

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1256

ccw
TMH
PMC
JEANETTE LEWIS, MARGARET ABELS, AND BURLIN PINION,
INDIVIDUALLY, AND ON BEHALF OF THEIR DECEASED
MOTHER, ALICE LEWIS

VERSUS

CHARLES KAMRATH, CREEK SERVICES, LLC, HARDWAY
TRUCKING, LLC, AND RISCOM WHOLESALE INSURANCE, LLC

CONSOLIDATED WITH

NO. 2014 CA 1257

LOUIS A. LEWIS, JR. THROUGH HIS AGENT-IN-FACT,
LOUIS A. LEWIS, III

VERSUS

CHARLES KAMRATH, CREEK SERVICES, LLC, HARDWAY
TRUCKING, LLC, AND RISCOM WHOLESALE INSURANCE, LLC

Judgment Rendered: MAR 06 2015

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On Appeal from the
21st Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Trial Court Numbers 139,427 c/w 139,751

Honorable Brenda Bedsole Ricks, Judge Presiding

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* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

These consolidated matters involve the trial court's dismissal of the plaintiffs' wrongful death and survival claims against a civil contractor on summary judgment. The trial court's ruling was based upon a finding that the alleged tortfeasor was an independent contractor for whom the civil contractor could not be held vicariously liable. For the following reasons, we find the trial court's grant of summary judgment was premature, and we therefore, reverse and remand.

FACTS AND PROCEDURAL HISTORY

A serious accident occurred on February 24, 2012, when a flatbed trailer suddenly detached from Charles Kamrath's pickup truck and struck an oncoming vehicle driven by Alice Lewis on Cullom Road in Springfield, Louisiana. Lewis sustained severe injuries and ultimately died shortly after the accident occurred. At the time of the accident, Kamrath was en route to a bridge replacement job site in Hammond, Louisiana, because he had been asked to move a bulldozer owned by a civil contracting company, Creek Services, LLC. Approximately two weeks prior to the accident, Kamrath had moved the same bulldozer with the same trailer, without incident, for \$100.00 cash. Kamrath's only other contact with Creek Services involved the use of his property for depositing dirt and timber material that was removed from the Hammond job site where Creek Services was demolishing and replacing an old bridge.

Lewis's adult children, Jeannette Lewis, Margaret Abels, and Burlin Pinion, and her surviving spouse, Louis A. Lewis, Jr., (hereafter referred to collectively as "the plaintiffs") filed two separate lawsuits against Kamrath and Creek Services, as well as their respective insurers, Allstate Insurance Company and Houston Specialty Insurance Company. The plaintiffs claim that Creek Services was vicariously liable for the wrongful death of Lewis under the doctrine of *respondeat superior* for the

negligent actions of its employee, Kamrath.¹ The two lawsuits were consolidated on September 6, 2013.² Creek Services denied that Kamrath was ever its employee, and thus, Creek Services maintains it is not responsible for Kamrath's actions.

In November 2013, Creek Services and Houston Specialty (hereafter referred to collectively as "the defendants") filed a motion for summary judgment seeking dismissal on the basis that Creek Services dealt with Kamrath as an independent contractor and could not be held vicariously liable for the negligence of any person over whom Creek Services exercised no control. In support of their motion, the defendants relied on excerpts from the deposition testimony of Kamrath, the affidavit of Creek Services' owner and CEO, Terri Hightower, and the policy of insurance issued to Creek Services. In his deposition, Kamrath testified that he determined which one of his three trailers to use for moving the Creek Services' bulldozer and that he did not have any help in hooking up his trailer or loading/unloading the bulldozer. He also stated that his contact with Creek Services was through James Snow, and he did not have a written contract for his bulldozer moving service or for moving and accepting the timber and dirt materials at his property. In her affidavit, Hightower declared that Creek Services had never employed Kamrath, had never issued W-2 wages or paid any employment taxes for Kamrath, and had never provided any training, control, or supervision regarding Kamrath's actions or work performance.

The hearing on the defendants' motion for summary judgment was originally scheduled for January 21, 2014, but by an unopposed joint motion to continue, the

¹ Both lawsuits were filed in the Twenty-First Judicial District Court. The first lawsuit was filed by Lewis' children in suit number 139,427 on November 21, 2012. The second lawsuit was filed by Lewis' spouse through his agent-in-fact, Louis A. Lewis, III, in suit number 139,751 on January 2, 2013. Initially, the lawsuits incorrectly identified Creek Services' insurer as Riscom Wholesale Insurance, LLC; however, by amended petition, the correct insurer of Creek Services, Houston Specialty Insurance Company, was subsequently named as a defendant.

² The record in these consolidated matters reflects that the judgment on the motion to consolidate was apparently re-submitted and signed on August 7, 2014. This appeal does not involve a question as to the consolidation.

hearing was reset for March 24, 2014. In their joint motion to continue, the parties indicated that three key depositions (Creek Services' 1442 deposition set for January 14, 2014; James Snow's deposition; and Buck Hamilton's deposition) were all necessary to determine the fact-intensive issue of whether Kamrath was a Creek Services' employee at the time of the accident. The trial court granted the joint motion to continue and reset the hearing two months later, on March 24, 2014. However, on March 11, 2014, the plaintiffs filed a second motion to continue the hearing, requesting additional time to complete the scheduled March 13, 2014 deposition of Snow, who was living in Oklahoma, and of Hamilton, which was not yet set because of difficulty in locating the witness, who was also apparently living in another state. Despite acknowledging that both Snow and Hamilton were key witnesses on the control issue in the initial joint motion to continue, the defendants opposed the second continuance.

After Snow's deposition was taken a few weeks before the scheduled summary judgment hearing, the plaintiffs filed an opposition to the defendants' motion for summary judgment. The plaintiffs relied on excerpts from Snow's deposition testimony that Hamilton was the Creek Services' employee who would have actually provided instructions to Kamrath as to how and where to move the bulldozer. The plaintiffs also cited the deposition testimony of Creek Services' corporate representative, Hightower, to the effect that Snow had the full authority to retain services needed to accomplish small tasks on the bridge project, such as moving the bulldozer. The plaintiffs argued that the conflicting testimony regarding the degree of control exercised by Creek Services over Kamrath created a genuine issue of material fact that precluded summary judgment.

On March 24, 2014, before the trial court heard argument on the summary judgment motion, the plaintiffs urged their pending motion to continue so they could depose Hamilton. The plaintiffs informed the trial court that after some difficulty,

Hamilton had been located by a private investigator, and arrangements had been made to subpoena Hamilton in Mobile, Alabama, and depose him on April 4, 2014. Despite the short delay requested by the plaintiffs, the trial court denied the plaintiffs' motion to continue. After further argument by counsel on the motion for summary judgment, the trial court granted summary judgment in favor of the defendants, dismissing the plaintiffs' claims against them.

The plaintiffs appeal from the summary judgment dismissal of the defendants, contending that the trial court legally erred in denying their motion to continue so they could depose a critical fact witness. The plaintiffs also argue the trial court erred in granting summary judgment, because there are unresolved matters of material fact involving issues of control, Hamilton's role in controlling Kamrath, and whether Kamrath was an agent on a mission for Creek Services.³ The defendants assert that the plaintiffs' arguments are speculative, the plaintiffs had adequate time for discovery, and the undisputed facts show that Creek Services exercised no control over the bulldozer moving service provided by Kamrath.

LAW AND ANALYSIS

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Shelton v. Standard/700 Associates**, 2001-0587 (La. 10/16/01), 798 So.2d 60, 64-65; **Cowart v. Lakewood Quarters Ltd. Partnership**, 2006-1530 (La. App. 1st Cir. 5/4/07), 961 So.2d 1212, 1214. A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion

³ The plaintiffs have not asserted a claim that Creek Services is liable in its individual capacity for the negligent hiring of an irresponsible independent contractor or for not barring Kamrath from moving heavy construction equipment without proof of valid vehicle registration and insurance or up-to-date maintenance on his pickup truck and trailer. Instead, the plaintiffs' claims against Creek Services focus on vicarious liability for the negligent actions of Kamrath, who was Creek Services' agent on a mission of moving their bulldozer when the accident occurred.

for summary judgment, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B)(2); **Dickerson v. Piccadilly Restaurants, Inc.**, 99-2633 (La. App. 1st Cir. 12/22/00), 785 So.2d 842, 844. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is “material” for summary judgment purposes can be seen only in light of the substantive law applicable to the case. **Dickerson**, 785 So.2d at 844.

The concept of vicarious liability is codified in La. Civ. Code art. 2320, which generally provides that employers are answerable for the damage occasioned by their employees in the exercise of the functions in which they are employed. However, Louisiana jurisprudence has held that vicarious liability generally does not apply when an independent contractor relationship exists. See **Triplette v. Exxon Corp.**, 554 So.2d 1361, 1362 (La. App. 1st Cir. 1989). A well-established exception to this jurisprudential rule is that a principal may be liable if it maintains operational control over the activity in question.⁴ See **Triplette**, 554 So.2d at 1363. Although courts look to the totality of the circumstances when determining whether an employment relationship exists, the single most important inquiry is whether the principal retained the right to exercise control over the work, rather than the control actually exercised. **Hickman v. Southern Pacific Transport Company**, 262 La. 102, 262 So.2d 385, 391 (La. 1972); **Sasser v. Wintz**, 2011-2022 (La. App. 1st Cir. 9/4/12), 102 So.3d 842, 848-49. See also **Davis v. State Farm Ins. Co.**, 558 So.2d 636, 639-40 (La. App. 1st Cir. 1990).

The distinction between an employee and an independent contractor is a factual determination that must be decided on a case-by-case basis. **Tower Credit, Inc. v. Carpenter**, 2001-2875 (La. 9/4/02), 825 So.2d 1125, 1129; **Hulbert v.**

⁴ Another exception that is not applicable here applies if the activity engaged in by the independent contractor is “ultrahazardous.” See **Triplette**, 554 So.2d at 1362.

Democratic State Central Committee of Louisiana, 2010-1910 (La. App. 1st Cir. 6/10/11), 68 So.3d 667, 670, writ denied, 2011-1520 (La. 10/7/11), 71 So.3d 316. In determining whether an independent contractor relationship exists, courts consider the following factors: (1) a valid contract exists between the parties; (2) the work is of an independent nature; (3) the contract allows for the work to be done according to the contractor's own methods, without being subject to control and direction except as to the result of the services to be rendered; (4) a specific price for the overall undertaking is agreed upon; and (5) the duration of the work is for a specific time and not subject to termination at the will of either party. See Hickman, 262 So.2d at 390-91.

Our *de novo* review of the evidence presented – with our focus on the key issue of whether Creek Services retained the right to exercise control over Kamrath's moving of Creek Services' bulldozer – convinces us that there may be some merit to the plaintiffs' argument that Hamilton's deposition testimony is critical to the determination of the control issue in this case. Hamilton may be able to shed light on the contradictory testimony regarding Kamrath's status and what, if any, control was exercised over Kamrath's work. The record reveals that the plaintiffs were not accorded reasonable time to locate, subpoena, and depose an out-of-state key witness, Hamilton. In their original motion to continue the summary judgment hearing, the plaintiffs and the defendants jointly acknowledged that the plaintiffs could not present a complete defense to the motion for summary judgment without the sworn testimony of Snow *and* Hamilton. The deposition testimony of a Creek Services' employee, Snow; subsequently revealed that Hamilton was the only Creek Services' employee who allegedly had contact with Kamrath regarding the movement of Creek Services' bulldozer. The plaintiffs informed the trial court that their investigator had experienced difficulty in locating Hamilton out-of-state, but that the witness had finally been located, and a date had been selected to subpoena

Hamilton for his deposition. That date was only two weeks after the scheduled hearing on the motion for summary judgment.

When a party provides sufficient reasons why additional evidence pertaining directly to an unresolved factual issue is necessary to oppose a summary judgment motion, but could not be produced without extra time, it is an abuse of discretion for the trial court to deny the request for a continuance. See Welch v. East Baton Rouge Parish Metropolitan Council, 2010-1532 (La. App. 1st Cir. 3/25/11), 64 So.3d 249, 254-55. Based on our review of the record and the applicable jurisprudence, we find the trial court abused its discretion in denying the plaintiffs' motion for a continuance. The plaintiffs are entitled to a reasonable time to subpoena and depose Hamilton, who may have information relevant to the issue of the right to control the work performed by Kamrath. By refusing to allow the plaintiffs a reasonable opportunity to depose Hamilton, the trial court abused its discretion and prematurely granted summary judgment in favor of the defendants. See Welch, 64 So.3d at 255.

CONCLUSION

For the reasons stated, we reverse the trial court's judgment and remand the case for further proceedings in accordance with the law and our holdings herein.⁵ All costs of this appeal are assessed against the defendants, Creek Services, LLC, and Houston Specialty Insurance Company.

REVERSED AND REMANDED.

⁵ Given our conclusion that the trial court prematurely granted the defendants' summary judgment, we need not address the plaintiffs' remaining assignment of errors.