STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0725

Hussein Musse, a minor, et al.,
Appellants,

vs.

Timothy Engle, et al.,
Respondents,

Skyline Tower of St. Paul, Limited Partnership,
d/b/a Skyline Tower, et al.,
Respondents.

Filed May 13, 2008
Affirmed
Hudson, Judge

Ramsey County District Court
File No. CX-05-4317

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Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.[*]

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

This is an appeal from summary judgment in appellants' personal injury action for vicarious liability based on respondeat superior, in which the district court ruled that the security company that employed the guard who shot appellant at an apartment building was an independent contractor. Appellants argue that the district court erred in granting summary judgment in favor of respondents building owner and its affiliates because (1) the district court improperly made findings of fact on a motion for summary judgment; (2) genuine issues of material fact exist regarding whether the security company was an agent of respondents; and (3) genuine issues of material fact exist regarding whether respondents are subject to the "retained control" exception to the general rule on vicarious liability. Because the district court did not make findings of fact, and because there are no genuine issues of material fact, we affirm.

FACTS

Wolf Protective Agency, Inc. (Wolf) is a security company that contracted to provide security services for Skyline Tower, a large apartment building in St. Paul. Michael Smith is Wolf's CEO. Skyline is owned by Skyline Tower of Saint Paul, L.P. (Skyline). Skyline conducts all of its business through its agents; CommonBond Housing is the managing agent for Skyline. CommonBond Housing is a nonprofit organization formed to manage operations of the properties developed by CommonBond Communities.

In 2002, Richard Hutsell, the vice president of property management for CommonBond Housing, and Smith executed an agreement for Wolf to "provide security service" to Skyline at Skyline Tower. The contract established the hours during which the security service was to be provided and the hourly rate billed. The contract provided that Wolf "shall perform the service called for hereunder as an agent of the client." The contract also provided that Wolf "reserves the right to refuse and or cancel services . . . that it may deem inappropriate or unreasonably dangerous."

In November 2003, Alan Walker, a security guard employed by Wolf, was working at Skyline Tower. Walker discovered Hussein Musse in the parking lot holding a car stereo; a car parked nearby seemed to have damage consistent with the removal of a stereo. Musse told Walker that the car belonged to his relative who lived at Skyline Tower. Walker asked Musse to accompany him to the lobby so that he could verify Musse's claim. Walker had difficulty locating the information he needed, so he called a dispatcher at Wolf, who then contacted Timothy Engle. Engle, also employed by Wolf as a security guard, was on mobile patrol and came to assist Walker.

While Engle and Walker were reviewing the security tape of the parking lot, Musse ran out of the building and into the car he had initially driven to Skyline Tower, in which two of his friends were waiting. Engle and Walker ran after Musse. As Musse backed up the car, it apparently grazed Engle's leg. Engle moved alongside the car, yelled at the occupants to put their hands up, and drew his gun. Engle moved to the driver's-side door of the car, there was some sort of struggle, and Engle's gun went off, striking Musse in the back. Musse was rendered paraplegic.

Musse, by and through his court-appointed guardian; Musse's mother; and the State of Minnesota filed an amended complaint in Ramsey County District Court against Engle, Wolf, Skyline Tower of Saint Paul, L.P. d/b/a Skyline Tower, CommonBond Communities, and CommonBond Investment Corporation. The complaint alleged (1) negligence by Engle; (2) civil assault and battery by Engle; (3) vicarious liability on the part of Wolf for Engle's actions; (4) negligence by Wolf; (5) vicarious liability on the part of Skyline Tower of Saint Paul, L.P d/b/a Skyline Tower, CommonBond Communities, and CommonBond Investment Corporation for the actions of Engle; (6) negligence by Skyline Tower of Saint Paul, L.P. d/b/a Skyline Tower, CommonBond Communities, and CommonBond Investment Corporation; and (7) negligence, assault and battery, and vicarious liability against all of the defendants.

The parties conducted significant discovery and deposed many of the people involved in the incident. Engle testified during his deposition that, as a security officer at Skyline Tower, his duties included "[m]ainly being present, walking the floors, checking the stairwells . . . checking the parking lots, the sidewalks around the building. But mainly just walking around the building and being seen." Engle also testified that he occasionally delivered mail to Skyline Tower residents and dealt with maintenance issues. Engle explained that when Skyline would ask the security officers to do something, they would comply, but that the actions would "ha[ve] to be okayed by our supervisors . . . . [Our] direct orders came from supervisors." Engle did not believe that Skyline had any input on Wolf's standard operating procedures (SOP) and stated that he never received any training from Skyline. Engle testified that Wolf had issued him a

badge, belt, handcuffs and holder, flashlight and holder, mace, and an ID card. Engle also purchased his gun from Wolf on a rent-to-own basis.

Walker explained that Wolf's security officers were always expected to complete daily logs detailing their daily activity, that they did so for every property Wolf contracted with, and that it was not unique to Skyline Tower.

Hutsell testified that Wolf was hired "for their expertise in security." When asked under what circumstances CommonBond would want people arrested at Skyline Tower, Hutsell answered: "Oh, that was really not my call. We hired them for their expertise in the security business. I'm not a security expert." Hutsell explained that, although he would expect Wolf's security guards to take some sort of action when they see crimes being committed, what circumstances would warrant the detention or handcuffing of people is "for [Wolf] to determine . . . I don't do security. That's not my business. And that is what they're trained for. Not my call to make." Hutsell stated that he "rel[ied] on [Wolf's] judgment when it comes to enforcing a particular [security] situation."

Hutsell also testified that although the management of Skyline would receive daily reports from Wolf and review those reports, he did not believe that they "were making determinations on the behavior of Wolf. They were a vendor and an independent contractor. I think it was [Skyline management's] job to know what was going on." He stated that Skyline management wanted to know what was happening at the property, but Hutsell did not believe that the management "made a value judgment one way or another about what work was being done."

Hutsell explained that, at one point, because of the racial makeup of the residents of Skyline Tower, he wanted Wolf to provide security guards who were people of color. When asked whether he had the authority to direct Wolf to comply with that wish, Hutsell replied, "[n]o, it was a request. It wasn't a mandate. We don't mandate. They're a vendor. . . . I made a suggestion. I don't tell people how to do their business." When asked whether he made the decision that security guards at Skyline Tower would be armed, Hutsell replied, "[n]o, I didn't discuss that. I left it up to the companies to make that determination by their training and their protocols. . . . [Whether the guards were armed is] not for me to make the determination. I relied on their training and their analysis of the situation."

Gregory Sullivan, a police officer who was one of Wolf's owners at the time of the incident, was also deposed. He testified that it was customary for Wolf to provide customized programs for specific clients. Sullivan explained that the SOP manual was developed by Wolf personnel, but if a client wanted to make changes in the SOP, Wolf would be responsive to those requests.

Michael Smith, one of Wolf's owners, testified that he met with Hutsell to discuss Skyline's needs. Smith testified that they discussed "some of things that they wanted to take place at that property, the routine daily activities of how they wanted the services to be, what their expectations of a service provider was going to be, the different duties and responsibilities that they'd have." Smith also testified that Skyline did not have anything to do with Wolf's SOP manual, and that he did not remember that Wolf ever shared that document with Skyline. Smith explained that Wolf trained its own security officers and

did not rely on its clients to do that. Smith stated that he was not aware of any training Skyline had provided to Wolf's security officers except some training on the operation of the camera system at Skyline Tower. Smith also stated that Skyline never told Wolf which security officers to assign to the Skyline property and that Wolf controlled the schedules of its officers.

Christopher Roberts, the chief financial officer and vice president of Wolf, was also deposed. Roberts testified that Skyline did not provide any training to Wolf's officers and that Skyline depended on Wolf to provide the appropriate security-type training to its officers. Roberts also testified that Skyline management had the authority to make requests of Wolf's officers and to direct Wolf's officers to deliver mail and fliers at the Skyline property. But Roberts stated that Wolf could decline a request from Skyline "for whatever reason." Roberts explained that it would not be acceptable for a Wolf employee to undertake an activity requested by Skyline management that was contrary to Wolf's SOP. Roberts also stated that the decision to have armed security officers at Skyline Tower was one made by Wolf, and that Skyline agreed with that recommendation.

Following discovery, Skyline Tower of St. Paul, L.P. d/b/a Skyline Tower, CommonBond Communities, and CommonBond Investment Corporation (Skyline respondents) moved for summary judgment, arguing that Wolf was an independent contractor, not an employee of Skyline respondents and, therefore, they could not be held liable for Engle's conduct. The district court granted the motion for summary judgment.

In its thorough and well-reasoned order and memorandum, the district court noted that "[w]hether an agency relationship existed between Wolf and Skyline, L.P., CommonBond Communities or CommonBond Housing is not the end of the inquiry in determining whether liability for the allegedly tortious acts of Engle extends to those entities on the theory of respondeat superior." The district court explained that "[t]he key determination is whether Wolf was an independent contractor or a servant/employee." The district court then examined the factors for determining whether a party is an independent contractor as set out by *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 128 N.W.2d 324 (Minn. 1964), and concluded:

> In the instant case, Skyline, L.P., CommonBond Communities, and CommonBond Housing, made it clear to Wolf *what* was to be done, including enforcement of a trespass policy, which included the criteria for designating someone a trespasser. . . . However, there is no evidence that these Defendants directed Wolf and its personnel on *how* they were to carry out their duties.
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> . . . .
>
> The Court concludes that [the *Guhlke* factors] weigh in favor of a determination that Wolf was an independent contractor. Wolf hired, paid, and made all employment decisions concerning Engle; Wolf outfitted Engle; Wolf armed Engle; Wolf trained Engle; and Wolf sent Engle to the Skyline Tower property on November 2, 2003. An examination of the factors set out in *Guhlke*, establishes, in the Court's opinion, that the Wolf Protective Agency was an independent contractor at the time [of the incident].

The district court also concluded that Skyline respondents did not retain sufficient control over Wolf to be subject to liability under Restatement (Second) of Torts § 414 (1965). This appeal follows.

D E C I S I O N

Minn. R. Civ. P. 56.03 provides that summary judgment is appropriate when "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 either party is entitled to a judgment as a matter of law."

On appeal from summary judgment, this court asks (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). This court views the evidence in the light most favorable to the party against whom judgment was granted. *Id*. No genuine issue of material fact exists when "the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997); *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (stating that "[a] party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.").

"Whether a worker is an employee or an independent contractor involves a mixed question of law and fact. Once the controlling facts are determined, the question whether a person is an employee becomes one of law." *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 629 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Dec. 20, 2000).

I

Appellants argue that the district court improperly made findings of fact in the summary-judgment proceeding. We disagree. The facts in this case are not in dispute. Instead, the parties dispute the interpretation of the facts in light of the relevant caselaw. Here, the district court did not weigh any facts or make any credibility determinations when making its decision regarding summary judgment; it simply applied the law to undisputed facts.

II

Appellants argue that the district court erred in granting summary judgment in favor of Skyline respondents because genuine issues of material fact exist regarding whether Wolf was an agent of Skyline respondents. Appellants maintain that the record supports an inference that Wolf was an agent of Skyline respondents, and, therefore, they may be held liable for Engle's actions.

Under the principle of respondeat superior, an employer may be held vicariously liable for torts committed by an employee acting within the course and scope of his or her employment. *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999). "Respondeat superior or vicarious liability is a principle whereby

responsibility is imposed on the master who is not directly at fault." *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 8 (Minn. 2006) (quotation omitted).

The Restatement (Second) of Agency § 2 (1958) states that

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
>
> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
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> (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

See Urban ex rel. Urban v. Am. Legion Post 184, 695 N.W.2d 153, 160 (Minn. App. 2005) (citing Restatement (Second) of Agency § 2 (1958)), *aff'd on other grounds*, *Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1 (Minn. 2006). The comments to the Restatement explain the relationship between servants, agents, and independent contractors:

> Although an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another and who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent, since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.

> The word "servant" is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from other persons for whose physical conduct the employer is not responsible. These latter persons fall into two groups: those who are agents but do not respond to the tests for servants, and those who are not agents. *For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term "independent contractor" is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible except in the performance of nondelegable duties*.

Restatement (Second) of Agency § 2 cmt. b (emphasis added). In Minnesota, the general rule is that an "'employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.'" *Conover v. N. States Power*, 313 N.W.2d 397, 403 (Minn. 1981) (quoting Restatement (Second) of Torts § 409 (1965)); *see also Urban ex rel. Urban*, 695 N.W.2d at 160 (stating that "principals are generally not vicariously liable for the acts of independent contractors"). Thus, even if Wolf were an agent of Skyline respondents, they would not be vicariously liable if Wolf were also an independent contractor. Therefore, as noted by the district court, the relevant question is whether there are genuine issues of material fact regarding whether Wolf was an independent contractor.

The factors to be considered when distinguishing between an employee and an independent contractor are "(1) [t]he right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to

discharge." *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964). The most important factor for consideration in light of the nature of the work involved is the employer's right to control the means and manner of performance. *Id.* It is not the actual control, but the right of control, that is determinative. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 730 (Minn. 1990); *Moore Assocs. v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 393 (Minn. App. 1996). "The label parties give to their relationship is not determinative; the relationship is determined by law." *Jenson*, 617 N.W.2d at 630.

Here, the undisputed facts in the record show that, while Skyline respondents did have some level of control over Wolf and the actions of its security officers, that control was limited to what duties the security officers were to perform and not how they performed those duties. Skyline respondents assigned tasks to the officers and established the types of tasks they wanted performed, but the details of that performance were left to Wolf and the security officers to decide. For example, Skyline respondents told Wolf's officers where to patrol but did not control how the officers patrolled or how they responded to disturbances or threats encountered while on patrol; instead, Skyline respondents relied on Wolf's security expertise. Hutsell testified that, although he would expect Wolf's security guards to take some sort of action if they saw crimes being committed, the specific circumstances that would warrant the detention or handcuffing of people were to be determined by Wolf. And Engle testified that when Skyline would ask the security officers to do something, they would comply, but that the actions would

"ha[ve] to be okayed by our supervisors . . . . [Our] direct orders came from supervisors."

Appellants focus on the fact that Skyline asked the officers to deliver mail to Skyline Tower residents, distribute fliers, attend community meetings organized by Skyline, collect rent from Skyline Tower residents, and deal with maintenance issues. Appellants maintain that those specific tasks "varied greatly from merely those one would attribute to a security force." These facts are undisputed, but they do not change the nature of the relationship between Skyline respondents and Wolf.

The record clearly shows that Wolf controlled the means and manner of the security officers' performance; determined what security officers would be assigned to Skyline Tower; trained the officers; equipped the officers with all the tools necessary for the job except for the surveillance system installed at the property and computers and fax machines located at the facility; directed the officers' conduct with regard to the use of force; monitored the officers' day-to-day conduct; provided services that were very specialized and required specialized training and equipment; provided direct supervision of the security officers; and paid the security officers. In short, the undisputed facts in the record show that Wolf was an independent contractor, and the district court did not err by granting summary judgment in favor of Skyline respondents on this issue.

III

Appellants argue that even if Wolf was an independent contractor, summary judgment was inappropriate because genuine issues of material fact remain regarding

whether Skyline respondents are subject to the "retained control" exception to the general rule on vicarious liability. We disagree.

"[A]n employer of an independent contractor may be found negligent when it retains detailed control over a project and then fails to exercise reasonably careful supervision over that project." *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 189 (Minn. 2005) (citing *Conover*, 313 N.W.2d at 401). The Restatement (Second) of Torts § 414 (1965) provides that:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The comment to the Restatement explains that:

> If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. *The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others*.

Id. cmt. a (emphasis added). But for liability under this exception to attach, an employer of an independent contractor must do more than exercise a minimal level of control over the independent contractor's performance:

> It is not enough that [the company] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. . . . There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Sutherland v. Barton, 570 N.W.2d 1, 5–6 (Minn. 1997) (quotation omitted) (addressing liability under section 414).

Here, the district court concluded that the undisputed facts did not support an inference that Skyline respondents exerted sufficient control over the actions of Wolf's security officers to be subject to liability under section 414. The facts, as outlined above, support the district court's conclusion. We conclude that the district court did not err by granting summary judgment in favor of Skyline respondents.

Affirmed.