STATE OF MICHIGAN

COURT OF APPEALS

LINDA SUE WOLFORD,

Plaintiff-Appellant,

v

PHILLIP ANTHONY PIKARSKI,

Defendant,

and

THUMB HOME REAL VIDEO, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
February 17, 2011

No. 295989
Huron Circuit Court
LC No. 09-004076-NI

Before: MURPHY, C.J., and MURRAY and SHAPIRO, JJ.

MURRAY, J. (*dissenting*).

With all due respect to my colleagues in the majority, I would affirm the circuit court's order granting defendant Thumb Home Real Video, L.L.C.'s motion for summary disposition, as there was no genuine issue of material fact that defendant Phil Pikarski was not an agent of THRV. MCR 2.116(C)(10).

When reviewing de novo a trial court's decision on a motion for summary disposition, *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), we must determine, while viewing the evidence in the light most favorable to the nonmoving party, whether a genuine issue of material fact exists for trial, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact only exists when the material facts could lead reasonable jurors to disagree. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 694; 558 NW2d 225 (1996).[1]

[1] Although it is certainly true that "generally" the fact-finder should decide whether an agency exists, that is only the case when the material facts are disputed. *Sliter v Cobb*, 388 Mich 202,

As the majority acknowledges, whether an agency exists depends upon the actual relations of the parties, which are exhibited through their agreements and actions. *St Clair Intermediate Sch Dist v Intermediate Educ Ass'n/MEA*, 458 Mich 540, 557; 581 NW2d 707 (1998). Long ago the Supreme Court characterized the fundamental aspects of an agent as a "business representative" whose function "is to bring about, modify, affect, accept performance of, or terminate contractual obligations *between his principal and third persons*." *Saums v Parfet*, 270 Mich 165, 172; 258 NW 235 (1935) (emphasis added). Also fundamental to the existence of such a relationship is the right of the principal to control the agent in the matter entrusted to him. *Briggs Tax Serv, LLC v Detroit Pub Schs*, 485 Mich 69, 80; 780 NW2d 753 (2010).[2]

Here, the uncontested evidence shows that THRV sells satellite television service, both for DISH Network and DIRECTV, and that the installation performed by Pikarski on the day at issue was for DISH Network. It is also undisputed that a customer must enter into two contracts before obtaining DISH Network services. First, the customer signs a contract with THRV, wherein the customer indicates a desire to receive the service and indicates what service is needed at his home. The contract with THRV is a two year commitment. After entering into a contract with a new customer, the satellite system would then be installed at the customer's home, which THRV occasionally hired Pikarski's company to perform. Sometimes THRV set the installation schedule, other times Pikarski would. Either way, when performing installation Pikarski used his own vehicle and tools, while THRV provided the satellite equipment. Pikarski was free to install the equipment according to his own experience and expertise, and received no training from THRV.[3] If, once Pikarski arrived at the house, the customer balked at the services, or there were problems precluding the installation, Pikarski would not install the material.

These undisputed facts reveal that Pikarski did not act as a business representative for THRV, and in no sense brought about a contractual relation or business for THRV. Indeed, the contract between the customer and THRV was created *before* Pikarski was ever called to perform installation, and in fact it is that contract that results in the need for installation.

The majority opinion makes much of the fact that Pikarski would present a DISH Network contract for the customer to sign once he confirmed that it was technically feasible to provide satellite service to the customer. Pikarski then returned these contracts to THRV, who would then transmit the contracts to DISH Network within the month.

206-207; 200 NW2d 67 (1972). There is no case suggesting that the procedure available through MCR 2.116(C)(10) is not available in cases where an agency is alleged.

[2] What is not relevant to whether an agency relationship existed is the extent of plaintiff's injuries, which has nothing to do with whether THRV is a principal to Pikarski. *Chlopek v Federal Ins Co*, 499 F3d 692, 700-701 (CA 7, 2007).

[3] Indeed, James Cameron, owner of THRV, testified that he did not even conduct an interview with Pikarski before engaging his company's installation services. Instead, he had previously heard about Pikarski's installation skills, and spoke to him on the phone one time before using him as an installer.

For several reasons, however, Pikarski's ministerial act of obtaining signatures on the contracts did not create a genuine issue of material fact as to his agent status. First, for agency purposes, the question is whether Pikarski brought about contractual obligations between his alleged principal (THRV) and third parties (the customers). The contract Pikarski had customers sign, however, was between DISH Network and the customer, not THRV and the customer. That latter contract, which is the relevant one for agency purposes, *Saums*, 270 Mich at 172, was signed by the customer prior to THRV even engaging Pikarski's installation services.

Second, even if the contract was between THRV and the customer, the only obligation required of Pikarski was to obtain a signature. There is absolutely no evidence—or even a suggestion—that Pikarski had ever negotiated any terms of the contracts he had customers sign, or even had the authority to do so. In fact, the only act Pikarski took was to ask the customer if she was the person named on the DISH contract. If she was, or if the same last-named spouse answered the door, the contract could be signed; if she was not, Pikarski would leave the site. These undisputed facts reveal that Pikarski was nothing more than a courier of the DISH contract, and played no role in procuring the sale for DISH, as the customer had already committed to the service when signing the THRV contract.

Cameron's testimony that if the customer did not sign the DISH Network contract, then THRV would not enforce its contract with the customer, is immaterial to the issue. Whether THRV enforces its own previously secured contract rights with the customer who fails to sign a contract with the satellite provider has nothing to do with Pikarski's service. The evidence shows that the matter entrusted to Pikarski was to install a satellite system, and what happens after that based on a customer's decision does not impact Pikarski's status. *Charvat v Echostar Satellite LLC*, 676 F Supp 2d 668, 676 (SD Ohio, 2009). Simply because it is—out of convenience—Pikarski who hands the DISH Network contract to the customer does not make him an agent of THRV, as he played no role in procuring the agreement between THRV and the customer, or DISH Network and the customer.[4]

Though the majority opinion and plaintiff rely heavily upon *Lincoln v Fairfield-Nobel*, 76 Mich App 514; 257 NW2d 148 (1977), that decision actually reveals why there is no genuine issue of material fact in this case as to whether an agency relationship existed. In *Lincoln*, the salesman was actively engaged in soliciting contracts between the company and its customers. The salesman used company material for his sales, used their advertising, and the customer contact was the salesman. *Id*. at 520. In other words, it was the salesman's job to seek out contracts for the company, while in the present case Pikarski only performed the service of installing satellite equipment. The contracts signed at the customers' homes were contracts

[4] Although plaintiff admits there exists no employer-employee relationship, I note that there is persuasive authority outside our jurisdiction concluding that installers of DISH Network or similar satellite products are independent contractors. See, e.g., *Mississippi Dep't of Employment Security v Harbin*, 11 So 3d 137, 140-142 (Miss App, 2009) and *Freund v Hi-Tech Satellite*, unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, decided May 31, 2006 (Docket No. 05-14091); 185 Fed Appx 782 (CA 11, 2006).

between the customer and DISH Network; the contract with THRV had already been made at THRV's store. Also, Pikarski never signed any papers on behalf of THRV. Thus, although the salesman in *Lincoln* was actively "bringing about contractual obligations" as discussed in *St Clair Intermediate School Dist*, Pikarski was merely performing THRV's pre-existing contractual obligation to install a satellite system.

Furthermore, THRV exercised very little control over Pikarski. THRV sometimes provided Pikarski with a schedule, but he was free to perform installations in any manner he felt the situation warranted. Furthermore, although plaintiff takes great pains to suggest that THRV required Pikarski to return the contracts to THRV the same day or as soon as possible, Pikarski indicated that he actually did this as "a common courtesy." It is also clear that he was free to return them by mail instead of delivering them personally.[5] As a result, there was no genuine issue of material fact, and as a matter of law Pikarski was not the agent of THRV.

In sum, Pikarski fits neither of the two main characteristics of an agent. He was not controlled by THRV and did not "bring about, modify, affect, accept performance of, or terminate contractual obligations" between THRV and its customers. I would hold that reasonable minds could not reasonably conclude that Pikarski was an agent of THRV, and would affirm the trial court's order.

/s/ Christopher M. Murray

[5] Additionally, payment to THRV from DISH Network was not contingent on DISH Network first receiving the contracts. Thus, there is no evidence that immediate return of signed DISH Network contracts was required or expected.