

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

VERMONT MUTUAL INSURANCE )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NICHOLAS MANSFIELD, )  
 )  
Defendant. )

Civil No. 05-158-B-S

**RECOMMENDED DECISION ON  
MOTION FOR SUMMARY JUDGMENT (DOCKET NO. 15) AND  
ORDER ON MOTION TO STRIKE JURY DEMAND (DOCKET NO. 9)**

Vermont Mutual Insurance Company filed the instant declaratory judgment action, requesting a judgment that Nicholas Mansfield cannot reach and apply insurance proceeds under policies of insurance that Vermont Mutual issued to Frederick Smiley, in connection with personal injuries Mansfield sustained while performing certain labor on real estate owned by Smiley. Now pending is Vermont Mutual's motion for summary judgment on its claim. I recommend that the Court deny the motion, but grant limited relief as set forth below.

**Summary Judgment Facts**

The following statement of facts is drawn from the parties' Local Rule 56 statements of material fact in accordance with this District's summary judgment practice. See Doe v. Solvay Pharms., Inc., 350 F. Supp. 2d 257, 259-60 (D. Me. 2004) (outlining the procedure); Toomey v. Unum Life Ins. Co., 324 F. Supp. 2d 220, 221 n.1 (D. Me. 2004) (explaining the "the spirit and purpose" of Local Rule 56). Pursuant to Rule 56 of the Federal Rules of Civil Procedure, all evidentiary disputes appropriately generated by the parties' statements have been resolved, for

purposes of summary judgment only, in favor of the non-movant. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998).

Nicholas Mansfield filed a civil action against Frederick Smiley in the Maine Superior Court, Kennebec County, docket number CV-04-194. (Pl.'s Statement of Material Facts (PSMF) ¶ 1.) Mansfield alleged in the Civil Action that he suffered substantial damages in an accident on October 24, 2002, as a direct and proximate result of the negligent conduct of Smiley, who was operating a piece of heavy equipment which struck and temporarily pinned Mansfield. (Id. ¶ 2.) On October 24, 2002, Smiley was an insured under two policies of liability insurance issued by Vermont Mutual: policy DF1 3-01-59-52 and policy HO1 2-17-48-28. (Id. ¶ 3.) The liability coverage sections of the policies contain an exclusion for "'bodily injury' to any person eligible to receive any benefits required to be provided by the 'insured' under any workers' compensation law." (Id. ¶ 4.) On May 12, 2005, Vermont Mutual, Smiley, and Mansfield attended a mediation in an effort to resolve the disputes among them. (Id. ¶ 5.) Mansfield and Smiley, on the one hand, and Vermont Mutual on the other, could not resolve the dispute between them as to the application of the exclusionary provision in the event of a money judgment entered against Smiley. (Id. ¶ 6.) Nonetheless, Mansfield, Smiley, and Vermont Mutual subsequently agreed in writing to dispense with the procedural formality of an entry of judgment against Smiley and a subsequent suit to "reach and apply" any available insurance proceeds and agreed to proceed instead with this declaratory judgment action to determine the application or not of the exclusion, following which Vermont Mutual would either be obligated to pay a pre-determined settlement amount to Mansfield or be released from any and all liability in connection with the accident. (Id. ¶ 7.)

A few days prior to the date of the accident, Smiley spoke with Mansfield's father, Mark Mansfield, and asked whether Mansfield and his brother, both young men,<sup>1</sup> might want to help Smiley move some brush on real estate owned by Smiley. (Id. ¶ 8; Def.'s Statement of Material Facts (DSMF) ¶ 28.) At the time, Mansfield was temporarily laid off from employment with Castine Energy. (Id. ¶ 9; DSMF ¶ 9.) At his deposition, Smiley characterized the offer as "short-term employment," but also as "something if you want to get out of the house and come over and help, he was welcome to help." (PSMF ¶¶ 10-11; DSMF ¶¶ 10-11.) He also testified that he was not "looking for employees" and that he did not consider Mansfield to be his employee when he showed up to clear brush. (DSMF ¶¶ 10-11.) Obviously, Smiley's characterization is not dispositive of the issue. As for payment, Mansfield's father "hoped" or "anticipated" that Smiley would pay Mansfield something, but no terms of payment were ever discussed. (Id. ¶ 12.) Smiley intended to pay Mansfield between \$7.00 and \$9.00 per hour, or a lump sum, depending on how productive he was, but "none of that happened because of the accident." (PSMF ¶ 13; DSMF ¶ 13; Smiley Dep. at 41:12-24.) Mansfield trusted that Smiley would pay him "some sort of money" for his efforts, but he also intimated that he would have gone to help Smiley anyway, because he was a good family friend and because his father asked him to. (PSMF ¶ 16; DSMF ¶ 16; Nicholas Mansfield Depo. at 23.) Ultimately, Smiley delivered several thousand dollars to the family to assist with Mansfield's injuries—a sum that had no correlation to the short period of time Mansfield worked prior to the accident. (PSMF ¶ 17; DSMF ¶ 17.)

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<sup>1</sup> Mansfield was 19 years old at the time and his brother, Jeb, was 22. (DSMF ¶ 30; Pl.'s Reply Statement ¶ 30.) The passages of the Smiley deposition cited by the parties reflect that Smiley regarded them as "small men," which a factfinder would likely interpret as not fully-grown men, but not children either. Smiley's use of the term "small men" is connected with testimony that he did not regard them as grown men whom he would "hire" to be his "employees." On page 38 of the Smiley Deposition, he refers to the young men as 18 or 19.

Mansfield's brother, Jeb, went to Smiley's to clear brush on the Monday following his father's conversation with Smiley. Mansfield chose not to go on Monday, but chose to go to Smiley's on Tuesday and again on Wednesday, the day of the accident. (DSMF ¶ 25.) While the work was in progress, Smiley was often absent. It was understood that Smiley wanted brush cleared, but the young men were largely left to do the relatively straight-forward work by themselves. (PSMF ¶ 18; DSMF ¶ 18.)<sup>2</sup> Mansfield acknowledged that Smiley had the authority to direct the work, but it is apparent that the work required little direction.<sup>3</sup> (PSMF ¶ 19; DSMF ¶ 19.) Smiley essentially told the young men that he wanted them to clear the brush. It is disputed whether Smiley designated any of the young men to use a chainsaw. In any event, all that Mansfield did was drag brush and throw it on a fire. (PSMF ¶ 20; DSMF ¶¶ 20, 36.) As Vermont Mutual states: "Because the assigned tasks were pretty simple, there were not a lot of instructions to be given." (PSMF ¶ 21.) Smiley did not provide Mansfield with any tools or equipment. (DSMF ¶ 37.) In addition to the three young men, Smiley obtained help from an older man named Alan Roy, who was 49 or 50 years old. Smiley had informed Mr. Roy as to the "parameters of the trees I wanted out." (Id. ¶¶ 22-23; Smiley Dep. at 40:4-8.) Mr. Roy may not have been present on the first day that the young men worked. (DSMF ¶ 22.) Unlike Mr. Roy, the young men did not have an understanding of the parameters of what Smiley sought to accomplish. (PSMF ¶ 23.)

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<sup>2</sup> Mansfield moves to strike the affidavit of Mike Hallee (Docket No. 18), a third young man who came to clear brush for Smiley, "on the grounds that it characterizes Mike Hallee, Jeb Mansfield and Nick Mansfield as 'employees' of Fred Smiley, and it fails to provide a basis for any personal knowledge that Nick was paid an hourly wage." (DSMF ¶ 18.) I fail to understand how these "grounds" would warrant striking the entire affidavit from the record. Having said that, Mr. Hallee's characterization of their status as "employees of Fred Smiley" does not control the issue of whether these young men were employees. The motion to strike is overruled.

<sup>3</sup> Smiley's testimony regarding what he intended to pay the young men reflects that he did not dictate how much work they should perform, but intended to pay them, in part, based on how productive they were.

On the second day that Mansfield worked for Smiley, Smiley obtained an excavator to uproot some stumps. The excavator tipped over under Smiley's operation and fell onto Mansfield, causing serious injuries. (PSMF ¶ 26; DSMF ¶¶ 26, 38.)

Smiley did not purchase workers' compensation insurance for Nick Mansfield or any of the other boys assisting him with brush removal because Smiley did not think he needed it. (DSMF ¶ 43.) Smiley believed that if there was an accident, his homeowner's insurance would cover it. (Id. ¶ 44.) Smiley and Mansfield's father have been close friends for more than 30 years and Smiley has known the Mansfield boys since they were born. (Id. ¶¶ 45-46.) Mansfield's assistance in dragging brush was performed for Smiley's own personal benefit, and was not meant to advance any business purpose for Smiley. (Id. ¶ 49.) The fact that Mansfield expected he would be paid or that Smiley intended to pay him does not change the fact that Smiley, and not his business enterprise, was the beneficiary of the young man's labor.

The foregoing facts are the material facts that emerge from the parties Local Rule 56 summary judgment statements. After reviewing these facts I reviewed the Maine Workers Compensation Act to better understand what the policy language might mean when it refers to benefits "required" to be provided under Maine law. As discussed below, the Act essentially required that coverage be obtained for every "employee," a category that is defined broadly, but does not include anyone engaged in "domestic service." 39-A M.R.S.A. § 401(1)(A). My review of the parties' summary judgment statements suggested that a reasonable factfinder might regard Mansfield as one engaged in domestic service for Smiley, because it was asserted that no business purpose was being advanced by the brush clearing activity. Rather than making any finding without any notice to or input from counsel, I ordered the parties to supplement the record to explain why the domestic services exception did or did not apply in this case. One

undisputed fact, in particular, has emerged as a result. It is now apparent to me that Smiley does not have any domicile on the premises, but that the brush clearing activity was undertaken to clear a view for a future residence "in the earliest stages of its construction." (Def.'s Supp. Brief at 2 n.1.) It is illuminating that the parties easily fill more than 10 pages apiece with purely legal memoranda addressing the applicability of the domestic services exception. My opinion is that the salient fact (that the work was performed with a future domicile in mind) should be considered by the Court before rendering judgment on the pending motion.

### **Discussion**

"The role of summary judgment is to look behind the facade of the pleadings and assay the parties' proof in order to determine whether a trial is required." Plumley v. S. Container, Inc., 303 F.3d 364, 368 (1st Cir. 2002). A party moving for summary judgment is entitled to judgment in its favor only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if its resolution would "affect the outcome of the suit under the governing law," and the dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In reviewing the record for a genuine issue of material fact, the Court must view the summary judgment facts in the light most favorable to the nonmoving party and credit all favorable inferences that might reasonably be drawn from the facts without resort to speculation. Merchants Ins. Co. v. United States Fid. & Guar. Co., 143 F.3d 5, 7 (1st Cir. 1998). If such facts and inferences could support a favorable verdict for the nonmoving party, then there is a trial-

worthy controversy and summary judgment must be denied. ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1st Cir. 2002).

Section 401 of Maine's Workers' Compensation Act provides that every private employer "shall secure the payment of compensation in conformity with this section and sections 402 to 407 with respect to all employees, subject to the provisions of this section." 39-A M.R.S.A. § 401(1). The term "private employer" includes natural persons as well as commercial entities. Id. § 102(17). The Act defines "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written," with certain exceptions. 39-A M.R.S.A. § 102(11)(A). One exception is for independent contractors. Id. § 102(11)(A)(7). By virtue of the statutory definition of "employee," parties who hire independent contractors are not required to obtain workers' compensation coverage for independent contractors because they are not employers with respect to independent contractors. Other exceptions exist even for persons who otherwise fall within the statutory definition of employee. In particular, section 401 of the Act, which imposes the obligation to obtain workers' compensation coverage, releases employers from that obligation with respect to certain categories of employees, including "employees engaged in domestic services." Id. § 401(1)(A).

Vermont Mutual argues that the facts necessarily establish, as a matter of law, that Mansfield was an employee for hire under an "implied contract" and, therefore, was someone falling under the Workers' Compensation Act's definition of "employee"; someone who—in terms of the exclusionary language of the policy—was "eligible to receive any benefits required to be provided by the 'insured' under any workers' compensation law." (Mot. Summ. J. at 5-6, Docket No. 15.) Mansfield disagrees and contends that he cannot reasonably be characterized as Smiley's "employee." In his view, the most fitting legal characterization for the capacity in

which he worked would be: "gratuitous provider of services." (Opp'n Mem. at 4-5, 11, Docket No. 26.) Alternatively, Mansfield maintains that he was more in the nature of an independent contractor than an employee. (Id. at 12.) This, then, is the threshold issue: whether there is a genuine issue of material fact that could support a finding that Mansfield was something other than Smiley's employee. If so, then Vermont Mutual's summary judgment motion should be denied. If not, then there remains a secondary question whether Mansfield generates a genuine issue of material fact that he was employed as Smiley's domestic servant, so that Smiley was not "required" to obtain workers' compensation for him. I address these issues in turn. My assessment is that no reasonable factfinder could fairly conclude from the existing record that Mansfield was an independent contractor, but that the facts and circumstances could support an inference (1) that Mansfield was a gratuitous provider of services or, at least, was not in Smiley's service under an "implied contract" of hire and/or (2) that Mansfield was engaged in domestic service for Smiley.

**A. Mansfield cannot fairly be characterized as an independent contractor under Maine law.**

The issue of employment status is a mixed question of law and fact. Marcoux v. Parker Hannifin/Nichols Portland Div., 2005 ME 107, ¶ 13, 881 A.2d 1138, 1143. "When the facts are undisputed, the issue is a question of law; when the facts are disputed, the issue is for the trier of fact." Id. The Workers Compensation Act defines "employee" as "every person in the service of another under any contract of hire, express or implied, oral or written," 39-A M.R.S.A. § 102(11)(A), but recognizes certain exceptions including those hired as independent contractors. Id. § 102(11)(A)(7). The Act supplies the following definition of "independent contractor":

**13. Independent Contractor.** "Independent contractor" means a person who performs services for another under contract, but who is not under the essential control or superintendence of the other person while performing those services.

In determining whether such a relationship exists, the board shall consider the following factors:

- A.** Whether or not a contract exists for the person to perform a certain piece or kind of work at a fixed price;
- B.** Whether or not the person employs assistants with the right to supervise their activities;
- C.** Whether or not the person has an obligation to furnish any necessary tools, supplies and materials;
- D.** Whether or not the person has the right to control the progress of the work, except as to final results;
- E.** Whether or not the work is part of the regular business of the employer;
- F.** Whether or not the person's business or occupation is typically of an independent nature;
- G.** The amount of time for which the person is employed; and
- H.** The method of payment, whether by time or by job.

Id. § 102(13). According to the Act, no one factor has any greater weight than any other. Id.

Among the various controversies that the parties highlight in their summary judgment statements is the matter of whether or not any terms of compensation were set prior to the commencement of work. Mansfield asserts that the undecided nature of his compensation, if any would be received at all, cuts in his favor, presumably because traditional employees understand what kind of wage they will receive prior to entering into an employment relationship. Vermont Mutual, on the other hand, focuses on Smiley's intention to pay Mansfield, probably in an amount factored on the number of hours worked, and also on Mansfield's "trust" that he would receive some compensation for his efforts. The parties are focusing here on alternative characterizations of the record. It is undisputed that neither the terms of compensation nor the scope of the work were established in advance. The absence of a mutual understanding about

payment terms and project scope does not mean that Mansfield cannot be characterized as Smiley's employee. The Maine "rule is that a sufficient contract of employment is created by a mutual agreement that one is to labor in the service of another, and that the question of compensation is not material." Lunt v. Fid. & Cas. Co., 28 A.2d 736, 739, 139 Me. 218, 223-24 (1942). However, although the absence of any discussion over price and over the scope of the project is consistent with employee status, it is inconsistent with independent contractor status. The record simply cannot support a finding that Mansfield labored pursuant to a contract for "a certain piece or kind of work at a fixed price," to borrow the language of factor A, quoted above.

Another controversy argued in the parties' papers concerns the existence or non-existence of specific instructions and whether Smiley actually exercised control over Mansfield's work. Again, there is no material dispute on this question. The work required no professional skill and therefore no appreciable instruction. In any event, a need for instruction and skill would not tend to favor a finding of independent contractor status over employee status or vice versa. The existence of special skill is not among the factors identified by the Act. With respect to the "control" factor, it is undisputed that Smiley did not exercise control over Mansfield because the nature of the work did not require oversight. But at the same time, there can be no serious suggestion based on this record that Smiley, as the proprietor of the premises, did not have the authority to exercise control and direction over the work or the authority to dismiss Mansfield from the work project if he chose to do so. Additionally, it is undisputed that only Smiley and Alan Roy understood the parameters of the project. Unlike an independent contractor, Mansfield did not comprehend the scope of the project he was working on. Smiley's right to control the scope and direction of the work, like his freedom to determine Mansfield's pay, points away from a finding that Mansfield was an independent contractor. Certainly Mansfield did not have any

"right" to control the progress or direction of the project. Cardello v. Mt. Hermon Ski Area, Inc., 372 A.2d 579, 581 (Me. 1977) ("It is the *right* to control and direct the employee's performance of his duties and the right to dismiss him, not the actual exercise of these rights, which gives rise to the employment relationship."). Indeed, Smiley's right to simply dismiss Mansfield and Mansfield's right to simply walk away from the job if he chose to are consistent with the "at-will" nature of the common law employment relationship in Maine. See, e.g., Harlow v. Agway, Inc., 327 A.2d 856, 859 (Me. 1974) ("The right to control on the other hand is best established by the right in the employer . . . to discharge the employee at will.") (quoting Owen v. Royal Indus., Inc., 314 A.2d 60, 62 (Me. 1974)). These reciprocal rights to freely terminate the relationship are atypical of the kind of relationship that arises when an independent contractor is engaged.

The term "independent contractor" presupposes the existence of a binding contract between the parties, for the breach of which a cause of action arises. . . . The most important point in determining whether a worker is an employee is the right of either party to terminate the relation without liability.

N. E. Ins. Co. v. Soucy, 1997 ME 106, ¶ 13, 693 A.2d 1141, 1144 (quotation marks and citation omitted). Like the worker in Soucy, Mansfield "did not have any particular task assigned to him which he had a right and obligation to complete" because there "was no contractual obligation" on Mansfield's part "to provide any end product." Id. (emphasis added).

A third controversy concerns the factor related to the supply of tools, supplies and materials. The facts are, again, undisputed. Mansfield did not contribute anything to the project other than his labor. This factor also stands in the way of a finding that Mansfield worked as an independent contractor.

Although the foregoing considerations do not relate to all of the factors listed in the Act to identify independent contractors, those factors that remain are not weighty enough to justify a finding of independent contractor status. Many of the remaining factors would only reinforce the

conclusion that Mansfield cannot fairly be characterized as an independent contractor as a matter of law. Mansfield was not engaged in his own business or calling, another factor emphasized in Soucy, ¶ 15, 693 A.2d at 1145, and the other young men were assisting Smiley and not Mansfield. Based on the undisputed material facts, I conclude as a matter of law that Mansfield cannot reasonably be characterized as an independent contractor. That conclusion, however, does not compel a finding that Mansfield was Smiley's employee.

**B. A genuine issue of fact exists as to whether Mansfield offered his services gratuitously and under circumstances that would not support a finding of an implied contract for hire.**

Mansfield argues that the factual record is ambiguous enough to permit the trier of fact to reject the employee label and to find that he occupied some other legal status such as a "gratuitous provider of services." (Def.'s Opp'n Mem. at 4-5.) The "gratuitous provider of services" terminology is premised on the Law Court's opinion in the matter of Harlow v. Agway, Inc. In Harlow, the Law Court reversed a commission finding that Harlow was entitled to workers' compensation for an injury he received while helping to unload a truck owned by Agway. 327 A.2d at 857-58. Harlow had "volunteered" to assist his father, who was the proprietor of the Agway store. Id. at 858. Harlow was "regularly employed" by another business. Id. The materials that Harlow was unloading from the truck were building materials ordered by his brother. Id. Harlow's testimony before the commission established that he did not expect payment for his assistance and he was only performing a favor for his brother. Id. at 859. His testimony also reflected that he did not personally regard himself as an employee of Agway and that he had no discussion with the Agway driver about either payment or employment. Id. The Law Court pronounced a new doctrine excluding from workers' compensation coverage "one accidentally injured while gratuitously performing a type of service

for another, during which he does not subject himself to any control by the person for whom such service is rendered." Id. at 860. Since Harlow, this label has not been applied to a worker in any published opinion of the Law Court, or in any published decision authored by a justice of the Maine Superior Court or a judge or magistrate judge of this Court. The Harlow opinion attaches legal significance to several areas of controversy in the parties' competing factual statements: (1) Smiley's vague intentions and Mansfield's "trust" in regard to payment; (2) the entirely open-ended nature of whether Mansfield would present himself for work or remain for any appreciable amount of time; (3) the fact that neither Smiley nor Mansfield regarded their relationship as an employment relationship and that Smiley did not want to "employ" Mansfield; (4) the fact that Mansfield, although subject to a layoff at the time, regarded himself as an employee of Castine Energy; and (5) the fact that Mansfield's assistance was in large part obtained as a result of what Mansfield and his father described as the bonds of friendship between Smiley and the Mansfield family, which made it "right" for the boys to help Smiley out, regardless of whether payment factored into the relationship.

Mansfield contends that there are genuine issues of fact for the factfinder to resolve in order to determine the mixed question of law and fact whether he was a gratuitous provider of services on the date of his injury. (Def.'s Opp'n Mem. at 5-7.) In my opinion, the record should be better developed on this issue because it appears from the existing record that a rational factfinder might well infer that Mansfield tendered his services to Smiley gratuitously, out of friendship, with only a hope for payment, and that he never actually subjected himself to any control by Smiley in the process.

Additionally, I find that the common law pertaining to implied contracts supports this conclusion because, even if Mansfield does not squarely fit within the parameters of the

"gratuitous provider of services" category set forth in Harlow, a reasonable factfinder might still conclude that the facts and circumstances of this case did not make it reasonable for Mansfield to ever "expect payment" from Smiley. Such a finding would be inconsistent with Vermont Mutual's position that Smiley was required to secure workers' compensation coverage for Smiley as someone in his service "under any contract of hire, express or implied, oral or written." 39-A M.R.S.A. § 102(11)(A). Maine law holds that an implied contract for hire only arises under circumstances in which it is "reasonable" for the person hired to "expect" payment. Forrest Assocs. v. Passamaquoddy Tribe, 2000 ME 195, ¶ 11, 760 A.2d 1041, 1045. That question is a question of fact, see id., that the summary judgment record does not clearly resolve.

**C. A genuine issue of fact exists as to whether Mansfield cleared brush in domestic service to Smiley.**

The parties have collected a number of cases from other jurisdictions that address domestic service exceptions under various state and federal regulations. Vermont Mutual argues that domestic service must occur in or within the curtilage of a "domus." (Pl.'s Supp. Brief at 1, Docket No. 30.) Mansfield argues that domestic service is a broader category that turns on whether the interest being served is a domestic or personal one. (Def.'s Supp. Brief at 4-5, Docket No. 31.) The cases collected by the parties address different statutes and regulations that, in some cases, contain qualifiers that are not present in the Maine Workers Compensation Act. The cases that are most analogous to this one involve general domestic service exceptions and the courts construing their reach recognize that physical presence in or proximity to a domicile is not required. Compare Smith v. Ford, 472 So.2d 1223, 1226 (Fla. Ct. App. 1985) ("Domestic services may, by definition, include chores and errands outside the house or away from the domestic premises."); Jack v. Belin's Estate, 27 A.2d 455, 456-57 (Pa. Super. 1942) ("Our conclusion . . . is that the place where the services are performed does not determine the nature

of the employment" and finding that employee "removing whitewash from the roof of a green house" was performing domestic service) with Fernandez v. Lawson, 71 P.3d 779 (Cal. 2003) (Construing "household domestic service" to include work performed outside a residence in service to a "household," a term not present in the Maine Act); Caddy v. SAIF Corp., 822 P.2d 156, 158 (Ore. App. 1991) (construing a narrower exception addressed to workers "employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing the worker," citing favorably a treatise to the effect that helping to build a residence is domestic service, but finding that the narrow list of tasks identified in the Oregon statute was exclusive and did not extend to building a home, only to tasks occurring "in or about an *existing* home"); Jenkins v. INS, 108 F.3d 195, 198 (9th Cir. 1997) (construing an INS regulation pertaining to the documentation of alien workers that makes an exception for "casual hires" who perform "domestic service in a private home," a narrower category than the Maine Workers Compensation Act describes, and merely finding that an ALJ's limitation of the exception to "the maintenance of a residence and its curtilage" was a permissible interpretation); See also Success Vill. Apartments, Inc. v. UAW, 397 A.2d 85, 87 (Conn. 1978) (characterizing domestic service broadly as implying "employment on an individual and personal basis" and not service for a legal entity); Catto v. Plant, 137 A. 764, 765-767 (Conn. 1927) (holding that a gardener is a "domestic servant" and stating that "ordinarily a domestic servant is one whose service is connected with the maintenance of the house and land connected with it").

Of course, the Maine Workers' Compensation Act must be construed in accordance with its own wording. The Maine exception is worded in terms that free employers from the obligation to secure workers' compensation coverage "with respect to . . . employees engaged in domestic service." 39-A M.R.S.A. § 401(1)(A). The Act effectively states the domestic service

exception in the broadest possible terms. It is the nature of the work and not the location that is determinative. The facts of this case demonstrate that Mansfield was not serving any of Smiley's commercial pursuits, that the work occurred on Smiley's private land and that the brush clearing activity was undertaken to clear a view for a residence in the earliest stages of construction. There exists a genuine issue of material fact on this record whether Mansfield performed domestic services for Smiley and his household even though the work was performed remotely from Smiley's then existing domicile.

Vermont Mutual raises the argument that the Maine Legislature certainly did not intend to allow an individual to act as his own general contractor for the construction of a personal residence and thereby escape the obligation of obtaining workers' compensation for day laborers that might be hired during the construction. (Pl.'s Rebuttal Brief at 3, Docket No. 32.) I am not sure exactly how that argument relates to the factual record in front of this Court. We do not know if Smiley had hired a general contractor to build his new residence. Nor does it necessarily follow that a homeowner, acting as his own general contractor, would necessarily employ anyone other than independent contractors to perform certain phases of the construction, in which case the Maine Workers' Compensation Act would not necessarily require the homeowner/general contractor to obtain workers' compensation insurance. A homeowner might do his own day labor during construction and rely upon friends, relatives, and neighbors to gratuitously help him, the very argument Mansfield and Smiley make in this case.

### **Order on Motion to Strike Jury Demand**

I previously deferred ruling on Vermont Mutual's motion to strike Mansfield's jury demand, reasoning that there was no need to rule upon it until after the Court ruled on any dispositive motions. If the Court adopts my recommendation, there will need to be a trial, either

on a stipulated record from which the factfinder would draw the necessary inferences from undisputed facts, or a trial with live testimony. In either event the Court will have to determine whether Mansfield is entitled to a jury trial on any or all issues that exist.

I am satisfied that Vermont Mutual correctly characterizes this action as a suit "in equity" to reach and apply the proceeds of the insurance policies. Indeed, Mansfield admitted as much in his answer. (Ans. ¶ 21, Docket No. 7). Even though the action is filed as a declaratory judgment action, the parties simply by agreement chose to use that mechanism rather than going through the formalities of reducing Mansfield's claim to a monetary judgment against Smiley. For purposes of this litigation the parties have reduced Mansfield's claim to a sum certain. Mansfield thus has no independent legal claim against Vermont Mutual in this action and the only right that is implicated is Mansfield's right to reach and apply insurance proceeds. There is no claim of breach of contract between Mansfield and Vermont Mutual<sup>4</sup> nor is there joined in this action a claim by Smiley against Vermont Mutual that would qualify as a "legal" claim for contract enforcement.

I conclude that the application of the reach and apply statute in this situation is an equitable action under federal law because the legal claims have been settled by agreement for the limited purposes of this action. See Whitlock v. Hause, 694 F.2d 861, 864 (1st Cir. 1982) (discussing Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), as holding that legal claims joined with equitable claims in a single action are triable as of right to a jury). Unlike a case involving joined legal and equitable claims, the parties here have agreed to litigate only the reach and apply remedy, which is equitable in nature. There is not even a demand for legal damages in this case. "Nothing in Dairy Queen requires a jury trial on factual issues surrounding the availability of

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<sup>4</sup> Vermont Mutual's complaint speaks of specifically enforcing the agreement, but neither party claims the other party has breached the Settlement Agreement. Both sides have complied with the Settlement Agreement.

equitable relief." Id. at 865 (addressing a fraudulent conveyance claim "stripped of any underlying legal claim"). See also Allen v. Pomroy, 277 A.2d 727, 728 (Me. 1971) (discussing the development of Maine's reach and apply statute, which originally read: "No bill in equity shall be brought against an insurance company to reach and apply said insurance money until twenty days shall have elapsed from the time of the rendition of final judgment against the judgment debtor."); Camire v. Commercial Ins. Co., 160 Me. 112, 123, 198 A.2d 168, 174 (1964) ("Our 'reach and apply' process has been an equitable concept and remedy since the original P. L., 1927, c. 146, § 2.").

Mansfield's underlying action, the "reach and apply" claim, relates to the remedy to enforce his "judgment" and is equitable in nature. In determining whether there is a right to a jury trial in a federal declaratory action, the court must look at the nature of the underlying action. Whitlock, 694 F.2d at 864. A direct action by Mansfield against Vermont Mutual to recover his legal damages would not comport with Maine legal practice. See Allen, 277 A.2d at 730 ("[I]t is proscribed practice in Maine to bring a direct action against an insurance company in a negligence case prior to final judgment, the only remedy being found in the 'Reach and Apply' statute."). By bringing the action to this Court in its present posture, it has been stripped of all legal claims and only the applicability of the equitable remedy remains to be resolved. That factual dispute is not triable of right to a jury. Accordingly I grant the motion to strike the jury trial demand.

### **Conclusion**

For the reasons stated herein, I **RECOMMEND** that the Court **DENY** Vermont Mutual Insurance Company's motion for summary judgment (Docket No. 15), but grant partial relief to Vermont Mutual by finding that Mansfield fails to generate a genuine issue of fact capable of

supporting a legal finding that he was an independent contractor. I separately **GRANT** Vermont Mutual's motion to strike Mansfield's demand for jury trial (Docket No. 9).

*So Ordered.*

September 14, 2006

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

VERMONT MUTUAL INSURANCE COMPANY v.

MANSFIELD

Assigned to: JUDGE GEORGE Z. SINGAL

Cause: 28:1332 Diversity-Declaratory Judgement

Date Filed: 10/14/2005

Jury Demand: Defendant

Nature of Suit: 110 Insurance

Jurisdiction: Diversity

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