IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JESUS COLON, Plaintiff, v. GANNETT COMPANY, INC., a Delaware corporation, t/a THE NEWS JOURNAL, Defendant/Third Party Plaintiff, v. VALNIQUE JOHNSON and KEITH WALKER, Third Party Defendants.	)	C.A. No. N10C-04-007 MMJ

Submitted: April 26, 2012
Decided: July 26, 2012

On Defendant/Third-Party Plaintiff, Gannett Company, Inc.'s Motion for Summary Judgment

OPINION

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JOHNSTON, J.

Plaintiff Jesus Colon ("Colon") was selling newspapers as a street hawker for Defendant-Third Party Plaintiff Gannett Company, Inc. ("Gannett") when he was struck by a motor vehicle. Colon filed suit against Gannett, alleging negligence and reckless disregard for Colon's safety.

Gannett filed this Motion for Summary Judgment, arguing that the independent contractor defense precludes any finding of liability on the part of Gannett. Gannett further argues that none of the exceptions to the independent contractor defense are applicable to the instant matter.

The Court finds that a genuine issue of material fact exists as to whether the inherently dangerous work exception to the independent contractor defense is applicable. In particular, there is a factual question as to whether selling newspapers as a street hawker presents a special danger or peculiar risk such that special precautions are necessary. Therefore, Gannett's Motion for Summary Judgment must be denied.

FACTUAL AND PROCEDURAL CONTEXT

Gannett, publisher of The News Journal, sells its newspapers through a variety of wholesale and retail sites. Relevant to the instant litigation is Gannett's utilization of "street hawkers" – independent contractors who purchase and resell copies of the newspaper at predetermined locations.

Gannett entered into a "Street Seller/Hawker Agreement" ("Agreement") with Third-Party Defendant Keith Walker ("Walker"). The Agreement provides that Walker, an independent contractor, purchases newspapers daily from Gannett and resells them in the "Bear-New Castle" area. Pursuant to the Agreement, Walker may employ or contract with other persons to assist in selling newspapers.

The Agreement further provides:

> Contractor [Walker] shall indemnify, defend and hold Company [Gannett] harmless from and against any and all claims, damages, losses and expenses, including by not limited to attorneys' fees, that may hereafter be asserted against Company by Contractor or by anyone performing Contractor's obligations under this Agreement or by any other person, for injury or death, damage to property, or for any other cause, arising out of any acts or omissions in performing Contractor's obligations under this Agreement….

In order to fulfill his obligations under the Agreement, Walker subcontracted with Colon to sell Gannett's newspapers as a street hawker. On April 2, 2008, Colon was working as a street hawker at the intersection of Fourth and Jackson Streets in Wilmington, Delaware. As Colon was completing a sales transaction, he was struck by an automobile driven by Valnique Johnson ("Johnson"). Colon sustained serious injuries as a result of the accident.

On April 1, 2010, Colon filed suit in this Court against Gannett, alleging negligence and reckless disregard for Colon's safety. Gannett, when answering Colon's Complaint, filed third party complaints against Walker and Johnson.[1]

STANDARD OF REVIEW

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[2] All facts are viewed in a light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[4] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[5] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish

[1] Walker and Johnson, the Third Party Defendants, have not joined Gannett's Motion for Summary Judgment.

[2] Super. Ct. Civ. R. 56(c).

[3] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).

[4] Super. Ct. Civ. R. 56(c).

[5] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

the existence of an element essential to that party's case," then summary judgment may be granted against that party.[6]

DISCUSSION

I. Independent Contractor Defense

Generally, an employer will not be held liable for the torts of an independent contractor which are committed in the performance of contracted work.[7] The employer's freedom from liability is premised on his lack of control over the method and manner in which the contractor performs his work.[8]

The general rule, however, has been substantially eroded by a number of exceptions.[9] In the words of the Restatement (Second) of Torts, the rule "can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it."[10] The Restatement refers to the exceptions as falling into three broad categories:

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[6] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[7] Restatement (Second) of Torts § 409 (1965); s*ee also Fisher v. Townsends, Inc*., 695 A.2d 53, 58 (Del. 1997).

[8] *Chesapeake and Potomac Tel. Co. of Md. v. Chesapeake Utils. Corp*., 436 A.2d 314, 324 (Del. 1981).

[9] *See* Restatement (Second) of Torts §§ 410-429.

[10] Restatement (Second) of Torts § 409 cmt. b.

> (1) Negligence of the employer in selecting, instructing, or supervising the contractor; (2) non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff; and (3) work which is specially, peculiarly or "inherently" dangerous.[11]

The Category One exceptions, set forth at §§ 410-415, deal with liability imposed by reason of actual fault on the part of the employer of the independent contractor.[12] The Category Two and Three exceptions, set forth at §§ 416-429, are rules of vicarious liability, [13] making the employer liable for the negligence of the independent contractor, regardless of whether the employer has been negligent.[14]

A. Gannett Did Not Retain Control Over the Method or Manner of the Work Performed

The initial question is whether Gannett retained control over the location and means by which newspapers were to be sold. If so, the active control exception to the independent contractor defense, as set forth at

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[11] *Id.*

[12] *Bowles v. White Oak, Inc.,* 1988 WL 97901, at *2 (Del. Super.).

[13] On December 2, 2010, the Court held oral argument on Gannett's Motion for Judgment on the Pleadings. At argument, counsel for Gannett stated that there was no claim for vicarious liability in the instant matter. However, Colon's allegation that his work as a street hawker was inherently dangerous necessarily imposes vicarious liability on Gannett, the employer, regardless of any negligence on the part of Gannett. *See Bowles*, 1988 WL 97901, at *2

[14] *Id*.

Section 414 of the Restatement (Second) of Torts,[15] applies. Colon contends that he was "required" to walk out into active lanes of traffic in order to complete newspapers sales.

An employer may be held liable for physical harm to the employees of the independent contractor if the employer retained active control over the manner and methods used by the independent contractor in performing his work.[16] In order for this exception to apply, "the employer must have retained at least some degree of control over the manner in which the work [wa]s done."[17]

Viewing the evidence in the light most favorable to Colon, the Court finds no evidence to suggest that Gannett retained any legally significant control over the manner or methods used by Walker in selling newspapers. The Agreement between Gannett and Walker designated only the general location and distribution times for newspaper sales. The Agreement expressly authorized Walker to resell the newspapers by "whatever manner,

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[15] Restatement (Second) of Torts § 414 ("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.")

[16] *Handler Corp. v. Tlapechco*, 901 A.2d 737, 745 (Del. 2006); *Kirpalani v. Reid*, 1997 WL 719084, at *2 (Del. Super.). *See also* Restatement (Second) of Torts § 414.

[17] *Cooke v. Seaside Exteriors*, 2006 WL 3308206, at *2 (Del. Super.) (citing *Handler*, 902 A.2d at 745).

means, method, or more" he chose. As such, the Court finds that Walker determined the manner and method of selling newspapers. Therefore, the Court finds that the active control exception to the independent contractor defense is inapplicable.

B. Colon Not Required to Engage in Illegal Conduct

Colon also contends that he was required to engage in unlawful conduct in order to perform his job as a street hawker for Gannett. Colon claims that he was "required" to walk out into active lanes of traffic to make newspaper sales, in violation of 21 *Del. C.* § 4147(a).[18] Colon argues that as a matter of public policy, a contract for illegal activity must preclude assertion of the independent contractor defense. In support of this argument, Colon points to a number of jurisdictions that have recognized this so-called "illegal conduct" exception.[19]

The Court finds that Colon was not required to engage in illegal conduct in order to perform his job duties as a street hawker.[20] First, the

[18] 21 *Del. C.* § 4147(a) provides as follows: "No person shall stand in a highway for the purpose of soliciting any employment, business or contributions from the occupant of any vehicle."

[19] *See Hester v. Bandy*, 627 So.2d 833, 841 (Miss. 1993); *Hickle v. Whitney Farms, Inc.,* 29 P.3d 50, 51 (Wash. Ct. App. 2001); *France v. S. Equip. Co.,* 689 S.E.2d 1, 9 (W. Va. 2010).

[20] In reaching this conclusion, the Court need not decide whether the illegal conduct exception is a valid exception to the independent contractor defense in Delaware.

Agreement between Gannett and Walker expressly provided that Walker was to comply with all laws while operating his business. Plainly, observance of all applicable traffic laws falls within the purview of this provision.

Moreover, the Agreement stated only that newspaper sales were to take place in the "Bear-New Castle" area. It is undisputed that there were a plethora of locations within that general area where newspapers could be sold. Specifically, representatives of Gannett testified that in addition to median strips and intersections, street hawkers also sold newspapers outside of churches, grocery stores, and big box stores. As such, the decision to position Colon at a busy intersection in downtown Wilmington, such that he may enter active lanes of traffic in violation of 21 *Del. C*. § 4147(a), rested solely with Walker.[21]

[21] Whether Walker was negligent in placing Colon at the intersection is a question of fact not relevant to the instant proceedings.

C. Question of Fact Whether Selling Newspapers Involves a "Special Danger" or "Peculiar Risk"

Colon also seeks to hold Gannett liable under the inherently dangerous work exception, set forth at Section 427 of the Restatement (Second) of Torts.[22] Section 427 provides:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.[23]

The comments make clear that Section 427 is not limited to generically hazardous work.

> It is not … necessary to the employer's liability [under Section 427] that the work be of a kind which cannot be done without a risk of harm to others, or that it be of a kind which involves a high degree of risk of such harm, or that the risk be one of very serious harm, such as death or serious bodily injury. It is not necessary that the work call for any special skill or care in

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[22] The comments note that Section 427 is closely related, and to a considerable extent a duplication of, that stated in Section 416, as to work likely to create a peculiar risk of harm to others unless special precautions are taken. Section 416 provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

[23] Restatement (Second) of Torts § 427.

> doing it. It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done.[24]

The rule applies "equally to work which, although not highly dangerous, involves a risk recognizable in advance that danger inherent in the work itself, or in the ordinary or prescribed way of doing it, may cause harm to others."[25]

The risk, however, must be beyond the risk ordinarily associated with the general type of work.[26] The comments make clear that the employer of an independent contractor will not be held liable for the contractor's failure to take "routine precautions, of a kind which any careful contractor could reasonably be expected to take, against all of the ordinary and customary dangers which may arise in the course of the contemplated work."[27]

For example, an employer who hires an independent contractor to transport goods by truck will not be held liable for the contractor's failure to

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[24] Restatement (Second) of Torts § 427 cmt. b.

[25] Restatement (Second) of Torts § 413 cmt. c.

[26] *Bowles,* 1988 WL 97901, at *7.

[27] Restatement (Second) of Torts § 413 cmt. b.

inspect the brakes on the truck or for his driving in excess of the speed limit.[28] As noted by the comments, the risks involved in such work are not peculiar and call only for ordinary precautions.[29]

In order to impose liability on the employer, the work must present a "special danger" or "peculiar risk"[30] to those in the vicinity, arising out of the particular situation created, and calling for special precautions, beyond those which any reasonable contractor could be expected to take.[31] "A 'peculiar risk' is a risk differing from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence which are usual in the community."[32] "It must involve some special hazard

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[28] Restatement (Second) of Torts § 416 cmt. d.

[29] *Id.*

[30] Because of the close relation between Section 416 and Section 427, the terms "special danger" and "peculiar risk" have been used interchangeably, and have been used by courts as the same rule. As noted by the Restatement (Second) of Torts § 416, comment a, "The two rules represent different forms of statement of the same general rule, that the employer remains liable for injuries resulting from dangers which he should contemplate at the time that he enters into the contract, and cannot shift to the contractor the responsibility for such dangers, or for taking precautions against them."

[31] Restatement (Second) of Torts § 413 cmt. b*; see also In re Asbestos Litig.,* 2002 WL 31007993, at *1 (Del. Super.) (noting that the peculiar risk doctrine is concerned with the type of risk which is "peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable [person] would recognize the necessity of taking special precautions").

[32] Restatement (Second) of Torts § 416 cmt. d.

resulting from the nature of the work done, which calls for special precautions."[33]

For instance, an excavation in the highway involves a special risk to persons travelling on the highway unless a fence or other guard is put up to prevent an individual from falling into the excavation.[34] Likewise, the use of a scaffold in painting the wall of a building above a sidewalk involves a special hazard that the scaffold, paint, or bucket may fall onto those passing below, unless special precautions are taken. [35]

In determining whether the inherently dangerous work exception is applicable in the matter *sub judice*, the Court's inquiry must focus on two issues: (1) whether Colon's work as a street hawker presented a routine risk or a peculiar/special risk; and (2) whether Gannett knew or had reason to know that the risk was inherent in or normal to the work.[36]

The Court finds that a genuine issue of material fact exists as to whether the inherently dangerous work exception to the independent

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[33] *Id.*

[34] Restatement (Second) of Torts § 413 cmt. c.; Restatement (Second) of Torts § 427 cmt. c.

[35] *Id.*

[36] Neither party addresses whether selling newspapers as a street hawker presents a "special danger." Instead, both parties ask the Court to decide only whether Gannett knew or had reason to know that Colon had to engage in dangerous conduct in order to fulfill his obligations as a street hawker.

contractor defense is applicable. Specifically, the Court finds that a factual question arises as to whether selling newspapers as a street hawker presents a special danger or peculiar risk of harm.

The record establishes that, on occasion, street hawkers would be positioned such that they would need to enter the roadway in order to complete a newspaper sale. Although Gannett did not assign the street hawkers to such locations, it is undisputed that Gannett was aware that street hawkers would, at times, enter the roadway. Representatives of Gannett testified during depositions that in the normal course and scope of selling newspapers, street hawkers entered the roadway to complete sales. Therefore, the Court finds that it was a reasonably foreseeable risk that street hawkers might be struck by vehicles while performing their jobs.

Whether this risk presents a special danger or hazard, however, is a question of fact. A street hawker, like a reasonable member of the community, must take routine precautions to protect against all ordinary and customary dangers that may arise. For instance, both the individual and the street hawker must ensure that, before entering the street, no oncoming vehicles are travelling down the roadway.

The trier of fact must determine whether a street hawker encounters a special risk, peculiar to the circumstances of the job. Unlike the ordinary

member of the community, a street hawker frequently traverses in and out of active lanes of traffic in order to sell newspapers. In so doing, the street hawker is exposed, for a prolonged period of time, to vehicular traffic. It is a question of fact whether a street hawker must take special precautions, beyond those taken by an ordinary individual, in order to avoid harm. The determination of whether special precautions are necessary, triggering the inherently dangerous work exception, is an issue that must be resolved by the trier of fact.[37]

CONCLUSION

The Court finds that a genuine issue of material fact exists as to whether the inherently dangerous work exception to the independent contractor defense is applicable. Specifically, the Court finds that a question of fact arises as to whether selling newspapers as a street hawker presents a special danger or peculiar risk, such that special precautions are necessary.

THEREFORE, Gannett's Motion for Summary Judgment is hereby **DENIED.**

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston

[37] *Muscelli v. Dean Witter Reynolds, Inc.,* 1990 WL 96578, at *2 (Del. Super.) (citing *Chesapeake and Potomac Telephone Co. of Maryland v. Chesapeake Utilities Co.,* 436 A.2d 314, 339 (Del. 1981)).