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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-218

Lori Ronning
as Trustee for the Next of Kin of James Parsons, decedent, et al.,
Respondents,

vs.

Thomas Gilbert Martin,
Respondent,

Morris Publishing, LLC, d/b/a Brainerd Dispatch,
Appellant.

Filed December 21, 2010
Reversed
Minge, Judge
Concurring specially, Ross, Judge

Aitkin County District Court
File No. 01-C7-07-000334

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Considered and decided by Johnson, Chief Judge; Minge, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

This appeal concerns a newspaper publisher's vicarious liability for damages caused by a part-time carrier. A Brainerd Dispatch newspaper carrier pulled ahead from a stop sign and crashed his car into a car occupied by a couple, seriously injuring them. The couple sued both the carrier and the Brainerd Dispatch's owner, Morris Publishing Company. Morris Publishing appealed after the district court denied its posttrial motions for judgment as a matter of law and for a new trial, arguing that because the carrier was not its employee but was an independent contractor, it is not liable for his negligent driving. Morris Publishing argues alternatively that trial errors require a new trial. Because we conclude the record only supports the conclusion that the carrier was an independent contractor, we reverse the judgment and do not address the alleged trial errors.

FACTS

James Martin had been working as a part-time Brainerd Dispatch newspaper carrier for less than two months when he drove his car into one driven by James[1] and Bonnie Parsons, resulting in this personal injury lawsuit by the Parsons against Martin and the newspaper's owner and publisher, Morris Publishing Company. Morris Publishing has 85 regular employees but it calls Martin and its 57 other carriers "independent contractors." Unlike Morris Publishing's regular employees, the carriers

[1] James Parsons is deceased. Lori Ronning, his trustee, maintains this action on behalf of his next-of-kin.

are part-time; their income is not subject to federal and state tax withholding; they are not directly supervised or disciplined by Morris Publishing; they receive no health insurance, retirement plan, or unemployment benefits; and they accrue no paid-vacation or paid-sick time.

Martin had signed an agreement with Morris Publishing designating Martin specifically as an "independent contractor" and "not an employee of the company." Under that agreement, Martin would buy newspapers from Morris Publishing and deliver them within a designated area. The contract described Martin's delivery duties but left the manner of delivery up to him:

> [The Contractor must] deliver a copy of the newspaper, including all parts, sections, inserts, pre-prints, supplements, samples, bags or other items furnished or authorized by company in a timely manner consistent with Company's delivery times as they may be announced to subscribers . . . in a dry, readable condition to each subscriber in the delivery area and to the satisfaction of each subscriber. . . . Contractor shall report all start and stop orders . . . to Company. . . . Contractor may deliver in any order and by whatever manner, means, method or mode Contractor chooses.

The contract required Martin to appoint Morris Publishing as Martin's agent for receipt of paid subscriptions, to treat subscription sales data as confidential, to obtain accident liability insurance with limits of $100,000 for property damage, $100,000 for bodily injury to a single person, and $300,000 for total bodily injury per accident, and to furnish a commercial surety bond to secure his obligations under the contract. The contract obligated Morris Publishing to pay Martin for all newspapers he delivered. It did not prohibit Martin from hiring others to deliver the papers assigned to him for delivery. The

delivery work was part-time; Martin had a full-time job elsewhere. There was evidence that despite the contractual provisions regarding Martin's purchase and sale of newspapers, Morris Publishing handled subscription and payment matters with subscribers.

Martin was delivering papers when he was involved in the early-morning collision that precipitated this lawsuit. The injured couple sued both Martin and Morris Publishing. Before trial, Morris Publishing moved for judgment as a matter of law on the theory that Martin was an independent contractor. The district court denied the motion. A jury found that Martin was Morris Publishing's employee and returned a verdict for the Parsons, awarding them $515,637.21.[2] Morris Publishing made posttrial motions for judgment as a matter of law or for a new trial. The district court denied the motions and entered judgment based on the jury's verdict. Morris Publishing appeals.

D E C I S I O N

Morris Publishing challenges the district court's failure to determine, as a matter of law, that Martin was an independent contractor rather than an employee. It alternatively asks this court to reverse the judgment and order a new trial based on several alleged trial errors. Because we conclude that Martin was an independent contractor, we do not discuss the alleged trial errors.

Judgment as a matter of law is appropriate if there is no legally sufficient evidentiary basis for a reasonable jury to find against the moving party. Minn. R. Civ. P. 50.01. We review de novo a district court's posttrial decision denying a motion for

[2] The judgment amount was reduced to $455,637.21 after posttrial motions.

judgment as a matter of law and will affirm unless, viewing the evidence in the light most favorable to the nonmoving party, the verdict is manifestly against the evidence. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn. 2003). In other words, we affirm if any competent evidence might sustain the verdict. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998).

The question of Martin's status either as Morris Publishing's employee or as its independent contractor is significant here because the collision victims sued Morris Publishing based on its vicarious liability for Martin's negligence. The parties do not dispute that an organization is vicariously liable for its employee's negligent acts committed in the scope and course of employment, *Lange v. Nat'l Biscuit Co.*, 297 Minn. 399, 404, 211 N.W.2d 783, 786 (1973), but it is not vicariously liable for negligent acts committed by its independent contractors, *Conover v. N. States Power Co.*, 313 N.W.2d 397, 407 (Minn. 1981). The parties disagree whether the facts are sufficient to sustain the jury's verdict that Martin was Morris Publishing's employee rather than an independent contractor.

Whether an employment relationship exists is a question of fact if the evidence is disputed. *See C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 133 (Minn. App. 2007). But the ultimate question of whether an individual is an employee or an independent contractor is not itself a question of fact. Rather, it requires the application of facts to the law on the employment status. *Id.* Thus, if the underlying facts surrounding Martin's relationship with Morris Publishing are not in dispute, the question of whether Martin was employed by Morris Publishing becomes one of law.

To determine whether a person is an employee or an independent contractor, courts should consider the following five factors: "(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W.2d 324, 326 (1964). The supreme court has repeatedly emphasized that the entity's right of control over the means but not the results of the tortfeasor's conduct remains "the most important single element" in determining whether the relationship demonstrates employment or independent contracting. *Boland v. Morrill*, 270 Minn. 86, 92, 132 N.W.2d 711, 715 (1965) (quotation omitted) (highlighting right-of-control preeminence); *see also C.B.*, 726 N.W.2d at 134 (stressing that the most important factor is the right to control); *Nichols v. Metro. Bank*, 435 N.W.2d 637, 639 (Minn. App. 1989) (same), *review denied* (Minn. Apr. 19, 1989); *Ossenfort v. Associated Milk Producers, Inc.*, 254 N.W.2d 672, 676 (Minn. 1977) (same).[3]

We begin by examining the right of Morris Publishing to control the means and manner by which Martin performed his delivery work. Here, there is no evidence that Morris Publishing specified whether or what type of vehicle Martin was to use or was in any way involved with the driving of its delivery persons. Martin was free to determine the order in which the newspapers were delivered to subscribers. Neither the contract nor the interaction between Morris Publishing and Martin indicates that Morris Publishing

[3] Our supreme court has also applied the various tests outlined in the Restatement (Second) of Agency, §§ 2, 220 (1958). *Boland*, 270 Minn. at 92, 132 N.W.2d 715.

specified the route he traveled to reach his delivery area. There is no indication that Morris Publishing instructed Martin how to drive safely and efficiently. The evidence here does not suggest that Morris Publishing expressed any concern, let alone control, over the condition or the appearance of Martin's delivery vehicle. The only control was the requirement that Martin deliver a dry Brainerd Dispatch newspaper, with inserts, within an established timeframe. In sum, Morris Publishing played no substantial role in controlling the means of Martin's work, and especially no role in controlling the manner of his driving.

We note that most of the evidence relevant to the other factors outlined in *Guhlke* support an independent contractor determination. The second factor is the mode of payment. Morris Publishing appears to control financial matters with subscribers. Martin was paid by the quantity of deliveries, rather than by the hour or on a general salary, and Morris Publishing did not make any deductions for income taxes or social security. Thus, he was paid for job performance, not wages. He was even allowed to hire a substitute.

The third factor is furnishing tools or material. Martin provided his own vehicle for his deliveries. This vehicle was Martin's principal work environment. He was responsible for gas, maintenance, licensing, and insurance. Aside from the exact newspaper-delivery destinations, Martin selected the route he would travel in reaching his delivery area. As for material, Morris Publishing supplied newspapers, the essential "product" involved in doing the delivery task. There is evidence that Morris Publishing supplied incidentals like rubber bands and plastic sleeves for newspapers. Although we

recognize that supplying the newspapers and incidentals supports the jury's finding, Martin's furnishing of the vital aspect of transportation strongly tilts this factor toward independent contractor.

The fourth *Guhlke* factor is control of the premises where the work is done. This has both been considered in the larger context of control in discussing the first factor and is part of the third factor concerning furnishing of tools. As we have seen, Morris Publishing had virtually no control over the premises where Martin conducted his work. The only premises requirement was maintenance of delivery tubes at subscribers' addresses.

The fifth *Guhlke* factor concerns the right of the employer to discharge. Martin's agreement with Morris Publishing was not subject to termination at will. Either party was required to give 30-days' notice before dissolving the relationship. This fact further supports the conclusion that Martin was an independent contractor rather than an employee.

We find two prior opinions to be most instructive to our analysis. The plaintiffs in *Ossenfort* were auto occupants who were injured when their car was struck by a driver who ran a stop sign while he was transporting milk. 254 N.W.2d at 676. They sued the milk processor and the jury found the driver was an employee and awarded damages, which was upheld on appeal. *Id.* The evidence in *Ossenfort* that was "of critical importance in sustaining the jury's verdict," demonstrated the milk processor exercised employer-like control over the drivers. *Id.* at 678. For example, the processor employed "fieldmen" who frequently exerted their authority to ride with the supposed independent

contractor's deliverers on their routes. *Id.* The fieldmen instructed the drivers as to safe driving, compliance with stop signs, and adhering to the speed limit. *Id.* They trained the drivers how to manage muddy roads and route changes. *Id.* They conducted drivers meetings where they discussed driver duties. *Id.* They supervised the drivers and made "suggestions" to the supposed independent contractor as to which drivers ought to be disciplined or discharged for poor performance, and the "independent" delivery operators all followed those "suggestions." *Id.* at 679. The milk processor's fieldmen also supervised the drivers regarding their own cleanliness and the cleanliness of their trucks. *Id.* at 678.

We also find instructive this court's prior opinion in *Neve v. Austin Daily Herald*, 552 N.W.2d 45 (Minn. App. 1996), a case with strikingly similar facts. There we found that a newspaper carrier was an independent contractor and we reversed the award of benefits by the commissioner of Economic Security. *Id.* at 48-49. The newspaper carrier in *Neve* had no set hours but, rather, could vary the time and order of her newspaper deliveries. *Id.* at 47. She received a flat daily fee for her work and was solely responsible for her own employment taxes. *Id.* at 46. She was also free to hire substitutes to perform her delivery work. *Id.* at 47. She delivered newspapers with her own vehicle and was required to maintain automobile insurance. *Id.* at 48. She was not subject to at-will discharge; rather, both parties were required to give three-weeks' notice of intent to discontinue the contractual relationship. *Id.*

Here, Martin could vary the order of his deliveries. His earnings were based on the number of newspapers delivered in his area. He was responsible for his own

employment taxes. He was free to hire additional personnel. He delivered newspapers with his own vehicle and maintained his own automobile-insurance coverage. He was not subject to at-will discharge; rather, both parties were required to give 30-days' notice of intent to discontinue the contractual relationship. We recognize that *Neve* arises out of a dispute over qualification for unemployment benefits, not tortious conduct. But the parties have not persuaded us that a different result should be reached in the tort area as compared to the unemployment program or that greater deference should be accorded the decision of a jury as compared to the decision of an unemployment judge.

We also note that our conclusion is consistent with the prevailing treatment in other jurisdictions of traditional newspaper carriers as independent contractors rather than employees:

> Although the dominant test in determining whether a person is an independent contractor or an employee [of the publisher] is who has the right to control the details of the work, a newspaper may establish some control over the operation of its carrier without becoming the carrier's employer. Thus, where decisions regarding the method of transportation used, the placement of the papers, the route taken, and whether or not one or several helpers are used are left entirely up to the news carrier, the newspaper is generally held not to exercise that degree of control over the news carrier as to create an employer-employee relationship, since in the newspaper industry, restrictions over time, place, and manner of delivery alone generally do not create an employer-employee relationship; rather, they reflect only the publisher's insistence that the carrier supply what the publisher has promised to the customer—a dry newspaper, conveniently delivered in a timely manner on a relatively consistent schedule.

19 Richard A. Lord, *Williston on Contracts* § 54:5 (4th ed. 2001); *see also LaFleur v. LaFleur*, 452 N.W.2d 406, 410 (Iowa 1990) (holding that newspaper carrier was an independent contractor as a matter of law); *Fleming v. Foothill-Montrose Ledger*, 139 Cal. Rptr. 579, 583 (Cal. Ct. App. 1977) (same); *Cable v. Perkins*, 459 N.E.2d 275, 277 (Ill. 1984) (same).

We note the injured respondent's claim that disputed material facts exist. For example, the parties dispute whether Morris Publishing or Martin paid for sleeves and rubber bands to wrap the newspapers during inclement weather. They also dispute whether Martin actually purchased and sold newspapers or simply delivered them with Morris Publishing handling the finances, and they dispute the impact of a nonpaying subscriber on Martin's compensation. But these factual disputes are not material. In light of the abundant facts supporting the determination that Martin is an independent contractor, these immaterial factual disputes do not shield appellants from judgment as a matter of law.

On balance, the importance of the control factor and the support the other *Guhlke* factors give to the independent contractor classification are determinative of the outcome in this case. We hold that the jury lacked a basis to deem Morris Publishing to be Martin's employer.

Morris Publishing argues alternatively that it should be granted a new trial based on its claims of jury bias, an erroneous evidentiary ruling, and an improper cross-

examination. We do not address the alleged trial errors in light of our determination that Morris Publishing is entitled to judgment as a matter of law.

Reversed.

Dated:

ROSS, Judge (concurring specially)

I concur in the majority's conclusion because the supreme court's reasoning in *Ossenfort v. Associated Milk Producers, Inc*., 254 N.W.2d 672 (Minn. 1977), a case eerily similar to this one, unquestionably directs us to reverse. I write separately to emphasize the important distinction that this court appropriately noticed in *Neve v. Austin Daily Herald*, 552 N.W.2d 45 (Minn. App. 1996).

That *Ossenfort*'s reasoning applies here and resolves the issue on appeal is clear. In *Ossenfort*, the question of an entity's vicarious liability was challenged on appeal after a jury found that the entity was the employer of a purported independently contracted delivery driver who ran a stop sign colliding with and seriously injuring or killing two occupants of another car. 254 N.W.2d at 677. That precisely describes this case also. The *Ossenfort* court stated and demonstrated that, in vicarious liability cases, our paramount consideration in determining whether an employment relationship arises from the circumstances relating an entity to its allegedly negligent worker is whether the entity has the right to control the means but not the results of the worker's conduct. *Id.* at 676. In *Ossenfort*, the presence of the multiple facts establishing the entity's clear control over its delivery drivers was "critical" to the supreme court's sustaining the jury's finding of an employment relationship. *Id*. at 678. And so here, the complete absence of those same "critical" right-of-control facts requires our reversing the jury's finding of an employment relationship.

Although *Ossenfort* entirely resolves this appeal, the majority goes further and substantially relies also on *Neve v. Austin Daily Herald*, and it indicates that *Neve* is directly on point. This is where I part with the majority.

This case does resemble *Neve*, but the resemblance is only skin deep and we should not overlook the important difference. In *Neve*, we also considered whether a particular newspaper carrier was an employee of the newspaper. But *Neve* answered a question that is materially different from the question posed here. In *Neve*, although we considered whether the worker was an employee or an independent contractor, we did so in a dispute about reemployment insurance, not vicarious liability. *Neve*, 552 N.W.2d at 47. It is true that the usual factors from *Guhlke v. Roberts Truck Lines*, 268 Minn. 141, 143, 128 N.W. 2d 324, 326 (1964), apply to determine employment status in administrative and vicarious liability cases alike. But important distinctions exist in the degree of appellate deference that we should give to a tribunal's finding or holding that a person is an employee, depending on the nature of the action and of the tribunal from which the appeal is taken. *Neve*, 552 N.W.2d at 47. The majority today instead reasons that "[no] greater deference should be accorded the decision of a jury as a finder of fact as compared to the decision of an unemployment judge." But this reasoning seems to me to be directly opposed by *Neve*, in which the majority of our court expressly criticized the *Neve* dissenting judge for overlooking the historic distinction in appellate deference to be afforded to "tort and workers' compensation decisions" as compared to decisions "reviewing the Commissioner's determination in reemployment insurance cases." *Id.*

The question of whether a tortfeasor is an employee or an independent contractor in the common-law vicarious-liability setting arises from a legal landscape entirely different from the question of employment status in other areas of law, such as income tax, administrative unemployment benefits, statutory job discrimination, breach of employment-contract, workers compensation, and so forth. So the different legal theories and policies that created the reasons to classify persons either as employees or independent contractors in different legal settings naturally may lead to slightly nuanced or even substantially different standards of proof, burden shifting, or standards of review. The *Neve* court cautioned against our oversimplifying (and mistakenly merging) the treatment of all employment-status questions reaching us on appeal as if the legal arenas from which the questions arise are all the same. I echo that caution. Based on *Neve*'s clear admonition, because *Neve* was an administrative reemployment insurance appeal rather than a vicarious liability jury appeal, its holding provides only indirect value in vicarious liability cases and peripheral support for our conclusion today.