

**Case Name:** Schmidt v. Burlington Northern and Santa Fe Railway Company

**Date Decided:** May 18th, 2010

**Originally Filed in:** Montana (Federal)

**Decided by:** Montana District Court (Federal)

**Court:** U.S.D.C. Montana

**Judge:** Judge Burns

**Citation:** 2010 WL 1960102 (C.A.9 (Mont.) 2010)

**Background:**

This is an appeal from the district court's grant of summary judgment in favor of the defendant Burlington Northern and Santa Fe Railway (BNS) because of Plaintiff's failure to provide evidence that he was employed by BNS.

John Schmidt, plaintiff, was originally hired by a subsidiary of BNS, Western Fruit Express (WFE) which maintain joint facilities. Throughout the years, Schmidt was intermittently employed by either BSN or WFE. After a period of unemployment with the two companies, he was recalled to work but was failed a medical exam for BNS due to a severe neck injury.

Schmidt alleges that the neck injury blames the injury on his supervisors' negligence; specifically resulting from welding assignments he performed during his employment on refrigerated cars and trailers for use by BNS .

In support of this allegation, Schmidt provided significant evidence that he was a BNS employee such as that he was told by the official who first hired him that he was a BNS employee, that employees wore equipment from BNS and that BNS handled Schmidt's payroll.

Further, Schmidt alleged ample evidence that his injuries could be traced in part to the welding work he did for BNS on railroad cars and the requirement by BNS that he wear a hard hat and a welding hood.

Despite this evidence, the district court found no evidence that BNSF controlled WFE's daily work and on that basis granted summary judgment.

**Issue:**

Must a parent company exercise actual day-to-day control over a subsidiary to be liable to an employee for injuries sustained while working for the subsidiary?

**Overall Issues Discussed or Touched Upon in this Case:**

- *Course & Scope Issue*
- *Summary Judgment - Defendant Legal Denied*

- *Procedural Issues - Federal*

**Held:**

Prior to the discussion of the FELA issue, the Appellate court reviewed the standard for granting a motion for summary judgment. The Appellate court explained that while drawing all inferences in favor of the non-moving party if the case file shows that there is no genuine issue of a material fact then the moving party is entitled to summary judgment.

Next, the court explained that under FELA, the test of whether a company is the employer of a particular worker turns on the degree of control the company exerts over the physical conduct of the worker in the performance of services. [Kelley v. Southern Pac. Co., 419 U.S. 318, 324, 95 S.Ct. 472, 42 L.Ed.2d 498 \(1974\).](#)

In Kelley, the Supreme Court explained three different theories by which Schmidt can prove that BNS was his employer: (1) the borrowed servant theory; (2) the joint employer theory; and, (3) the subservant theory.

Schmidt advanced his claim against BNS only under the third theory outlined in Kelley at the trial court stage and as such waived any arguments on appeal under the other two theories.

For Schmidt to succeed under the subservant theory, he must show BNS controlled or had the right to control his physical conduct on the job. The court explained that it would be insufficient to merely show that BNS had generalized oversight of Schmidt, but instead he must show physical control or the right to exercise physical control of his daily work.

To make the determination whether a master-servant relationship existed the Appellate court reviewed several restatement factors outlined in the Restatement (Second) of Agency Â§ 220.

After applying these factors to the evidence alleged by Schmidt the Appellate Court concluded that the evidence could reasonably support a finding the WFE was BNS' servant and that BNS had the right to control WFE's employees, including Schmidt.

Specifically the court cited to the fact that BNS' policies regulated how welding work was carried out, BNS and WFE employees participated in safety and skills training exercises together, and that Schmidt's employers wore BNS logos.

As such the Appellate court ordered the motion for summary judgment be reversed and remanded.

**Comments:**

**To succeed under sub-servant theory of employment for purposes of Federal**

**Employers' Liability Act (FELA) liability, plaintiff must show that railroad controlled or had the right to control his physical conduct on the job.**