

STATE OF MICHIGAN
COURT OF APPEALS

STEPHEN M. KRYWY,

Plaintiff-Appellant,

v

DETROIT NEWSPAPER AGENCY d/b/a
DETROIT NEWS,

Defendant/Counterplaintiff-
Appellee,

and

JARED ELLIS BARBER,

Defendant,

and

JANE KOCH,

Defendant/Counterdefendant.

UNPUBLISHED
February 16, 2010

No. 283896
Macomb Circuit Court
LC No. 2004-004846-NI

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Plaintiff appeals by right the circuit court's order granting summary disposition in favor of defendant Detroit Newspaper Agency (DNA). Because there remains an outstanding question of fact for the jury, we reverse and remand for further proceedings consistent with this opinion.

Defendant Jane Koch delivered newspapers for DNA and was assisted by defendant Jared Barber, with whom she lived. On February 20, 2004, Barber was driving eastbound on 12-Mile Road in Warren, Michigan, in an automobile owned by Koch. In the car were newspapers that Barber had picked up from DNA's warehouse, and which were intended for delivery. DNA had

provided the newspapers to Barber, as it understood him to be Koch's assistant. While it is disputed whether Barber was engaged in the transport or delivery of newspapers at the precise time of the accident,¹ it is not disputed that Barber's acts of picking up, transporting, and delivering the newspapers that day were done at Koch's request and for the purpose of fulfilling Koch's responsibilities to DNA. Barber failed to stop at a traffic signal and collided with the rear of plaintiff's automobile, which was stopped for the traffic signal. Plaintiff sustained a closed-head injury and serious neurological injury as a result of the accident. After DNA was granted summary disposition regarding plaintiff's claim for vicarious liability, the parties agreed to binding arbitration. The arbitrators found that plaintiff was permanently disabled and awarded him \$1,500,000. The circuit court issued a judgment against Barber and Koch that was consistent with the arbitrator's award, plus interest, case evaluation sanctions, attorney fees, and costs.

Plaintiff now appeals the circuit court's grant of summary disposition on the issue of DNA's vicarious liability. Plaintiff argues that Barber and Koch were employees or agents of DNA, making DNA liable for their negligence under principles of respondeat superior. Plaintiff contends that the circuit court erred by finding no genuine issue of material fact concerning whether Barber was an agent or subagent of DNA. We agree with plaintiff.

A circuit court's ruling on a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). Under the principal of vicarious liability, or respondeat superior, "a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 650-651; 649 NW2d 23 (2002), quoting *Murphy v Kuhartz*, 244 Mich 54, 56; 221 NW 143 (1928). The extent of an employer's right to control the activities of a tortfeasor-employee must be analyzed in determining whether the employer ought to be legally liable. See *Hoffman v JDM Assoc, Inc*, 213 Mich App 466, 469; 540 NW2d 689 (1995). The "control test" therefore governs whether a master should be held vicariously liable for the acts committed by a servant that injure a third party. *Ashker v Ford Motor Co*, 245 Mich App 9, 16; 627 NW2d 1 (2001). This same control test applies in determining whether a newspaper carrier is an employee or an independent contractor of the newspaper company. *Janice v Hondzinski*, 176 Mich App 49, 53; 439 NW2d 276 (1989).

In this case, the circuit court concluded that Koch was an independent contractor and that, "at most," Barber was also an independent contractor. What the circuit court failed to recognize is the long-established rule that "the existence and scope of an agency relationship are questions of fact for the jury." *Whitmore v Fabi*, 155 Mich App 333, 338; 399 NW2d 520 (1986); see also *Michigan Nat'l Bank of Detroit v Kellam*, 107 Mich App 669, 678; 309 NW2d 700 (1981). Indeed, in *Sliter v Cobb*, 388 Mich 202, 207-209; 200 NW2d 67 (1972), a case remarkably similar to the case at bar, our Supreme Court unanimously reversed the grant of summary

¹ Irrespective of whether the circuit court was not asked determine this issue at the time of summary disposition, or simply did not reach it, this issue is not before us on appeal. It will need to be determined on remand, and appears to present a disputed question of fact for the jury.

disposition for a newspaper company because there were outstanding questions of material fact concerning whether a newspaper delivery person was an employee or an independent contractor. The *Sliter* Court held that “[i]t is clear that in this area the result must be based on the particular facts of each case” *Id.* at 207.

In *Janice*, 176 Mich App at 53-54, this Court set forth a list of “indicia” to determine whether a newspaper carrier is an independent contractor or an employee of the publisher:

if the carrier purchased his route from another carrier rather than the publisher, if the carrier is referred to as an “independent contractor” in the contract with the publisher, if the carrier is not included in any of the benefit plans, and if the carrier trains his own successor. Other important factors for this determination include: whether the carrier hired his own substitutes, whether the company rules or suggestions had to be followed, and whether the carrier could deliver other items as well as the publisher’s newspaper.

In light of the abovementioned caselaw, and after having thoroughly reviewed the record, we conclude that there were sufficient facts from which a rational jury could have found the existence of an employer-employee relationship between Koch and DNA in this case. Specifically, the record reveals that: (1) DNA owned the delivery route and contracted with whomever it chose once a carrier stopped delivering, (2) new carriers, including Koch, were trained by DNA, and not the prior carrier, (3) DNA set forth rules or “suggestions to be followed” regarding how newspapers should be delivered, (4) when the carriers, including Koch, do not comply with delivery instructions on the “throw list,” or fail to deliver a newspaper, they may be fined a substantial penalty that must be paid over to DNA rather than to the customer whose paper was misdelivered, (5) the contract between Koch and DNA is terminable at will, (6) all billing and accounting is handled by DNA rather than by Koch, (7) Koch received her check from DNA, (8) the newspapers are never owned by Koch, but remain the property of DNA until they are left at the customers’ premises, at which time they become the customers’ property, and (9) Koch could not cancel a customer for nonpayment, or indeed for any reason, without receiving permission from DNA. Under the standards set forth in *Janice* and related cases, these factors all militate in favor of a finding that Koch was DNA’s employee.

We fully acknowledge that there were also certain facts weighing in favor of a finding that Koch was an independent contractor. In particular, (1) the means and method of transportation for delivering the newspapers was left up to Koch,² (2) Koch was permitted to deliver other newspapers at the same time as she delivered newspapers for DNA, (3) Koch was responsible for providing her own substitute carrier rather than DNA providing her with one, (4) Koch’s contract with DNA refers to her as an “independent contractor,” (5) Koch is not included in any DNA benefit plans, and (6) Koch’s contract with DNA provides that she “shall indemnify, defend and hold DNA harmless from and against all claims, damages, losses, and expenses . . . asserted against DNA . . . by any other person, for injury . . . arising out of any acts

² Plaintiff argues that this was in dispute, but the record does not appear to support this contention.

or omissions of the Contractor or the Contractor's agents." However, given that the facts of this case do not clearly identify Koch as either an employee or an independent contractor under the *Janice* standards, we conclude that plaintiff raised a genuine issue of material fact that precluded summary disposition on this matter. See *Sliter*, 388 Mich at 208-209. We conclude that reasonable minds could certainly differ concerning whether Koch was an employee of DNA or an independent contractor. See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In *Sliter*, 388 Mich at 203-204, just as in the instant case, the plaintiffs were injured when a car owned by a newspaper carrier, driven by the carrier's friend at the request of the carrier, and used to deliver newspapers for a publisher, collided with the plaintiff's automobile. Our Supreme Court saw no bar to the publisher's liability, even though it was not the carrier herself who was driving the car at the time of the accident. Instead, our Supreme Court remanded for trial on the question of whether the carrier was an employee or independent contractor. *Id.* at 208-209. Implicit in this remand was the notion that, if the carrier were found to be an employee of the publisher, the publisher would be liable for the negligence of the driver assisting the carrier in the act of delivering the newspapers. Otherwise, there would have been no reason to remand for trial, and our Supreme Court would have simply concluded that the publisher could not be held liable for the acts of the driver because the driver had no contract with the publisher.

The holding in *Sliter* is consistent with the concept of subagency. "A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal." 1 Restatement 3d, Agency, § 3.15(1), p 272. Agents may only appoint subagents if they have "actual or apparent authority to do so." 1 Restatement 3d, Agency, § 3.15(2), p 272. If the agent has such authority,

[a]s between a principal and third parties, is it immaterial that an action was taken by a subagent as opposed to an agent directly appointed by the principal. . . . [A]n action taken by a subagent carries the legal consequences for the principal that would follow were the action taken by the appointing agent. [1 Restatement 3d, Agency, § 3.15, comment *d*, pp 275-276.]

Here, Koch was contractually obligated by DNA to provide her own substitute carrier and contractually authorized to "employ . . . any person to perform any part" of her obligations to DNA. Thus, viewing the evidence in a light most favorable to plaintiff, Koch had express authority from DNA to hire a substitute carrier. And even absent such express authority to hire a substitute, Koch certainly had implied authority to hire a subagent given the contractual requirement to provide for her own substitute. If Koch was an employee, rather than an independent contractor, she was acting within the scope of her employment or agency when she hired Barber, making Barber a sub-employee or subagent of DNA. This would result in DNA being liable to plaintiff for the actions taken by Barber within the scope of that employment. See 1 Restatement 3d, Agency, § 3.15, comment *d*, pp 275-276; see also *Harper v Toler*, 884 So 2d 1124, 1135 (Fla App, 2004); *Waggaman v Gen Finance Co of Philadelphia*, 116 F2d 254, 258-259 (CA 3, 1940). Thus, if the jury concludes on remand that Koch was an employee of DNA for purposes of respondeat superior liability, then DNA will necessarily be liable for Barber's negligence based on his status as a subagent or sub-employee, provided that Barber was engaged in the task of transporting or delivering DNA's newspapers at the request of either DNA or Koch

at the time of the accident. However, if the jury concludes that Koch was an independent contractor for whom DNA had no respondeat superior liability, then Barber is merely an employee of Koch rather than a subagent or sub-employee of DNA, and DNA has no liability for Barber's negligence.

In sum, we conclude that the record evidence in this case created a genuine issue of material fact precluding summary disposition. As such, we reverse the grant of summary disposition for DNA and remand for trial.

With respect to plaintiff's remaining arguments concerning the matter of discovery, we have already concluded that summary disposition was improperly granted. After reviewing the record and the arguments of the parties, we also conclude that plaintiff would have stood a reasonable chance of uncovering further factual support for his position had the circuit court allowed the parties to complete discovery. See *Huff v Ford Motor Co*, 127 Mich App 287, 296; 338 NW2d 387 (1983). The purpose of discovery is not solely to collect evidence in support of or in opposition to a pretrial motion for summary disposition; it is axiomatic that discovery is also designed to permit the parties to gather evidence for use at trial, itself. See *Masters v Highland Park*, 97 Mich App 56, 59; 294 NW2d 246 (1980). With this in mind, we direct the circuit court on remand to provide the parties additional time to complete discovery before trial.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane E. Beckering