

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

MICHAEL A. ZIMMERMAN,)
CONNIE ZIMMERMAN)

Plaintiffs)

v.)

C.A. No. 03C-10-038 (JTV)

THE CARRIAGE PLACE, INC.,)
FRIENDS OF OLD DOVER, INC.)
D/B/A THE DOVER HISTORICAL)
SOCIETY, GEORGE E. PARRIS,)
JR. AND CLINTON C. GLENN)

Submitted: September 9, 2005

Decided: December 30, 2005

Scott E. Chambers, Esq., Schmittinger and Rodriguez, Dover, Delaware. Attorney for Plaintiff.

Thomas S. Bouchelle, Esq., Bouchelle & Palmer, Newark, Delaware. Attorney for The Carriage Place, Inc.

Gary F. Traynor, Esq., Prickett, Jones & Elliott, Wilmington, Delaware. Attorney for Friends of Old Dover, Inc., d/b/a The Dover Historical Society.

Mr. George E. Parris, Jr., *pro se*

Mr. Clinton C. Glenn, *pro se*

Upon Consideration of Defendant Friends of Old Dover, Inc., d/b/a The Dover Historical Society's Motion for Summary Judgment

DENIED

VAUGHN, President Judge

Zimmerman v. The Carriage Place, Inc., et al.
C.A. No. 03C-10-038
December 30, 2005

OPINION

FACTS

The plaintiffs, Michael and Connie Zimmerman (“Plaintiffs”), have brought an action against The Carriage Place, Inc. (“The Carriage Place”), Friends of Old Dover, Inc. d/b/a The Dover Historical Society (“Friends of Old Dover”), George E. Parris, Jr., and Clinton C. Glenn, jointly and severally, for damages in the amount of \$25,280 plus costs and pre and post-judgment interest for damage to their driveway allegedly caused by trespass by horse drawn carriages used for public rides during Old Dover Days, 2003.

Defendant Friends of Old Dover has moved for summary judgment as to all claims asserted against it. Plaintiffs oppose the motion. The other defendants have offered no opposition to the motion.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.¹ The facts must be viewed in the light most favorable to the non-moving party.² Summary judgment may not be granted if the record indicates a

¹ Superior court Civil Rule 56(c).

² *Guy v. Judicial Nominating Comm’n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995); *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1087 (Del. Super. Ct. 1994).

Zimmerman v. The Carriage Place, Inc., et al.
C.A. No. 03C-10-038
December 30, 2005

material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.³ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.⁴

CONTENTIONS OF THE PARTIES

The Carriage Place, Inc., was hired to give carriage rides during Old Dover Days, 2003. One of the carriages was not able to turn around in the street and it was suggested that the drivers use Plaintiffs driveway at their property known as "The Governor's Club". The driveway was damaged as a result.

Plaintiffs claim that Friends of Old Dover is responsible for the damage caused by The Carriage Place because: (a) Friends of Old Dover contracted with The Carriage Place to provide the horse drawn carriage rides and (b) Friends of Old Dover retained such control over The Carriage Place's activities that a reasonable trier of fact could conclude that Friends of Old Dover is liable for the torts of its independent contractor.

Friends of Old Dover asserts that the claim against it must fail as there is no evidence of a contract between itself and The Carriage Place. Secondly, Friends of Old Dover asserts that even if it had contracted with The Carriage Place, it is not liable because the Delaware Supreme Court has held "[t]he...general rule is that

³ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁴ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

Zimmerman v. The Carriage Place, Inc., et al.
C.A. No. 03C-10-038
December 30, 2005

[a]...contractee will not be held liable for the torts of an independent contractor which are committed in the performance of the contracted work.”⁵ Plaintiffs contend that the general rule has been substantially eroded by numerous exceptions and Friends of Old Dover can be held liable for the acts of its independent contractor.⁶ Plaintiffs contend that the record contains questions of material fact which, when viewed in a light most favorable to them, preclude summary judgment.

DISCUSSION

When a plaintiff’s legal theory is based upon vicarious liability, the type of relationship must be identified and distinguished: principal/agent; master/servant; employer/employee; agent-independent contractor and non-agent independent contractor. These distinctions are important in evaluating a defendant's liability to parties who are harmed by the tortious physical act of another.⁷ In the case at bar, it must be determined if The Carriage Place is an agent-independent contractor or a non-agent independent contractor. Two general rules establish the framework for determining vicarious liability. The first general rule is that if the principal is the master of an agent who is a servant, the fault of the agent, if acting within the scope of employment, will be imputed to the principal by the doctrine of *respondeat*

⁵ *See Fisher v. Townsends, Inc.*, 695 A.2d 53, 58 (Del. 1997).

⁶ *Id.* at 60.

⁷ *Id.* at 57.

Zimmerman v. The Carriage Place, Inc., et al.
C.A. No. 03C-10-038
December 30, 2005

superior.⁸ The second general rule is that an owner or contractee will *not* be held liable for the torts of an independent contractor which are committed in the performance of the contracted work.⁹ This second general rule has been substantially eroded by numerous exceptions.¹⁰ One example of such erosion is that if the owner or contractee retains control over the activities of an independent contractor, the owner or contractee will be held liable for the torts of the independent contractor.¹¹ If the principal assumes the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract, a master/servant type of agency relationship has been created.¹² In determining whether a person is a servant or an independent contractor, Delaware recognizes that no single rule could be laid down to determine a given relationship and that each particular case must depend on its own facts.¹³ It must be shown that the [employer] controlled or had the right to control the physical conduct

⁸ *Id.* citing *Fields v. Synthetic Ropes, Inc.*, 215 A2d. 427, 432 (Del. Supr. 1965).

⁹ *Id.* at 58. (emphasis added).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 59.

¹³ *White v. Gulf Oil Corp.*, 406 A.2d 48, 51.

Zimmerman v. The Carriage Place, Inc., et al.
C.A. No. 03C-10-038
December 30, 2005

of the [servant] in the performance of the [servant's] work.¹⁴ That determination is ordinarily made by the fact finder.¹⁵ If there is sufficient evidence to establish that the requisite right of control existed “the trier of fact may find that the [servant] is an agent of the [employer] and thus impose vicarious liability on the [employer].”¹⁶

In this case, there are questions of fact as to whether there was a contract between Friends of Old Dover and The Carriage Place, and whether Friends of Old Dover exercised sufficient control that The Carriage Place became an agent-independent contractor, thus exposing Friends of Old Dover to liability for the acts of The Carriage Place. Although James E. Banning, owner and President of The Carriage Place, is unable to produce a written contract with Friends of Old Dover, he claims in his deposition that he had one which was signed by M. Jane Richter as representative for the Friends of Old Dover.¹⁷ Additionally he has produced a cancelled check from Friends of Old Dover payable to himself. Banning has also testified that Eddie Perez, who claimed to be or was presented to him as acting on behalf of Friends of Old Dover, showed Banning the precise route for the horse-drawn carriages. When Banning requested a change to the route to make it easier for the operation of the carriages, Perez stated that approval had to come from Friends

¹⁴ *Murphy v. Bayhealth, Inc.*, 2005 WL 578823 (Del. Super. Ct. 2005).

¹⁵ *Fisher v. Townsends, Inc.*, 695 A.2d 53, 59 (Del. 1997).

¹⁶ *Murphy v. Bayhealth, Inc.*, 2005 WL 578823 (Del. Super. Ct. 2005).

¹⁷ Deposition of Mr. Banning p. 6.

Zimmerman v. The Carriage Place, Inc., et al.
C.A. No. 03C-10-038
December 30, 2005

of Old Dover. Subsequently Perez told Banning the request was denied.¹⁸ To rebut the allegations of Plaintiffs, Friends of Old Dover has submitted the sworn affidavit of M. Jane Richter denying any involvement of the Friends of Old Dover and denying that Mr. Perez represented the Friends of Old Dover at any time during Old Dover Days, 2003.¹⁹

On this record, I conclude that there are genuine issues as to material facts and that the motion for summary judgment is *denied*.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File

¹⁸ *Id.* p. 13.

¹⁹ See Sworn Affidavit of Ms. Richter.