3) Flores was not

[3] After Cenobio filed suit and signed an affidavit stating he was employed by Schoenmann at the time of the accident, FTI filed a declaratory judgment action in the United States District Court. FTI sought a determination as to Cenobio's employment status and reimbursement of approximately $300,000 paid under its Voluntary Employee Injury Benefit Plan. The District Court found Cenobio's injury occurred in the course and scope of employment with FTI. Schoenmann contends this ruling collaterally estopped the Coronados from denying that Cenobio was FTI's employee and from claiming Cenobio was Schoenmann's "borrowed servant" at the time of the injury. Appellants do not contend that Cenobio was Schoenmann's borrowed servant.

acting in the course and scope of employment with Schoenmann at the time of the accident. We conclude that the Coronados have not appealed the grounds involving whether Flores was a Schoenmann employee. With respect to the ground that Cenobio was not acting in the course and scope of employment with Schoenmann, we find the Coronados have not waived that ground on appeal. Rule 38.1(e) of the Texas Rules of Appellate Procedure provides "[t]he statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(e). Courts are further directed to liberally construe appellate briefing rules. *Tex. Mexican Ry. Co. v. Bouchet*, 963 S.W.2d 52, 54 (Tex. 1998). Keeping these rules in mind, we conclude the issues presented in this appeal fairly include whether Cenobio was acting in the course and scope of employment by Schoenmann at the time of the accident. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 843–44 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

III. STANDARD OF REVIEW FOR DIRECTED VERDICT

A directed verdict is proper when (1) a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact. *Knoll v. Neblett*, 966 S.W.2d 622, 627 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). When reviewing a motion for directed verdict, we consider all the evidence in the light most favorable to the nonmovant, disregard all evidence and inferences to the contrary, and give the nonmovant the benefit of all inferences arising from the evidence. *Mayes v. Stewart*, 11 S.W.3d 440, 450 n.4 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In this review, we must determine whether there is evidence of probative value to raise a fact issue on the material question presented. *Kline v. O'Quinn*, 874 S.W.2d 776, 785 (Tex. App.—Houston [14th Dist.] 1994, writ denied). If we find any evidence of probative value that raises a material fact issue, the directed verdict is improper and the judgment must be reversed and remanded for a jury

determination on that issue. *Columbia/HCA of Houston, Inc. v. Tea Cake French Bakery & Tea Room*, 8 S.W.3d 18, 22 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

IV. RIGHT OF CONTROL

The Coronados seek to impose upon Schoenmann the non-delegable duty of an employer to provide a safe place to work; therefore, it is their burden to show that Cenobio was an employee of Schoenmann at the time of his injury. *See Anchor Cas. Co. v. Hartsfield*, 390 S.W.2d 469, 471 (Tex. 1965). The Coronados contend they presented evidence sufficient to raise a material fact issue on FTI's and Schoenmann's concurrent control over Cenobio's work at the time of his injury.

Under Texas law, the test to determine whether an individual is an employee is the purported employer's right to control the details of that individual's work. *Newspapers, Inc. v. Love*, 380 S.W.2d 582, 592 (Tex. 1964); *INA of Tex. v. Torres*, 808 S.W.2d 291, 293 (Tex. App.—Houston [1st Dist.] 1991, no writ). In the absence of an express contract of employment or where the terms of employment are indefinite, evidence of the exercise of control may be introduced to establish the right to control. *See Anchor Cas. Co.*, 390 S.W.2d at 471; *INA of Tex.*, 808 S.W.2d at 293. The exercise of control, "must be so persistent and the acquiescence therein so pronounced as to raise an inference that at the time of the act or omission giving rise to liability, the parties by implied consent and acquiescence had agreed that the principal might have the right to control the details of the work." *Newspapers*, 380 S.W.2d at 592. However, "the 'right to control' remains the supreme test and the 'exercise of control' necessarily presupposes a right to control which must be related to some agreement expressed or implied." *Id.* at 590. Cenobio's employment status when he sustained injuries is to be determined by all the facts and circumstances surrounding his work at that time. *See Goodnight v. Zurich Ins. Co.*, 416 S.W.2d 626, 630 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.).

Here, there is no express contract of employment between Cenobio and Schoenmann establishing either Cenobio's status as a Schoenmann employee or Schoenmann's right to control the details of his work. The Coronados claim, in the absence of such a contract, they have presented evidence of Schoenmann's "actual and persistent" exercise of control over Cenobio and other FTI workers thereby establishing Schoenmann as Cenobio's joint employer.

Appellants rely on section 226 of the Restatement (Second) of Agency, which provides:

> A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.

RESTATEMENT (SECOND) OF AGENCY § 226. Texas courts have recognized the dual employment doctrine set forth in section 226.[4] Prior to the adoption of the Restatement definition, the Court of Civil Appeals, in *Western Union Telegraph Co. v. Rust*, first addressed employer liability under the dual employment doctrine. 55 Tex. Civ. App. 359, 120 S.W. 249 (1909, writ ref'd n.r.e.). The court held that (1) at the time of the accident, a messenger boy was a servant under the control of both Western Union Telegraph Co., which was in the business of sending and receiving telegrams, and American District Telegraph Co., which rented office space from Western Union and furnished messenger boys to Western Union, and (2) both were liable for the negligence of the messenger boy in knocking down a man with his bicycle when he was carrying a package for Western Union. *Id.* at 250–54.

[4] *See, e.g., Hoffman v. Trinity Indus., Inc.*, 979 S.W.2d 88, 89–90 (Tex. App.—Beaumont 1998, pet. dism'd by agr.); *Ely v. Gen. Motors Corp.*, 927 S.W.2d 774, 777 (Tex. App.—Texarkana 1996, writ denied); *Brown v. Aztec Rig Equip., Inc.*, 921 S.W.2d 835, 843 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *White v. Liberty Eylau Sch. Dist.*, 880 S.W.2d 156, 159 (Tex. App.—Texarkana 1994, writ denied); *Gulf Oil Corp. v. Williams*, 642 S.W.2d 270, 272 (Tex. App.—Texarkana 1982, no writ).

The Coronados rely on *White v. Liberty Eylau School District* in support of their contention that Schoenmann and FTI both had the right to control Cenobio's work at the time he sustained his injuries. 880 S.W.2d 156 (Tex. App.—Texarkana 1994, writ denied). In *Liberty Eylau*, Brantley, a school teacher with the Liberty Eylau School District, was also employed as a bus driver by the Bowie County School Transportation Department. *Id.* at 157. The plaintiffs alleged Brantley was transporting students in a bus and failed to stop at a stop sign, hitting their automobile. *Id.* The plaintiffs sued the school district and the transportation department. *Id.* The school district moved for summary judgment on the basis that, although Brantley was employed as a teacher, she was not acting within the scope of her employment with the school district when the accident occurred, she was not acting in furtherance of its business (i.e., teaching students, or within the general scope of her authority as a teacher), and it did not have any right to control the details of her work as a school bus driver. *Id.* at 158. The school district asserted that Brantley, instead of working for the school district, was performing work for the transportation department, a separate legal entity. *Id.* The plaintiffs argued that although Brantley was under the control of the transportation department when the accident occurred, she was also under the control of the school district. *Id.* at 159. The dispositive question was whether Brantley was under the control and direction of the district when the accident happened even though she was also acting as a bus driver for the transportation department. *Id.*

The evidence showed that the transportation department made the ultimate employment decisions regarding bus drivers, but recommendations to the transportation department's board came from the school districts; no one who received an unfavorable recommendation from a school district had ever been recommended to the board. *Id.* The school districts also had the authority to recommend the termination of bus drivers, with such recommendations being followed by the transportation department. *Id.* The evidence further showed that the director of special services for the school district served as the district's liaison with the transportation department and, therefore, he interviewed potential

bus drivers and recommended them for employment with the transportation department. *Id.* The director of the transportation department and the director of special services jointly planned the bus routes. *Id.* School district personnel handled all disciplinary problems on school buses. *Id.* Furthermore, routine gassing and maintenance of buses took place at Liberty Eylau High School and was performed by employees of the transportation department but while under the supervision of the director of special services for the school district. *Id.* Finally, there was evidence that a number of teachers in the district drove school buses, and when teachers were interviewed for teaching positions, they were also informed of the opportunity to drive buses for the transportation department. *Id.* at 159–60. The court of appeals held the summary judgment evidence raised a fact issue as to whether the school district and transportation department jointly controlled the operation of school buses. *Id.* at 160.[5] Here, the facts pertaining to the right to control details of the assigned task (replacement of the conveyor belt on the cull tank) are distinguishable.

In support of their contention that evidence of overlapping supervisory authority between Schoenmann and FTI is probative evidence of a concurrent right of control over Cenobio's work, the Coronados rely on a line of federal cases decided under the Federal Employers' Liability Act ("FELA"), concerning whether an injured employee is an employee of the railroad even though he is carried on the employment rolls of another company. *See, e.g., Kelley v. S. Pac. Co.*, 419 U.S. 318 (1974); *Baker v. Tex. & Pac. Ry. Co.*, 359 U.S. 227 (1959); *Lindsey v. Louisville & Nashville R.R. Co.*, 775 F.2d 1322 (5th Cir. 1985).[6] The Coronados assert they do not need to show that Schoenmann had full supervisory control over Cenobio's work, rather they need only show that Schoenmann's

---

[5] At trial on remand, the jury found Brantley was not acting as an employee of the school district at the time of the accident, thereby absolving the school district of liability for the plaintiffs' injuries. *White v. Liberty Eylau Indep. Sch. Dist.*, 920 S.W.2d 809, 811 (Tex. App.—Texarkana 1996, writ denied). On appeal, the court affirmed the trial court's take-nothing judgment entered in favor of the school district on the jury's finding. *Id.* at 815.

[6] Under FELA, a covered railroad is liable for negligently causing the injury or death of any person "while he is employed" by the railroad. 45 U.S.C.A. §§ 51–60 (1986); *Kelley*, 419 U.S. at 319.

employees played "a significant supervisory role" with regard to his work. *See Lindsey*, 775 F.2d at 1324 (citing *Kelley*, 419 U.S. at 327) (stating "[t]he law does not require that the railroad have full supervisory control. It requires only that the railroad, through its employees, plays a 'significant supervisory role' as to the work of the injured employee").[7] Nonetheless, even under FELA, the test is whether the railroad has control over the employee's work or the right to control the employee's work at the time of the injury.[8] While evidence of an overlap in supervisory ranks and a significant supervisory role may be factors to consider, "the 'right to control' remains the supreme test" in Texas for determining employment. *Newspapers*, 380 S.W.2d at 590.

The Coronados claim the overlap in the supervisory ranks of Schoenmann and FTI personnel establishing Schoenmann's right of control over Cenobio's work at the time of the accident is demonstrated by Gerald Farrell's dual role as vice president of FTI and general manager of both Schoenmann and FTI. As general manager and vice president of FTI, Farrell had the right to control FTI employees as long as he went through the employee's supervisor. Lee Odale, FTI's maintenance supervisor, was Cenobio's direct supervisor. Odale's immediate supervisor was Farrell. Odale testified that when he had questions, he went to Farrell. The Coronados argue a reasonable inference exists that, as

---

[7] The question of master-servant status under FELA is to be determined by reference to common-law principles. *Kelley*, 419 U.S. at 323; *Baker*, 359 U.S. at 228; *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, 94 (1915).

[8] *See, e.g., Kelley*, 419 U.S. at 327 (finding that although railroad personnel were occasionally in area where unloading operations were conducted and advised and consulted with trucking company's employees from time to time, railroad employees did not play significant supervisory role in unloading operations and finding neither that injured employee was being supervised by railroad employees at time of accident nor that railroad employees had any *general right to control* activities of injured employee); *Baker*, 359 U.S. at 228–29 (finding evidence showing that employee's work was part of the maintenance task of railroad, railroad furnished material, and supervisor employed by railroad *exercised directive control over details of job* raised issue for jury's determination); *Lindsey*, 775 F.2d at 1324–25 (finding evidence that railroad representatives *directed contractor's employees* concerning which cars to unload, *gave specific orders and instructions* on occasion, inspected loading and positioning of trailers on the cars, and that contractor's employees consulted with railroad representatives on questions regarding their work supported jury's finding that injured employee was employee of railroad).

Odale's supervisor, Farrell provided supervisory instruction regarding Cenobio's repair of the cull tank. The *undisputed* evidence establishes that no one instructed Odale to replace the damaged belt on the cull tank. Instead, he noticed the damaged belt and instructed Cenobio to replace it. *See Gonzales v. Hearst Corp.*, 930 S.W.2d 275, 279 (Tex. App.—Houston [14th Dist.] 1996, no writ) (accepting only the *undisputed facts* or appellant's version of disputed facts, avoiding all evaluations of credibility, and crediting all permissible inferences to appellant in review of directed verdict). Even without considering Odale's undisputed testimony, we find that while the Coronados presented evidence that Farrell was involved in some aspects of the management of Schoenmann, there is no evidence raising a reasonable inference that Farrell was involved in the decision to replace the belt on the cull tank or that he otherwise instructed Odale or Cenobio on the replacement of the belt.

Anthony Colunga, as FTI's plant manager, controlled Cenobio's work on occasion. The Coronados cite to testimony that Colunga came to Farrell for instruction and guidance. Based on this testimony, the Coronados argue a reasonable inference exists that Farrell provided instruction regarding the repair of the cull tank to Colunga, who, in turn, could supervise Cenobio when Odale told Cenobio to see Colunga for additional personnel to assist with the replacement of the belt. The Coronados, however, have taken this isolated testimony out of context. Colunga continued to explain that he went to Pat Goolsby, president of FTI, if he had a question concerning the operation of the line and only went to Farrell regarding personnel issues. In any event, we cannot reasonably infer from this evidence that Farrell provided any instruction to Colunga regarding the replacement of the belt on the cull tank.

The Coronados contend overlap in the supervisory ranks demonstrating Schoenmann's right of control is further evidenced by Mark Steakley's serving as vice president, general counsel, and chief finance officer of Schoenmann, as well as the officer in charge of safety for FTI. The Coronados argue that, because Steakley witnessed the

accident, it can be reasonably inferred that he was, in his role as an employee of Schoenmann, directly overseeing Cenobio's replacement of the belt on the cull tank.[9] Steakley's testimony on this point was equivocal and we cannot draw a reasonable inference from his mere view of the accident, if indeed he saw it happen, that he was exercising the right to control details of Cenobio's work. Other than evidence of his overlapping duties between Schoenmann and FTI, there is no evidence raising a reasonable inference that Steakley controlled the details of Cenobio's work or was involved in any way with the repair of the cull tank. The Coronados further point out that it was Steakley's responsibility to investigate the accident. Any actions taken after the accident, however, are not relevant to determining control at the time of the injury. *See Archem Co. v. Austin Indus., Inc.*, 804 S.W.2d 268, 270 (Tex. App.—Houston [1st Dist.] 1991, no writ); *Denison v. Haeber Roofing Co.*, 767 S.W.2d 862, 866 (Tex. App.—Corpus Christi 1989, no writ). Therefore Steakley's post-accident actions, as well as other evidence of Schoenmann's actions after the accident, are irrelevant to the issue of right of control at the time of Cenobio's injury. We must consider the facts and circumstances as they existed at the time of the injury. *Anchor Cas. Co.*, 390 S.W.2d at 471; *Goodnight*, 416 S.W.2d at 630.

The Coronados point to additional evidence of Schoenmann's and FTI's overlapping of supervisory personnel. For example, when Cenobio applied for a job, he went through Schoenmann's personnel office, which handled the hiring of workers for both Schoenmann and FTI. The Coronados also point out that although Cenobio's job application is on FTI letterhead, it was approved by both Farrell, general manager of Schoenmann and FTI, and Colunga, plant manager for FTI. Cenobio was also issued a safety manual, with Schoenmann's and FTI's names appearing on the cover of the manual. Finally, the Coronados argue that despite Schoenmann's evidence that it did not use the cull tank, it

[9] Without providing any supporting citation to the record, the Coronados contend Steakley personally observed Cenobio and Flores begin repair efforts on the cull tank. In our review of the record, we found no evidence to support this assertion.

nonetheless would have benefitted from Cenobio's replacing the belt on the cull tank because of the interdependence of the two businesses.

At most, the Coronados presented some evidence of overlapping supervisory duties and joint administrative functions between Schoenmann and FTI. Such evidence, however, is not sufficient to raise a fact issue on the question of whether Schoenmann exercised control over the details of Cenobio's work (replacement of the belt on the cull tank) at the time he was injured. *See Kelley*, 419 U.S. at 327 (finding that although railroad supervisory personnel were occasionally in area where trucking company conducted unloading operations and would advise and consult with trucking company's employees, court did not find petitioner was being supervised by railroad employees at time of injury); *Ely v. Gen. Motors Corp.*, 927 S.W.2d 774, 778–79 (affirming summary judgment, court found that although automobile manufacturer contracted with dealership to do warranty service work, provided service training and manuals to dealership, and paid dealership for warranty work, plaintiffs produced no evidence that manufacturer had right to control dealership's mechanic during act (i.e., test drive) resulting in wrongful death action). Finally, we are not persuaded by the Coronados' reliance on the *Liberty Eylau* case. *See Liberty Eylau Sch. Dist.*, 880 S.W.2d at 160. While the court in *Liberty Eylau* found a fact issue existed with regard to the school district's right of control over the bus drivers based on the school district's apparent exercise of some control over the operation of the buses, we do not find evidence in this record which raises a fact issue on Schoenmann's control of Cenobio's work details in this record. *See id.*

IV. CONCLUSION

The right to control details of the work which resulted in injury is the essential legal test for imposition of an employer's liability to a purported employee. Without a written agreement expressing the right of control, we must examine the appellate record for evidence that Schoenmann was exercising control over appellant at the time of his injury. This test is not altered when claims are pursued against a joint or dual employer. We find

the Coronados failed to present any evidence of probative value sufficient to raise a fact issue on Schoenmann's right to control the details of Cenobio's work (replacement of the belt on the cull tank) at the time of the accident. Therefore, the trial court properly granted a directed verdict in favor of Schoenmann. All of the Coronados' issues are overruled. Accordingly, we affirm the judgment of the trial court.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed December 20, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
Publish — TEX. R. APP. P. 47.3(b).