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IN THE
COURT OF APPEALS OF INDIANA

Jennifer Pfadt,

Appellant-Plaintiff,

v.

Wheels Assured Delivery Systems, Inc., and Jason Shartzer, Special Administrator for the Estate of Jonathan R. Zeigler,

Appellees-Defendants,

and

Amanda Mitchell, as Personal Representative of the Estate of Gregory Mitchell, Deceased,

December 19, 2022

Court of Appeals Case No. 21A-CT-1449

Appeal from the Marion Superior Court

The Honorable Marc Rothenberg, Judge

Trial Court Cause Nos. 49D07-1806-CT-025268 49D07-1905-CT-021945

Appellant-Plaintiff,

v.

Jason Shartzer, as Personal Representative of the Estate of Jonathan Zeigler, and Wheels Assured Delivery Systems, Inc.
Appellees-Defendants.

May, Judge.

[1] Jennifer Pfadt, individually, and Amanda Mitchell, as personal representative of the estate of Gregory Mitchell, (collectively, "Plaintiffs") appeal following the trial court's order granting summary judgment in favor of Wheels Assured Delivery Systems, Inc. ("Wheels Assured"). Plaintiffs allege the trial court erred as a matter of law in concluding:

> 1. a delivery driver involved in an automobile accident was an independent contractor and not an employee of Wheels Assured, which precluded recovery under a theory of respondeat superior; and
>
> 2. Wheels Assured was entitled to summary judgment on Pfadt's apparent agency claim.

We reverse and remand.

Facts and Procedural History

[2] Shortly after 4:00 a.m. on June 1, 2017, Jonathan R. Ziegler was driving southbound on State Road 1 in Allen County, Indiana, when his vehicle crossed the center line and struck Gregory Mitchell's car head-on. Ziegler and Mitchell both died as a result of the collision, and Ziegler's front-seat passenger, Pfadt, sustained significant injuries. At the time of the accident, Ziegler was traveling the "Auburn Route" and delivering packages for Wheels Assured, a commercial logistics and delivery service. (App. Vol. II at 80.)

[3] On June 27, 2018, Pfadt filed suit against Wheels Assured.[1] Pfadt alleged Wheels Assured was responsible for Zeigler's negligence because he was acting within the course and scope of his employment for Wheels Assured at the time of the accident. Pfadt also alleged Wheels Assured was negligent in hiring and retaining Zeigler. On May 31, 2019, Amanda Mitchell, as personal representative of the estate of Gregory Mitchell, filed suit against Ziegler's estate and Wheels Assured. Mitchell also alleged Ziegler was acting in the course and scope of his employment for Wheels Assured at the time of the accident. In each answer, Wheels Assured denied Zeigler was an employee of Wheels Assured at the time of the accident. The trial court consolidated the two suits on July 15, 2019.

[1] Pfadt subsequently amended her complaint to include a claim against Ziegler's estate for negligence.

[4] On September 20, 2019, Wheels Assured filed a motion for summary judgment. Wheels Assured asserted it was entitled to summary judgment on the basis that it was not liable for Ziegler's alleged negligence because he was an independent contractor at the time of the accident and Indiana law generally does not impose vicarious liability against the principal for the negligent actions of an independent contractor. In support of its motion, Wheels Assured designated a copy of the contract between Wheels Assured and Zeigler. The contract was labeled "**INDEPENDENT CONTRACTOR AGREEMENT**" ("ICA") and went into effect on February 20, 2017. (App. Vol. II at 115) (formatting in original). The ICA, referring to Ziegler as "CONTRACTOR" and Wheels Assured as "COMPANY", stated in relevant part:

> 1. PROVISION OF SERVICES AND EQUIPMENT. In performing the expedited delivery and courier services contemplated herein, CONTRACTOR shall furnish the Equipment set forth in Appendix A (the "Equipment"). CONTRACTOR represents and warrants that CONTRACTOR has a substantial financial interest in the Equipment, and has title to or is authorized to contract the Equipment and services to COMPANY. CONTRACTOR further warrants that the Equipment will be used primarily for business purposes.
>
> * * * * *
>
> 3. COMPENSATION (49 CFR 376.12(d)). It is expressly understood and agreed that CONTRACTOR's compensation shall be set forth in Appendix B and such compensation shall constitute the total compensation for everything furnished, provided, or done by CONTRACTOR in connection with this Agreement, including driver's services. COMPANY agrees to

make reasonable efforts to make deliveries available from time to time for transportation by CONTRACTOR; provided, however, that there is no guarantee by COMPANY to CONTRACTOR of a minimum number of deliveries, or that CONTRACTOR is guaranteed a profit under this Agreement.

* * * * *

5. CONTRACTOR'S RESPONSIBILITIES

(a) Compliance with Pertinent Laws and Regulations.

i. CONTRACTOR shall provide competent drivers who meet all of the requirements of the U.S. Department of Transportation, including but not limited to familiarity and compliance with Federal, state, and local traffic laws and regulations.

ii. CONTRACTOR shall carry a copy of this Agreement in the Equipment at all times and file with COMPANY, on a timely basis, all log sheets, physical examination certificates, accident reports, and any other required data, documents, or reports.

iii. CONTRACTOR agrees that all shipping manifests or other papers identifying the deliveries made by CONTRACTOR during the period it is contracted shall be those of COMPANY, or as authorized by COMPANY.

iv. CONTRACTOR agrees not to receive any credit extension in COMPANY's name or in any way to use COMPANY's name to obtain credit, unless CONTRACTOR first receives COMPANY's written consent to do so.

v. CONTRACTOR agrees to operate the Equipment in a safe and prudent manner at all times in accordance with the laws of the various jurisdictions in which the Equipment will be operated and pursuant to the operating authorities of COMPANY and in accordance with all rules related to traffic safety, highway protection, and road requirements. Moreover, CONTRACTOR agrees that all drivers and/or workers employed by CONTRACTOR will comply with the terms of this Agreement, including the requirement of safe operations while operating the Equipment on behalf of CONTRACTOR. CONTRACTOR agrees that any driver utilized by CONTRACTOR will comply with COMPANY's policies and procedures and any subsequent revisions thereto, which will be provided by COMPANY.

(b) Operational Expenses (49 CFR 376.12(e)).

i. CONTRACTOR shall, at its sole cost and expense, provide all the Equipment ready to operate and fully roadworthy, including the necessary permits and vehicle license plates, and shall furnish all necessary oil, fuel, tires, and other parts, supplies, and equipment necessary or required for the safe and efficient operation and maintenance of the Equipment, including repairs for the operation of such Equipment; and shall pay all other expenses incidental to such operation, including, but not limited to, highway use taxes, state property or indefinite situs taxes, fuel taxes, and registration fees, ferry and toll charges and detention and accessorial charges not collected by COMPANY because of CONTRACTOR's failure to provide the required documentation.

ii. Unless otherwise required by law, empty mileage expense shall be borne by CONTRACTOR.

iii. CONTRACTOR shall have the right to maintain and repair the Equipment at any place CONTRACTOR should choose. CONTRACTOR shall be responsible for maintaining, and shall maintain the Equipment in safe condition and in complete compliance with all laws and regulations of the states in which CONTRACTOR operates and the Department of Transportation. CONTRACTOR has the right to choose the route of travel of the Equipment and at what points CONTACTOR shall make stops subject however to any delivery schedules prescribed by COMPANY's customers.

iv. CONTRACTOR agrees to pay all fines imposed for violation of any law or regulation by the state in which CONTRACTOR operates and the Department of Transportation, where such violation results, at least partially, from the acts or omissions of CONTRACTOR.

v. CONTRACTOR shall, at his sole cost and expense, supply all drivers and substitute drivers necessary to provide the services contemplated herein and to meet any delivery schedules provided by COMPANY's customers.

(c) Damage Claims (49 CFR 376.12 (1)). COMPANY reserves the right to investigate all claims, including but not limited to, delays, shortages, misdeliveries, and claims related to lost or damaged shipments, arising out of, or in connection with CONTRACTOR's services to determine if CONTRACTOR's actions or omissions resulted in or contributed to the cargo claim. If it is determined that CONTRACTOR's actions or omissions resulted in or contributed to the cargo claim, then COMPANY shall charge back CONTRACTOR for the insurance deductible portion of the cargo claim pursuant to paragraph 12 of this Agreement.

(d) Equipment/Property Damage (49 CFR 376.12(l)). CONTRACTOR shall be liable for, and pay, all direct, indirect and consequential damage, including but not limited to reasonable attorney fees, arising out of, or in connection with, CONTRACTOR's use of COMPANY's equipment, or any other property belonging to COMPANY.

(e) Insurance (49 CFR 376.12(l)). The responsibilities and obligation between COMPANY and CONTRACTOR involving insurance shall be as specified in paragraph 6(d) and in Appendix C. COMPANY shall have no insurance responsibilities or obligations pertaining to CONTRACTOR other than those expressly stated in this Agreement or mandated by law.

(f) Accident Reports. CONTRACTOR shall immediately report any accident to COMPANY involving operations under this Agreement, including CONTRACTOR's written report of such accident. In the event CONTRACTOR fails to notify COMPANY of the accident within one (1) hour from the time of the accident, CONTRACTOR shall be liable for any and all damages resulting from that failure to notify, including but not limited to consequential damages, fines, claims by third parties and reasonable attorney fees.

(g) Hold Harmless. CONTRACTOR agrees to defend, indemnify and hold harmless COMPANY from any direct, indirect and consequential loss, damage, fine, expense, including reasonable attorney's fees, action, claim for injury to persons, including death, and damage to property which COMPANY may incur arising out of or in connection with CONTRACTOR's negligence or breach of this Agreement.

(h) Uniforms. In order to comply with customer imposed requirements or for security reasons, COMPANY may elect that CONTRACTOR purchase and/or rent from COMPANY

uniforms to be worn while operating the Equipment pursuant to this Agreement. Although CONTRACTOR may purchase uniforms from another source with prior approval from COMPANY, COMPANY agrees to also maintain a supply of uniforms on hand for purchase by CONTRACTOR.

6. COMPANY'S RESPONSIBILITIES

(a) Exclusive Possession and Responsibility (49 CFR 376.12(c)). The Equipment shall be for COMPANY's exclusive possession, control, and use for the duration of this Agreement. COMPANY shall assume complete responsibility for the operation of the Equipment for the duration of this Agreement. This subparagraph is set forth solely to conform to federal leasing regulations and shall not be used for any other purposes, including any attempt to classify CONTRACTOR as an employee of COMPANY. Nothing in the provisions required by 49 CFR 376.12(c)(1) is intended to effect [sic] whether the CONTRACTOR or any driver provided by the CONTRACTOR is an independent contractor or an employee of the COMPANY. An independent contractor relationship may exist when a carrier complies with 49 U.S.C. 11107 and attendant administrative requirements.

(b) Inspection of Equipment. COMPANY certifies that, before taking possession of the Equipment, the Equipment was inspected by one of its responsible and competent employees or agents.

(c) Identification of Equipment (49 CFR 376.11(c)). COMPANY shall identify the Equipment in accordance with the requirements of the Department of Transportation, and appropriate state regulatory agencies. COMPANY shall have the right to place and maintain on the Equipment COMPANY's name and any lettering, advertisement, slogans, or designs as

COMPANY may choose. CONTRACTOR shall remove such identification at the termination of this Agreement or while operating such Equipment for any purpose other than conducting COMPANY's business. CONTRACTOR further agrees to keep the Equipment in clean appearance and identified as described herein, at its sole expense.

(d) Insurance. COMPANY shall maintain public liability, property damage, and cargo insurance in such amounts as are required by the Department of Transportation and applicable state regulatory agencies. COMPANY shall maintain insurance coverage for the protection of the public pursuant to applicable federal statutes and regulations pertaining to for-hire motor carriers. COMPANY's possession of legally required insurance in no way restricts COMPANY's right of indemnification from CONTRACTOR under paragraph 5(g) and other provisions of this Agreement.

(e) Contractor Loss & Damage. COMPANY shall not be liable for any loss or damage that may occur to the Equipment or any other property belonging to CONTRACTOR used in the performance of this Agreement.

7. CONTRACTOR NOT EMPLOYEE OF COMPANY. It is expressly understood and agreed that CONTRACTOR is an independent contractor for the Equipment and driver services provided pursuant to this Agreement. The parties further recognize that CONTRACTOR has a significant financial investment in the Equipment and the driver services provided herein, and that CONTRACTOR has the exclusive right to direct and control the financial aspects of CONTRACTOR's business operations, including the ability to earn a profit under this Agreement. CONTRACTOR agrees to defend, indemnify and hold COMPANY harmless for any claims, suits, or actions, including reasonable attorney's fees in protecting COMPANY's interests, brought by employees, any union, the public, or state or

federal agencies, arising out of the operation of the Equipment pursuant to this Agreement. In this regard, CONTRACTOR hereby assumes full control and responsibility for all hours scheduled and worked, wages, salaries, unemployment insurance, state and federal taxes, fringe benefits, and all other costs relating to the use of drivers provided by CONTRACTOR pursuant to this Agreement. Proof of such control and responsibility shall be submitted by CONTRACTOR to COMPANY as required by COMPANY and may include, but not be limited to, proof of highway use tax being currently paid when the CONTRACTOR purchases the license; proof of income tax being currently paid; proof of payment of payroll tax for CONTRACTOR's drivers and a certificate of insurance containing a 30-day notice of change and/or cancellation clause. As required by law, COMPANY agrees to file information tax returns (Form 1099) on behalf of CONTRACTOR if CONTRACTOR is paid more than the statutory amount in compensation during a calendar year. CONTRACTOR shall have the right to choose the routes of travel of CONTRACTOR's Equipment and at what points driver shall take rest stops and refuel the Equipment, all of which shall be the obligation and responsibility of CONTRACTOR. As an independent contractor and not an employee of COMPANY, CONTRACTOR shall perform the work contemplated under this Agreement free from control and direction of COMPANY in all areas, including but not limited to the following:

(a) CONTRACTOR shall be responsible for the control of the method by which the work is accomplished.

(b) CONTRACTOR shall not be required to work exclusively on behalf of COMPANY provided, however, that CONTRACTOR is required to provide written notice to COMPANY before trip-leasing the Equipment to another company or carrier.

> (c) CONTRACTOR is not subject to supervision or instruction of COMPANY.
>
> (d) CONTRACTOR and CONTRACTOR's drivers are not to be paid on a salary or hourly rate, but rather on contract rate specified in Appendix B.
>
> (e) The contractual relationship between COMPANY and CONTRACTOR cannot be terminated except as set forth in this Agreement.
>
> (f) CONTRACTOR is responsible for providing all required training for CONTRACTOR and its drivers.
>
> (g) CONTRACTOR is responsible for providing all tools and equipment necessary for the services contemplated herein.
>
> (h) CONTRACTOR is exclusively responsible for dictating the time of his work performance and routes of travel; subject however to the delivery schedules dictated by COMPANY's customers.
>
> (i) CONTRACTOR's business operations are to be maintained separately and distinctly from the business operations of COMPANY.

(*Id*. at 115-117.)

[5] Following extensions of time, Plaintiffs filed a joint response in opposition to the motion for summary judgment on May 29, 2020. Plaintiffs argued a genuine issue of material fact existed regarding whether Zeigler was acting as an employee or an independent contractor at the time of the collision. In

support of their response, Plaintiffs designated a multitude of "Human Resource Settlements," which are business records maintained by Wheels Assured documenting the company's payments to Ziegler from April 24, 2016, through May 31, 2017. (*Id*. at 184.) These settlements indicate Ziegler drove for Wheels Assured on multiple days each week for weeks on end.

[6] Plaintiffs also designated over one-hundred pages of route manifests Ziegler completed in the course of his work for Wheels Assured between July 6, 2013, and January 19, 2017.[2] Each manifest listed the name and address of each of the facilities where Ziegler was required to stop on his route. The manifests also listed any alarm or door codes Ziegler needed to complete his route. Some of the manifests included limited directions for some of the stops Ziegler was required to make. (*See*, *e.g.*, App. Vol. III at 104 ("Front of bldg faces away from Lahmeyer – turn L on Lahmeyer from Stellhorn, go 1 blk then turn R on Trotters Chase Ln. 1st bldg on R is Generations") & 105 ("Turn R into parking lot entrance just past Jefferson St, go L around bldg & pull up to sidewalk @ N end of bldg (not the public sidewalk). Take sidewalk to door.").) On the manifests, Ziegler would list the time he made each stop. Ziegler generally made the stops along his route in the order listed on the manifest, but he would sometimes make stops out of order. He would also indicate on the manifest whether he made a delivery at the location, picked items up at the location, or

[2] During discovery, Wheels Assured failed to produce the manifests completed by Ziegler during the six-month period immediately preceding the collision despite Plaintiffs sending letters to Wheels Assured in September 2017 and March 2018 notifying Wheels Assured of potential litigation related to the accident.

did both. Ziegler also used the manifest sheets to note any issues he encountered along the route and to document whom he informed about the issue. (*See*, *e.g.*, *id*. at 38 ("Grabill [illegible] had 4 loose pieces crammed in the top portion of their lockbox. These were items that I delivered yesterday. They dislodged when I opened the lockbox. I notified Bob Brown") & 54 ("Eyecare Express, Ft Wayne, still has yet to provide us with a new key, I informed Bob Brown").)

[7] Wheels Assured filed a reply in support of its motion for summary judgment, and the trial court held a hearing on Wheels Assured's motion for summary judgment on April 27, 2021. At the conclusion of the hearing, the trial court directed the parties to submit proposed findings of fact and conclusions of law. On June 16, 2021, the trial court adopted verbatim the proposed order tendered by Wheels Assured and granted summary judgment in favor of Wheels Assured.

Discussion and Decision

Summary Judgment

[8] Our standard of review following a trial court's order on summary judgment is well-settled.

> When reviewing the grant or denial of a motion for summary judgment, we apply the same standard as the trial court: whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. We grant summary judgment only if the evidence sanctioned by Indiana

> Trial Rule 56(C) [meets that standard]. Further, we construe all evidence in favor of the nonmoving party and resolve all doubts as to the existence of a material issue of fact against the moving party.

Anonymous Doctor A v. Foreman, 127 N.E.3d 1273, 1276-77 (Ind. Ct. App. 2019) (internal citations and quotation marks omitted). "A fact is 'material' if its resolution would affect the outcome of the case and 'genuine' if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Gonzalez v. Ritz*, 102 N.E.3d 910, 913 (Ind. Ct. App. 2018) (quoting *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009)), *reh'g denied*, *trans. denied*. "[S]ummary judgment is not a summary trial" and "it is not appropriate merely because the non-movant appears unlikely to prevail at trial." *Hughley v. State*, 15 N.E.3d 1000, 1003-04 (Ind. 2014) (internal quotation marks omitted). "Indiana consciously errs on the side of letting marginal cases proceed to trial on the merits, rather than risk short-circuiting meritorious claims." *Id*. at 1004. To succeed on summary judgment in an Indiana state court, the movant must affirmatively negate its opponent's claim, which is a more onerous burden than that imposed by the Federal Rules of Civil Procedure. *Id*. at 1003.

[9] Here, the trial court entered findings of fact and conclusions of law in connection with its ruling on Wheels Assured's summary judgment motion. Generally, special findings are not required on summary judgment, but such findings are useful to the extent they provide insight into the trial court's reasoning. *Jernagan v. Ind. Univ. Health*, 156 N.E.3d 734, 740 (Ind. Ct. App.

2020). However, our confidence that findings of fact and conclusions of law are the result of a considered judgment by the trial court is diminished when the trial court adopts verbatim the proposed findings of fact and conclusions of law submitted by one of the parties, as the trial court did here. *See Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001).

1. Independent Contractor v. Employee

[10] The doctrine of respondeat superior imposes vicarious liability on an employer for the negligent acts of its employee performed in the scope of the employee's employment. *Southport Little League v. Vaughn*, 734 N.E.2d 261, 268 (Ind. Ct. App. 2000), *trans. denied*. "The general rule is that vicarious liability can be imposed when an employer, who is not liable because of his own acts, is found responsible for the wrongful acts of his employee committed within the scope of employment." *Hogan v. Magnolia Health Sys. 41, LLC*, 161 N.E.3d 365, 370 (Ind. Ct. App. 2020), *trans. denied*. Conversely, a principal will generally not be liable for the negligence of an independent contractor.[3] *Dow v. Hurst*, 146 N.E.3d 990, 996 (Ind. Ct. App. 2020), *trans. denied*. "The theory behind non-liability for independent contractors is that it would be unfair to hold a master liable for the

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[3] The five exceptions to this rule are:

> (1) where the contract requires performance of intrinsically dangerous work; (2) where the principal is by law or contract charged with performing the specific duty; (3) where the act will create a nuisance; (4) where the act to be performed will probably cause injury to others unless due precaution is taken; and (5) where the act to be performed is illegal.

Bagley v. Insight Commc'ns Co., L.P., 658 N.E.2d 584, 586 (Ind. 1995).

conduct of another when the master has no control over that conduct." *Sword v. NKC Hosp., Inc.*, 714 N.E.2d 142, 148 (Ind. 1999).

[11] "Whether one acts as an employee or an independent contractor is generally a question for the finder of fact. If the significant underlying facts are undisputed, however, the court may properly determine a worker's classification as a matter of law." *Moberly v. Day*, 757 N.E.2d 1007, 1009 (Ind. 2001). In *Moberly*, our Indiana Supreme Court adopted the ten-factor test recited in the Restatement (Second) of Agency § 220 (1958) for determining whether an individual is an employee or an independent contractor:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;

> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

Id. at 1009-10 (quoting Restatement (Second) of Agency § 220(2) (1958)). We consider all the factors, and no one factor is dispositive. *Id*. at 1010.

1.1 Extent of Control over Details of the Work

[12] "Although not dispositive, the right to control the manner and means by which the work is to be accomplished is the single most important factor in determining the existence of an employer-employee relationship." *Wishard Mem. Hosp. v. Kerr*, 846 N.E.2d 1083, 1090 (Ind. Ct. App. 2006). An independent contractor generally "controls the methods and details of his task and is answerable to the principal as to results only." *Id*. In contrast, an employee "is one 'employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.'" *Walker v. Martin*, 887 N.E.2d 125, 132 (Ind. Ct. App. 2008) (quoting Restatement (Second) of Agency § 220(1)), *reh'g denied*, *trans. denied*.

[13] With respect to this factor, the trial court concluded that it weighed in favor of independent contractor status. (App. Vol. VIII at 167 ("Ultimately, there is no genuine, material dispute that Zeigler was answerable to Wheels Assured only

for results, not for the details and particulars of how he went about his task.")). However, we see resolution of this factor in the *Moberly* analysis as much more muddled than the trial court.

[14] The ICA gave Wheels Assured control over various aspects of Ziegler's work. Wheels Assured required Ziegler to complete manifests detailing when he made scheduled deliveries, and he was required to return a completed manifest and any undelivered packages to Wheels Assured at the end of his route. The ICA required that Ziegler's vehicle to be used "primarily for business purposes." (App. Vol. II at 115.) The ICA also provided: "The Equipment shall be for COMPANY's exclusive possession, control, and use for the duration of this Agreement." (*Id*. at 116.) Moreover, Ziegler was required to provide Wheels Assured with written notice before "trip-leasing the EQUIPMENT to another company or courier." (*Id*. at 117).

[15] Wheels Assured also had the right to inspect Ziegler's vehicle, place advertisements or designs on Ziegler's vehicle, and require Ziegler to wear a uniform. Wheels Assured required that it be a named insured on Ziegler's automobile insurance policy. Wheels Assured also prohibited Ziegler from having passengers accompany him on the route unless Ziegler received written authorization from Wheels Assured and the passenger completed a passenger authorization form provided by Wheels Assured. (*Id*. at 118 ("As prohibited under 49 CFR 392.60, no passenger shall be permitted to travel in the Equipment without prior written authorization from COMPANY. Any

authorized passenger … must sign a waiver of liability as provided in the Passenger Authorization Form to be provided by COMPANY.")).

[16] The detailed ICA distinguishes the case at bar from other instances in which we held the control factor did not weigh in favor of employee status. *See Moberly*, 757 N.E.2d at 1010 (weighing the control factor in favor of independent contractor status in absence of a formal agreement when farmer simply told the workers "what he wanted done and [they] would do it"); *see also*, *Family Christian World, Inc. v. Olds*, 100 N.E.3d 277, 283 (Ind. Ct. App. 2018) (concluding control factor did not weigh in favor of finding worker to be an employee "[w]ithout evidence that [worker] had an agreement with [employer] concerning the means, manner, or method by which she would discharge her babysitting duties, and without evidence that the [pastors] exercised actual control over the means, manner, or method by which [worker] discharged her babysitting duties"), *trans. denied*.

[17] Nonetheless, Wheels Assured argues "it was Zeigler who enjoyed the most control over the salient details of his work." (Appellee's Br. at 16.) Wheels Assured notes the ICA stated Ziegler "assume[d] full control and responsibility for all hours scheduled and worked[.]" (App. Vol. II at 117.) Ziegler was required to make all his deliveries by the established deadline, but he did not have to receive permission from Wheels Assured before stopping to use the bathroom, refueling, or getting something to eat. He could request or decline work from Wheels Assured, and Wheels Assured did not guarantee him a

minimum of deliveries. He also had the option to hire other drivers to perform the routes assigned to him.

[18] Moreover, Wheels Assured asserts Ziegler was not required to make his deliveries in the order listed on the manifests, and Wheels Assured points to times when Ziegler performed the stops out of order. However, the manifests also indicate Zeigler often made the deliveries in the exact order listed on the manifest. The stops were grouped on the manifest such that stops in the same area were listed near each other, presumably to promote driver efficiency. The manifests also sometimes listed turn-by-turn instructions for stop locations along the route. When Ziegler encountered an issue on his route, Ziegler noted the issue on the manifest and documented whom he contacted regarding the issue. He also documented on the manifest the exact time he made each stop. As Plaintiffs observed at the hearing on Wheels Assured's motion for summary judgment, the ICA "drafted by Wheels giveth with the left hand and taketh away with the right hand." (Tr. Vol. II at 58.) Thus, the evidence supports conflicting inferences regarding the degree of actual control Wheels Assured exercised over Ziegler, and therefore, there is a genuine issue of fact that must be resolved by a trier of fact. *See Carter v. Property Owners Ins. Co.*, 846 N.E.2d 712, 719 (Ind. Ct. App. 2006) (noting conflict in the evidence regarding extent of control company exercised over laborer and stating that "[a]t the very least, the evidence tends to reveal a rather substantial issue of material fact appropriate for resolution by the trier of fact"), *trans. dismissed*.

1.2 Occupation or Business of One Employed

[19] "The second factor considers whether or not the one employed is engaged in a distinct business or occupation." *Walker*, 887 N.E.2d at 132. If the employed person performs the same type of work for multiple employers, that fact weighs in favor of finding the person to be an independent contractor. *Id*. (holding fact truck driver hauled logs for multiple companies and individuals weighed in favor of finding the truck driver to be an independent contractor). The trial court concluded Ziegler was not required to work exclusively for Wheels Assured and weighed this factor in favor of independent contractor status. The trial court observed that the ICA required Ziegler's business operations "to be maintained separately and distinctly from the business operations" of Wheels Assured. (App. Vol. II at 117.) The ICA also gave Ziegler the "exclusive right to direct and control the financial aspects of [his] business operations" and authorized him to hire drivers to perform his contracted work. (*Id*.)

[20] Plaintiffs argue this conclusion is erroneous because Ziegler delivered packages solely for Wheels Assured. They note Ziegler was paid sums commensurate with full time employment. The Form 1099s sent by Wheels Assured to Ziegler reveal he earned $59,718.43 from Wheels Assured in 2013, $56,025.74 in 2014, $49,802.55 in 2015, $47,545.73 in 2016, and $19,823.00 in 2017 (the year in which Ziegler died). Plaintiffs acknowledge Wheels Assured designated evidence of an affidavit from Amy Golden, a division manager for Wheels Assured, in which she averred: "I am aware that Zeigler did, in fact, perform other transportation services for other companies. For example, I know that

Ziegler drove for Uber using the same vehicle(s) he utilized in the performance of Contracted Services." (*Id*. at 110.) However, the Plaintiffs argue the trial court erred in crediting Golden's affidavit because Golden "did not state when this supposedly occurred or how often Ziegler supposedly did this" and further "acting as a self-employed Uber driver is not the same type of work as delivering parcels for a logistics entity." (Appellants' Br. at 36.)

[21] In *Walker*, we weighed this *Moberly* factor in favor of independent contractor status because "[t]he evidence demonstrated that Martin worked as a self-employed truck driver hauling logs for companies and individuals under the name JTM Express. He testified in his deposition that, during 2003, he hauled logs for both LaFountaine and Wood, as well as for others." 887 N.E.2d at 132. However, whereas in *Walker* the driver performed the same type of work for multiple companies (hauling logs), Ziegler's act of delivering and retrieving parcels along a suggested route is not the same as providing a personal rideshare service. Wheels Assured notes Ziegler retained the right to work for others. Nonetheless, Ziegler's record of earnings at least gives rise to an inference that he worked essentially on a full-time basis for Wheels Assured, and we must construe all reasonable inferences in favor of the nonmovant. *See Butler v. City of Peru*, 733 N.E.2d 912, 917-18 (Ind. 2000) (holding conflicting factual inferences precluded summary judgment). Thus, with respect to this second factor, there remains a genuine issue of fact for a trier of fact to resolve.

1.3 Kind of Occupation

[22] "The third factor focuses on whether the kind of occupation involved consists of work usually done under the direction of an employer or by a specialist without supervision." *Walker*, 887 N.E.2d at 132. If the work is done by a specialist without supervision, this factor weighs in favor of independent contractor status. *Id*. The trial court weighed this factor in favor of independent contractor status. It explained:

> There is no genuine dispute that Wheels Assured did not have any representative accompany Ziegler during the performance of a courier route. Absent such, there is simply no basis upon [which] one might reasonably infer that Wheels Assured or Zeigler expected this task to be subject to a high degree of Wheels Assured supervision.

(App. Vol. VIII at 155) (internal citation to record omitted).

[23] Wheels Assured analogizes the instant case to *Snell v. C.J. Jenkins Enterprises, Inc.*, where we weighed this factor in favor of independent contractor status because, in the contract between the parties, the laborer retained the right to perform similar delivery services for others. 881 N.E.2d 1088, 1092 (Ind. Ct. App. 2008). Plaintiffs argue the case at bar is distinguishable from *Snell*. Even though a Wheels Assured employee did not accompany Ziegler on his routes, the Plaintiffs assert "that does not mean the company is not effectively supervising or monitoring the courier." (Appellant's Br. at 37.) Plaintiffs reference the factors discussed *supra* in Section 1.1. regarding the control factor to argue it is possible to infer Wheels Assured closely monitored and supervised

Ziegler. For example, Ziegler recorded the minute he made each stop on a manifest and informed Wheels Assured if any issues arose in completing the stops on his route. Moreover, small parcel delivery is generally not a job that requires a specialist to perform. Given the conflicting evidence of the degree of supervision Wheels Assured exercised over Ziegler and the fact that Ziegler's job was not one that required a specialist, we cannot conclude as a matter of law that this factor weighs in favor of either employee or independent contractor status. Instead, a genuine issue of material fact remains for trial.

1.4 Skill Required

[24] "Unskilled labor is usually performed by employees, while skilled labor is often performed by independent contractors." *Walker*, 887 N.E.2d at 132. Ziegler did not need a specialized driver's license to perform the job, and the job did not require any special skills. The trial court found, and both parties agree, this factor supports employee status.

1.5 Supplier of Equipment, Tools, and Work Location

[25] "This factor is a consideration of whether the employer or the worker supplied the instrumentalities, tools, and place of work." *Walker*, 887 N.E.2d at 133. This factor cuts toward employee status if the employer provides tools or instrumentalities of substantial value, and it points toward independent contractor status if the workman provides the items. *Id*. The trial court weighed this factor in favor of independent contractor status.

[26] The ICA required Zeigler to provide his own vehicle and other equipment necessary for making deliveries and to warrant "that the Equipment will be used primarily for business purposes." (App. Vol. II at 115.) Nonetheless, the ICA also provided: "The Equipment shall be for [Wheels Assured's] exclusive possession, control, and use for the duration of this Agreement," (*id*. at 116), and reserved for Wheels Assured "the right to place and maintain on the Equipment [Wheels Assured's] name and any lettering, advertisement, slogans, or designs as [Wheels Assured] may choose." (*Id*.) Plaintiffs thus contend that on this factor the ICA supports the positions of both Plaintiffs and Wheels Assured. We agree.

[27] While there is no dispute Ziegler provided the delivery vehicle and his work location was primarily on the public roads, Wheels Assured reserved the right to exercise control over Ziegler's delivery vehicle. In *Walker*, we held the fact that the timber business never asked the truck driver to place the business's logo on his truck and the timber business's owner asked the truck driver to remove the business's logo from his truck supported finding the truck driver was an independent contractor. 887 N.E.2d at 132. In contrast, in the instant case, Wheels Assured reserved the right to require Ziegler to display Wheels Assured's insignia on his vehicle and uniform. Therefore, we cannot at this stage conclude this factor favors either employee or independent contractor status. This issue of fact must be resolved at trial.

1.6 Length of Employment

[28] Employment over a considerable period with regular hours or performance of continuous service for another indicates employee status. *Id*. at 133. The trial court concluded Ziegler "was not required to work regular hours" and weighed this factor in favor of independent contractor status. (App. Vol. VIII at 153.) However, as Plaintiffs note, the emphasis in the analysis of this *Moberly* factor is not only whether the person worked regular hours but also "the length of time for which the person is employed." *Moberly*, 757 N.E.2d at 1010. While the record does not indicate the exact length of time Ziegler performed work for Wheels Assured, the undisputed evidence indicates it was for a lengthy period. For example, Ziegler sent a text message to Golden in April 2017 in which he referenced working for Wheels Assured for fourteen and a half years without losing a paycheck. Further, Human Resource Settlements indicate Wheels Assured paid Ziegler for driving routes for Wheels Assured for multiple days each week from at least April 24, 2016, through May 31, 2017. Thus, this *Moberly* factor tends to weigh in favor of employee status.

1.7 Method of Payment

[29] "Sporadic payments in lump sum amounts for each job performed, instead of payments by the hour or on a weekly basis are more typical of an independent contractor than an employee." *Walker*, 887 N.E.2d at 133. The parties agree this factor weighs in favor of independent contractor status because Zeigler was paid by the route without any payment withheld for tax purposes.

1.8 Regular Business of the Employer

[30] If the employed person is being used to further the business of the employer, this factor weighs in favor of employee status. *Contra*. *Family Christian World*, 100 N.E.3d at 284 ("There is no evidence that FCC is in the business of providing babysitting services. At most, any babysitting services [employer] provides are ancillary to its 'business.' This factor weighs significantly in favor of independent contractor status."), *trans. denied*. In the case at bar, the trial court weighed this factor slightly in favor of independent contractor status. The trial court found "a sufficient distinction" between the small parcel deliveries Ziegler performed and the large commercial deliveries made by employees on Wheels Assured's payroll. (App. Vol. VIII at 159.)

[31] In *Moberly*, our Indiana Supreme Court concluded this factor weighed in favor of independent contractor status because the laborer was injured when repairing drainage tile and the farmer who hired the laborer was in the business of farming, not drainage tile repair. 757 N.E.2d at 1012. Plaintiffs thus attempt to draw a contrast between the instant case and *Moberly* by arguing that "Wheels Assured's 'regular business' is doing transport/courier work, which is [the] same type of work for which they hired Zeigler." (Appellants' Br. at 42.) Thus, unlike in *Moberly* where drainage tile repair and farming are distinct activities, the Plaintiffs' contend Ziegler was furthering Wheels Assured's delivery business at the time of the accident. Wheels Assured, on the other hand, argues that with respect to small parcel deliveries, it "only directly provides logistics (*i.e.*, what needs to go where and when); it ***does not*** provide any fleet of

vehicles purposed for these deliveries and has no workers on its employee payroll who perform such work." (Appellee's Br. at 43-44) (emphasis in original). While we sympathize with Plaintiffs' observation that Wheels Assured's contention "is akin to splitting delivery hairs" (Appellants' Br. at 41), we also recognize the act of delivering small parcels using a personal vehicle is different from delivering freight by means of a commercial rig. Thus, this *Moberly* factor does not clearly weigh in favor of either independent contractor or employee status and must be resolved by a trier of fact.

1.9 Belief of the Parties

[32] Whether the parties believed they were creating an employer-employee relationship or an employer-independent contractor relationship is not determinative, but it is indicative of the relationship the parties had. *Walker*, 887 N.E.2d at 133-34. As our Indiana Supreme Court explained in *Moberly*, "[i]t is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one *and* submission to control by the other." *Moberly*, 757 N.E.2d at 1012-13 (emphasis in original). The trial court found this factor weighed in favor of independent contractor status, and we agree. While Plaintiffs contend Ziegler submitted to Wheels Assured's control, the express terms of the ICA between Ziegler and Wheels Assured stated Ziegler was to be an independent contractor. (App. Vol. II at 117) ("It is expressly understood and agreed that CONTRACTOR is an independent contractor for the Equipment and driver services provided pursuant to this Agreement.").

Therefore, we conclude the parties understood Ziegler to be an independent contractor when they entered the ICA.

1.10 Whether the Principal Is in Business

[33] If the principal is in business, this factor will weigh in favor of employee status. *Snell*, 881 N.E.2d at 1093. Here, the parties do not dispute that Wheels Assured is in business. Therefore, as a matter of law, this factor weighs in favor of employee status.

1.11 Summation

[34] In sum, we conclude three *Moberly* factors weigh in favor of employee status—the level of skill required, the length of employment, and that the principal is in business—and two factors weigh in favor of independent contractor status—the method of payment and the parties' beliefs. A trier of fact could determine that any of the five remaining *Moberly* factors weigh in favor of either employee or independent contractor status. The trier of fact needs to weigh the evidence to determine the nature of the relationship between Ziegler and Wheels Assured, and ultimately, whether Ziegler was an employee of Wheels Assured or an independent contractor. Therefore, we reverse the trial court's grant of summary judgment for Wheels Assured.[4] *See Carter*, 846 N.E.2d at 722

[4] On cross-appeal, Wheels Assured argues the trial court erred in denying its motions to strike portions of the affidavits of Pfadt and Timothy Hibbard, another driver for Wheels Assured. However, we need not decide this issue because a genuine issue of material fact precluding summary judgment is apparent from the other evidence in the record. *See* Ind. Appellate Rule 66(A) (no error or defect in any ruling or order or in anything done or omitted by trial court is ground for granting reversal where its probable impact, in light of all evidence, is sufficiently minor as not to affect parties' substantial rights).

(holding genuine issue of material fact regarding whether laborer was an employee or an independent contractor precluded summary judgment).

2. Apparent Agency

[35] The trial court also concluded Wheels Assured was entitled to summary judgment in its favor on Pfadt's claim that Wheels Assured was liable under an apparent agency theory. Apparent agency is another theory for imposing vicarious liability. *Wilson v. Anonymous Def. 1*, 183 N.E.3d 289, 295 (Ind. 2022). "Apparent agency refers to the ability of an agent with apparent authority to bind the principal to a contract with a third party." *Id*. (internal quotation marks omitted). Apparent authority is the authority a third person reasonably believes an agent to possess because of some manifestation, including through direct or indirect communication or advertisements, from the principal. *Id*. For example, "[w]hen a party places an agent in the position of sole negotiator on his or her behalf, it may be reasonable for the third person to believe that the agent possesses authority to act for the principal." *Warfield v. Dorey*, 55 N.E.3d 887, 893 n.5 (Ind. Ct. App. 2016). "Generally, the question of whether an agency relationship exists is a question of fact." *Somerville Auto Transp. Serv., Inc. v. Auto. Fin. Corp.*, 12 N.E.3d 955, 966 (Ind. Ct. App. 2014), *trans. denied*.

[36] The trial court determined "that when courts examine vicarious liability in tort, we look to *respondeat superior* . . . Apparent authority has no place in this analysis in a tort context." (App. Vol. VIII at 170.) However, this determination was erroneous. For example, in *Swanson v. Wabash College*, we

held the plaintiff could not recover under an apparent agency theory because the alleged tortfeasor was not an apparent agent of the principal, 504 N.E.2d 327, 332 (Ind. Ct. App. 1987), without ever suggesting the apparent agency theory was unavailable in a tort case. In addition, in *Sword*, our Indiana Supreme Court held a hospital could be liable under an apparent agency theory for the negligence of an independent contractor physician if the hospital did not make clear to the patient that the physician was not acting as a hospital employee. 714 N.E.2d at 152-53. Wheels Assured argues that with respect to torts, the apparent agency doctrine is limited to the "specific context of a hospital setting," (Appellee's Br. at 47), but our Indiana Supreme Court recently clarified that tort recovery under an apparent agency theory is not limited to the hospital context. *Arrendale v. Am. Imaging & MRI, LLC*, 183 N.E.3d 1064, 1073 (Ind. 2022) (holding non-hospital medical entity may be held vicariously liable for negligent acts of independent contractor physician unless patient has knowledge of the employment arrangement). Thus, it follows from *Swanson*, *Sword*, and *Arrendale*, that Pfadt may assert a claim against Wheels Assured for recovery under an apparent agency theory even though her underlying action sounds in tort.

[37] In the alternative, Wheels Assured also argues it did not make any manifestation to Pfadt that Ziegler was Wheels Assured's agent. Wheels Assured contends: "No one other than Ziegler ever told Pfadt that, for example, Zeigler was authorized to train or recruit drivers on behalf of Wheels Assured and she admits that everything she knew about Wheels Assured and its

relationship with Zeigler *came from Zeigler*." (Appellee's Br. at 49) (emphasis in original). Yet, the manifestations of agency do not need to be in the form of direct communication. *Malone v. Basey*, 770 N.E.2d 846, 852 (Ind. Ct. App. 2002), *trans. denied*. "The placing of an agent in a position to perform acts or make representations that appear reasonable to a third person is a sufficient manifestation to endow the agent with apparent authority." *Id*.

[38] There is a genuine issue of material fact as to whether Pfadt's observations of Ziegler as he performed his routes reasonably instilled in her a belief that he was acting as Wheels Assured's agent in training her. Pfadt accompanied Ziegler to Wheels Assured's facility on four occasions. While there, she assisted him in loading cargo, and she observed him retrieve instrumentalities, like the manifests, necessary for him to complete his routes. In *Swanson*, we held the alleged tortfeasor was not an apparent agent of the principal, and in so holding, we explained the alleged tortfeasor never acquiesced to any type of control over him by the principal. 504 N.E.2d at 332. Conversely, Wheels Assured exercised some degree of control over Ziegler (although the exact contours of that control is a question of fact to be resolved at trial). Thus, a genuine issue of material fact remains regarding whether Pfadt reasonably believed because of manifestations by Wheels Assured that Ziegler was acting as Wheels Assured's agent. *See Wilson*, 183 N.E.3d at 297-98 (holding genuine issue of material fact precluded summary judgment for physician group on claim that it was liable under an apparent agency theory for physical therapist's alleged negligence).

Conclusion

[39] We reverse the trial court's grant of summary judgment in favor of Wheels Assured because a genuine issue of material fact exists regarding whether Ziegler was an employee of Wheels Assured at the time of the automobile collision and resolution of this question of fact impacts whether Wheels Assured can be liable under the theory of respondeat superior. Moreover, a genuine issue of material fact exists regarding whether Wheels Assured's actions manifested to Pfadt a reasonable belief that Ziegler was Wheels Assured's agent, which precludes summary judgment on Pfadt's claim for recovery under apparent agency theory. Because these issues must be resolved by the trier of fact, we remand for further proceedings consistent with this opinion.

[40] Reversed and remanded.

Riley, J., and Tavitas, J., concur.