STATE OF MICHIGAN

COURT OF APPEALS

TIM PRICE and SUE PRICE

Plaintiff-Appellees,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 186219
Clinton Circuit Court
LC No. 93-007151-CK

Before: McDonald, P.J., and Murphy and M. F. Sapala*, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered for plaintiffs, specifically challenging the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV). Plaintiffs had an insurance policy with defendant in 1990 at the time the roof to their store was damaged in a storm. The roof was repaired by Thorton and Sons Construction Company, and subsequently large amounts of water leaked into the store. Plaintiffs brought this action to recover the cost of repairing the water damage from defendant, arguing that defendant was vicariously liable for Thorton's negligent repairs. At the conclusion of the trial, the jury determined that the roof had been negligently repaired and that Thorton had acted as defendant's agent in so doing. The trial court subsequently denied defendant's motion for JNOV. We affirm.

Defendant first argues that it cannot be held vicariously liable for Thorton's negligent acts because Thorton was an independent contractor. We disagree. The mere fact that a party can be considered an independent contractor does not preclude a finding of vicarious liability under an agency by estoppel (ostensible agency) theory. *Howard v Park*, 37 Mich App 496; 195 NW2d 39 (1972). A party's reasonable belief that they are dealing with an agent of the principal is one of three elements necessary for establishing agency by estoppel. *Chapa v St Mary's Hospital*, 192 Mich App 29, 33-34; 480 NW2d 590 (1991). Defendant attempts to distinguish *Howard* by arguing that the application of agency by estoppel arose in that case because numerous facts suggested to the plaintiff that the treating doctor was not only an agent but actually an employee of the defendant clinic. Defendant argues the fact that Thorton was an independent contractor precluded any finding that plaintiffs

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

reasonably believed that Thorton was an agent/employee of defendant. We conclude that this argument does not demonstrate that vicarious liability was precluded as a matter of law, as defendant suggests, but rather attacks the factual basis on which the jury determined that defendant was vicariously liable under an agency by estoppel theory.

Defendant supplements its argument by asserting that even if the agency were express, rather than ostensible, defendant would not be vicariously liable because Thorton was an independent contractor. Based on this premise, defendant concludes that it would make little sense to find defendant vicariously liable under an ostensible agency theory when no liability could be found if the agency were express. In support of its premise, defendant cites *Janice v Hondizinski*, 176 Mich App 49; 439 NW2d 276 (1989). However, *Janice* does not support the rule of law upon which this argument is based. This Court did not expressly hold in Janice that the principal cannot be held vicariously liable for the negligence of an express agent. That formulation can only be arrived at by making the assumption that this Court, in *Janice*, considered the negligent carrier an express agent of the newspaper and nevertheless found the newspaper not liable due to the carrier's status as an independent contractor. However, where the plaintiff in *Janice* was injured after being struck by the carrier and had no prior association with the carrier that would raise such an agency issue, we believe that defendant's reading of *Janice* is untenable.

Defendant next argues that the trial court erred in denying its JNOV motion, maintaining that there was insufficient evidence produced at trial to find that the elements of agency by estoppel were present. We disagree. Three elements must be satisfied to establish agency by estoppel:

> (1) the person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one, (2) the belief must be generated by some act or neglect on the part of the principal sought to be charged, and (3) the person relying on the agent's authority must not be guilty of negligence. [*Chapa v St Mary's Hospital*, 192 Mich App 29, 33-34 (1991).]

We agree with the trial court that there was sufficient evidence produced at trial to satisfy all three elements. Plaintiffs testified that they had not authorized Thorton to repair their roof; that they discovered Thorton repairing their roof one day, and that when asked, Thorton told them that defendant had sent him to do the repairs. This evidence supports the conclusion that plaintiffs reasonably believed that defendant had authorized Thorton to repair the roof on its behalf.

As to the second element, we note that apparent authority must be traceable to the principal and cannot be established solely by the acts and conduct of the agent. *Alar v Mercy Memorial Hospital*, 208 Mich App 518; 529 NW2d 318 (1995). However, when evidence of such declarations does not stand alone but is supplemented by the introduction of evidence of attending facts and circumstances from which an inference of agency may be drawn, the question is one for the jury. *Shinabarger v Phillips*, 370 Mich 135; 121 NW2d 693 (1963). Not only was there evidence that Thorton told plaintiffs that defendant sent him to do the repairs, other evidence presented indicated that defendant authorized the payment of plaintiff's 1990 claim based on Thorton's estimate, that defendant, rather than

plaintiffs, requested the estimate from Thorton, that defendant paid the claim in an amount equaling Thorton's estimate less plaintiffs' deductible, and that plaintiffs believed, based on defendant's issuance of a check consistent with Thorton's estimate, that defendant had authorized Thorton to do the job. This evidence was sufficient to create a question of fact for the jury on this element.

Finally, the evidence showed that plaintiffs were not negligent in allowing Thorton to finish the roofing job and thus, the third element is satisfied. Prior to the time they found Thorton doing the repairs, they had no previous contact with him. Further, by the time plaintiffs arrived, Thorton had already removed the existing roofing material and bare wood was exposed. Thorton testified that it would have been ill-advised to leave the roof in that state because if they had, it would have leaked. Thus, evidence supports the finding that plaintiffs were not negligent in allowing Thorton to complete the job. Consequently, the trial court did not err in denying defendant's JNOV motion.

Affirmed. Costs to plaintiffs.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ Michael F. Sapala