STATE OF MICHIGAN

COURT OF APPEALS

MARK SOKOLOWSKI and LISA SOKOLOWSKI,

Plaintiffs-Appellants,

v

CITY OF CHARLEVOIX, SECOND CHANCE, INC., SECOND CHANCE BODY ARMOR, RICHARD C. DAVIS, DENNIS HALVERSON, WILLIAM CARVER, MICHAEL WIESNER, JOANNE PATRICK, JAMES YOUNG, CHARLEVOIX CHAMBER OF COMMERCE, JACQUELINE MERTA, VENETIAN FESTIVAL COMMITTEE, JOHN TAYLOR, FIREWORKS NORTH, INC., MICHAEL JAYE, CURTIS CRAWFORD, LARRY GRISE, WOLVERINE FIREWORKS DISPLAY, INC., LIDU AMERICA, SUNNY INTERNATIONAL, and PYRO SHOWS, INC.,

Defendants,

and

SECOND CHANCE BODY ARMOR, INC.,

Defendant-Appellee.

UNPUBLISHED
November 20, 2003

No. 241037
Charlevoix Circuit Court
LC No. 98-140018-NO

DEBORAH A. YAGER, Individually and as Personal Representative of the Estate of MARK R. YAGER, Deceased, and as Conservator of the Estates of KATIE YAGER and EMILY YAGER, Minors, MEAGAN YAGER, MARK A. YAGER, and MARCELLA YAGER,

Plaintiffs-Appellants,

v

No. 241210

Charlevoix Circuit Court
LC No. 98-139218-NO

SECOND CHANCE BODY ARMOR, INC.,

Defendant-Appellee,

and

CHAMBER OF COMMERCE, VENETIAN FESTIVAL, FIREWORKS NORTH, INC., RICHARD C. DAVIS, MICHAEL JAYE, GLEN CRAWFORD, LAWRENCE GRISE, DENNIS HALVERSON, DOUG CARVER, MICHAEL WIESNER, WOLVERINE FIREWORKS DISPLAY, INC., OLD GLORY MARKETING, INC., UNITED PYROTECHNICS, INC., HUNAN PROVINCIAL FIREWORKS & FIRECRACKERS IMPORT/EXPORT CORPORATION, PRYO SHOWS, INC., DESIGN STAR SPECIALTY, TEMPLE OF HEAVEN, LIDU AMERICA, and SUNNY INTERNATIONAL,

Defendants.

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs[1] appeal by leave granted from an order of the trial court granting summary disposition in favor of defendant Second Chance Body Armor, Inc. (Second Chance) under MCR 2.116(C)(10). We reverse and remand for further proceedings.

These matters arise from an accident that occurred during a fireworks display, presented by Fireworks North, which injured several persons. Plaintiffs allege, in pertinent part, that Second Chance is vicariously liable for the negligent conduct of workers in connection with the design or construction of the "fireworks launching apparatus" or "trailer" from which the fireworks were launched. The trial court granted summary disposition in favor of Second Chance, concluding that there was no genuine issue of material fact with regard to vicarious liability.

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[1] The reference to "plaintiffs" includes both the Sokolowski plaintiffs in Docket No. 241037 and the Yager plaintiffs in Docket No. 241210.

Plaintiffs argue that the trial court erred in granting summary disposition because there was a genuine issue of material fact regarding whether the allegedly negligent workers were acting within the scope of their employment with Second Chance. We agree.[2]

We review a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) de novo and consider the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is appropriate if there is no genuine issue with regard to any material fact, and the moving party is entitled to judgment as a matter of law. *Alspaugh v Comm Law Enforcement Standards*, 246 Mich App 547, 567; 634 NW2d 161 (2001).

Under the well-established doctrine of vicarious liability, also often referred to as respondeat superior, an employer or "master" is responsible to third parties for wrongful acts committed by an employee or "servant" while performing some duty within the scope of employment. See, e.g., *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 650-651; 649 NW2d 23 (2002). It is possible for a person to be a servant of two masters simultaneously. *Vargo v Sauer*, 457 Mich 49, 68-69; 576 NW2d 656 (1998). This is significant because, even if some or all of the relevant employees here, Richard Davis, Curtis Glen Crawford, and Lawrence Grise, could be considered servants of Fireworks North in connection with the design and construction of the trailer at issue, this would not necessarily preclude a conclusion that they were also acting as servants of Second Chance.

Second Chance essentially contends that the relevant employees were "loaned" to Fireworks North with regard to the construction and design of the trailer. In considering the "loaned servant" doctrine to determine if an employer is liable for the negligence of an employee, we apply the "control test." *Hoffman v JDM Associates*, 213 Mich App 466, 468; 540 NW2d 689 (1995). In *Hoffman*, this Court has set forth the control test as follows:

> The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person. [*Id.* at 468-469, quoting *Janik v Ford Motor Co*, 180 Mich 557, 562; 147 NW 510 (1914).]

In *Hoffman*, this Court concluded that the defendant was not subject to vicarious liability for the conduct of an employee where it did not "retain any day-to-day control or supervision of his

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[2] In the related, but not consolidated, case *Dobrowolski v Second Chance Body Armor*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2003 (Docket No. 238007), another panel of this Court ruled similarly.

specific work activities" or have the right to control his "detailed activities." *Hoffman, supra* at 473. Thus, we must inquire here whether there was evidence that the employees were under the general control of Second Chance at the time of the relevant work on the trailer and whether any work performed could be considered part of their job duties for Second Chance. Contrary to what Second Chance argues, we need not further inquire into whether the work served the business purposes of Second Chance.

Applying the control test to the present case, we conclude that plaintiffs presented sufficient evidence to establish a genuine issue of material fact regarding whether the relevant work was performed by employees acting within in the scope of their employment with Second Chance. At his deposition, Grise testified with regard to work related to fireworks that they "had to piece it in between times when we were working" on other work for Second Chance, indicating that the work was performed during the course of his work for Second Chance at his normal work location. Also, Crawford indicated in his deposition testimony that he obtained a "HAZMAT license" primarily so he could haul fireworks and that he received a pay raise from Second Chance for obtaining that license. Moreover, Crawford testified that, while he was working on the trailer, he was working for Davis, who was the president of Second Chance. From this evidence, a reasonable factfinder could determine that Davis was acting in that capacity in directing Grise and Crawford to perform work on the trailer within the course of their employment with Second Chance. Thus, viewed in a light most favorable to plaintiffs, there was a genuine issue of material fact regarding whether the relevant work was performed by employees of Second Chance while acting within the scope of their employment, such that Second Chance may be vicariously liable for any negligence in connection with that work.[3]

In arguing that authorization is unimportant to determining whether an employer is vicariously liable, Second Chance discusses at some length our Supreme Court's decision in *Barnes v Mitchell*, 341 Mich 7; 67 NW2d 208 (1954). But the import of that decision was that an employer may be liable for conduct within the apparent authority of an employee, although the employee was not actually authorized to engage in the conduct. *Id.* at 13-14 (noting that "it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority" and that an injured party cannot "always be expected to know or be able to discover whether [the servant's conduct] was or was not without express sanction"). This is simply inapposite to the present issue in which there is evidence that Second Chance authorized, and indeed directed, relevant work by its employees on the trailer. It does not reasonably follow from the conclusion in *Barnes* that apparent authority may provide a basis for imposing vicarious liability that actual authorization is not also a factor in support of finding vicarious liability.

Second Chance also relies on the following language from *Barnes*:

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[3] While the parties attach significance to whether there was evidence of either Fireworks North or Davis reimbursing Second Chance for the relevant work, we do not because the question of payment is not significant to the control test. See *May v Harper Hosp*, 185 Mich App 548, 555; 462 NW2d 754 (1990) (indicating that "who pays the employee" is significant for workers' compensation purposes, but not for the control test for vicarious liability in a tort suit).

> The phrase "in the course or scope of his employment or authority," when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business. [*Id.* at 13, quoting *Riley v Roach*, 168 Mich 294, 307; 134 NW 14 (1912).]

This language actually undermines Second Chance's basic position that an act must further the narrowly understood business interests of the employer in order to be considered within the scope of employment. Rather, this language reflects that it is enough if the servant is "engaged in the service of his master." In this case, there was evidence that could reasonably support a conclusion that the relevant employees were engaged in the service of Second Chance with regard to the work on the trailer, regardless whether this furthered the company's business interests.

Second Chance also cites language in *Anderson v Schust Co*, 262 Mich 236; 247 NW 167 (1933), related to vicarious liability in the employment context. However, in *Kiefer v Gosso*, 353 Mich 19, 29; 90 NW2d 844 (1958), our Supreme Court referred to *Anderson* as "one of a long list of cases wherein this Court modified the owner liability statutory test . . . by the additional test, in employee driver situations, of scope of employment." The Court in *Kiefer* also referred to the justices who joined the earlier plurality opinion in *Moore v Palmer*, 350 Mich 363; 86 NW2d 585 (1957), as having "voted to overrule this judicial modification of the owner liability statute" and then proceeded to apply the reasoning of the *Moore* plurality decision to resolve the matter in *Kiefer*. We interpret this as a complete overruling of *Anderson*, depriving it of any precedential value, inasmuch as that case involved only one basic issue concerning liability for use of a car, and the commentary in *Anderson*, regarding a master's liability for a servant's conduct, was directed to that issue. Accordingly, Second Chance's reliance on *Anderson* is not warranted.

Second Chance also invokes *Martin v Jones*, 302 Mich 355; 4 NW2d 686 (1942), a case in which the operator of a Standard Oil service station shot a customer following an argument. In holding that Standard Oil was not vicariously liable, our Supreme Court emphasized *both* that the shooting was not done to further the company's business and that being armed was not one of the operator's duties. *Id.* at 357-358. The holding in *Martin* is inapposite because there is evidence here that the relevant employees performed the work on the trailer as part of job duties assigned to them within their employment with Second Chance.

Finally, we note that, contrary to what Second Chance suggests, our holding does not equate with a conclusion that an employer will always be vicariously liable for sponsoring charitable activity or allowing its employees to work on charitable projects while being paid by the company. In a circumstance in which an employer clearly relinquishes control of an employee's activities to a charity, there would be no basis for imposing liability on the employer under the control test. In the present case, a genuine issue of material fact exists and therefore summary disposition is inappropriate.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski