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NO AGENCY LIABILITY FOR INDEPENDENT CONTRACTOR NEGLIGENCE

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Negligence liability presupposes some measure of control over the operational details of an unreasonably dangerous condition or conduct which caused plaintiff's injury. Under the traditional "Master/Servant Rule" and "vicarious liability" doctrine, the master will be held responsible for the negligent acts of its servants committed within the scope of the servant's authority. In other words, an agency will be liable for the negligent acts of its agents, both employees and volunteers, when such negligence was related or incidental to an agent's responsibilities.

On the other hand, unlike agents, the master will not be liable when the negligence which produces plaintiff's injury is caused by an independent contractor. Unlike a servant/agent, a master/agency does not exercise sufficient control over the manner in which an independent contractor operates or accomplishes a task. The *Restatement (Second) of Agency § 2* provides the following definitions which distinguish "Master, Servant, and Independent Contractor":

> (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
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> (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
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> (3) An independent contractor is a person who contracts with another to do something for him, but who is not controlled by the other nor with respect to his physical conduct in the performance of the undertaking.

The cases described herein illustrate these general legal principles and the legal analysis applied by a federal and a state court to determine whether an independent contractor relationship existed when a public parks and recreation department arranged for security at a state fair and entertainment at a medieval festival. In both instances, the courts cited expressed language in the contract as significant evidence in establishing an independent contractor relationship. Under such circumstances, the agency is not responsible and held liable for the alleged negligence of the independent contractor.

FREE BIRD

In the case of *Thomas v. Oregon State Police*, 2013 U.S. Dist. LEXIS 90938 (Dist. Ore. 6/25/13), the issue before the federal district court was whether defendant Oregon Parks and Recreation Department (OPRD) was liable for the alleged negligence of an agency and individuals providing security services at a state fair.

On August 14, 2009, OPRD entered into a contract with Starplex Corporation for the provision

of security, crowd management, and related services at the Oregon State Fair (OSF). On September 3, 2010, Starplex provided security services at a Lynyrd Skynyrd concert during the Fair. Plaintiff Robert Thomas (Thomas) attended that concert and, while there, participated in a physical altercation with another attendant.

Following the altercation, Starplex employees asked Thomas to leave the premises and escorted him to the center aisle. Thomas responded by demanding that security remove the other attendant as well. While moving towards the exit, Thomas was taken to the ground multiple times and placed in handcuffs by Starplex employees, resulting in Thomas' fractured collarbone.

Thomas conceded that Starplex was not an employee of OPRD. Instead, Thomas argued Starplex was acting on behalf of OPRD and, therefore, Starplex employees were agents of OPRD. As a result, Thomas claimed OPRD should be held vicariously liable for the alleged negligence of Starplex security officers. In response, OPRD maintained Starplex and its employees were not acting as OPRD agents during the Fair. As characterized by OPRD, "nothing in the security contract with Starplex nor any other evidence established that OPRD had a right or duty to monitor Starplex employees." As a result, OPRD claimed it was entitled to summary judgment which would effectively dismiss Thomas' negligence claims against OPRD.

AGENCY RELATIONSHIP?

The issue before the federal district court was, therefore, "whether a reasonable jury could find that Starplex was a non-employee agent of defendant." For Starplex to be considered a non-employee agent of OPRD, the court would require Starplex to: (1) be subject to OPRD's control and (2) Starplex would have to act on behalf of OPRD.

Moreover, the court noted that a principal, in this case OPRD, "can be liable for the torts of a non-employee agent [in this case Starplex] only if those actions are within actual or apparent authorization of the principal":

> [A] principal is vicariously liable for an act of its nonemployee agent only if the principal intended or authorized the result or the manner of performance of that act. Intention or authorization over the manner of performance must include the right to control the physical details of the conduct of the agent that gave rise to the tort claim.

In this particular instance, Thomas had argued that Starplex was subject to OPRD's control, and thus OPRD's agent based on "the terms of the Contract."

Applying "general principles of contract interpretation," the federal district court noted that "contract terms are to be given their ordinary meaning." Further, "when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself." Examining the terms of OPRD's contract with Starplex, the court found OPRD's "methods of control" stated in the contract did not affect "the performance of Starplex or its employees in a way that would establish an agency relationship."

> Although the plain language of the Contract does allow for OPRD to determine and modify the delivery schedule, as well as to evaluate the quality of the completed performance, these provisions do not serve as evidence that Starplex was subject to OPRD's control.

Most importantly, the court noted that the contract specifically stated that "OSF cannot and will not control the means or manner of Contractor's performance." Further, the court found "[t]he remainder of the Contract also serves as evidence that OPRD did not possess control sufficient to establish an actual agency relationship with Starplex."

> All transportation, scheduling, and management of employees was to remain the sole responsibility of Starplex. OPRD could not hire Starplex employees; OPRD merely retained the right to "request" that Starplex remove an employee "[i]n the event that Contractor's employees) are found to be violating . . . any other provisions of the Contract."

As characterized by the court, these provisions were merely "a means for OPRD to enforce the Contract provisions," not evidence of OPRD's contractual right to exercise control over Starplex. In particular, the court found "nothing in the Contract gives OPRD the authority to hire, train, manage, monitor, or supervise Starplex employees, nor is there any evidence in the record that OPRD actually did so." As a result, under such circumstances, the federal district court concluded "a reasonable jury could not find that Starplex was subject to OPRD's control, such that an actual agency relationship existed."

In addition, the court found "insufficient evidence in the record to establish that Starplex was acting on behalf of OPRD." In so doing, the court noted that "Starplex employees never affirmatively indicated or identified themselves to plaintiff as employees or representatives of OPRD."

> [W]hile providing security services at the OSF, Starplex employees wore clothing that "clearly identifies the individual as being employed by Contractor." Further, plaintiff specifically stated that he could distinguish between Starplex employees and state employees.

Accordingly, under the circumstances, the federal district court concluded that a jury could not reasonably find that Starplex was acting on behalf of OPRD.

"Even if an actual agency relationship existed between OPRD and Starplex," the federal district court found no vicarious liability could be attributed to OPRD because "nothing in the Contract suggests that OPRD 'intended or authorized' either the 'result' (plaintiff's broken collarbone) or 'the manner of performance' of Starplex's employees." Instead, the court noted that the contract specifically stated that "OSF cannot and will not control the means and manner of Contractor's performance."

> [A]lthough the Contract authorizes the means and manner of performance to some extent by allowing Starplex employees to physically escort individuals out of the

> venue, it nonetheless does not support the conclusion that OPRD had the right to control the physical manner in which Starplex employees carried out their actual duties.

Accordingly, the federal district court concluded "plaintiff's claim fails to the extent it is premised on the theory that an actual agency relationship existed between OPRD and Starplex."

APPARENT AGENCY?

Absent an "actual agency relationship," the federal district court then considered Thomas' claim that "Starplex was an apparent agent of OPRD and, therefore, should be vicariously liable." According to the court, "for apparent authority to support potential liability," Thomas would have to demonstrate "(1) OPRD represented, or 'held out,' Starplex as its agent; and (2) plaintiff actually and justifiably relied on those representations":

> Apparent authority can be created only by some conduct of the principal that, when reasonably interpreted, causes a third party to believe that the principal consents to have the apparent agent act for him on that matter. The third party must also rely on that belief.

Under the circumstances of this case, the federal district court found no evidence of apparent authority existed which would reasonably indicate Starplex was OPRD's agent.

> The Contract specifies that Starplex personnel were not OPRD's employees; the Contract also prohibited Starplex from taking any action that would create the appearance it was OPRD's agent. The record before the Court reveals that Starplex acted in accordance with these provisions and, additionally, OPRD did nothing to give the appearance that the Starplex security personnel involved in plaintiff's injury were its agents.
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> Specifically, Starplex employees did not indicate in any way that they were state employees or wear any apparel indicating they were agents of OPRD, and OPRD did not provide Starplex with vehicles, logos, or marks for vehicles or apparel that might lead a reasonable person to believe Starplex employees were agents of OPRD.

As a result, the federal district court found no evidence on the record indicating OPRD represented to Thomas that "the security personnel working at the OSF on September 3, 2010 were acting under its authority." Moreover, the court found no evidence that Thomas in fact relied upon "OPRD's alleged representation that Starplex was its agent." Further, the court found any such reliance would not have been reasonable to think Starplex was OPRD's agent. The federal district court, therefore, concluded that Thomas' claim also failed "to the extent it is premised on the theory that an apparent agency relationship existed between OPRD and Starplex."

As a result, the federal district court granted OPRD's motion for summary judgment and

dismissed OPRD from the case.

MEDIEVAL MISHAP

In the case of *Grant v. Washington Heights and Inwood Development Corp.*, 2009 N.Y. Misc. LEXIS 5384; 2009 NY Slip Op 31665(U) (7/21/2009), Matthew Grant, age 10, was injured while attending the "Medieval Festival" with his mother, Susan Taylor, at Fort Tryon Park on October 8, 2006.

The festival drew throngs of people and featured numerous entertainment events for both children and adults. As part of one of these events, about one hundred children were divided into two groups, the light and the dark. The children were all given foam swords and were told to hit with swords the children from the opposing team. A stricken child was to act "dead" by lying motionless on the ground. Grant participated in the play and was injured when he tripped on one of the "dead" children lying on the ground.

Taylor brought a cause of action against the City on behalf of Grant for negligent supervision and oversight of the event. In response, the City claimed it was entitled to summary judgment because the City's actions were not the legal cause of Grant's injuries. In so doing, the City argued that it "owed Grant no special duty to protect him from the alleged negligent supervision" of co-defendants Washington Heights and Inwood Development Corporation (WHID) and the Wayfinder Experience, Inc. (Wayfinder). Specifically, the City contended that it "did not breach a duty of care" owed to Grant because "WHID was an independent contractor under the terms of a contract between the City and WHID."

Pursuant to the terms of the contract, the City contended WHID had "assumed the responsibility for organizing and overseeing the Medieval Festival, including making arrangements for the services of instructors who supervised the 'jousting' play during which Grant was injured." Moreover, the City asserted that WHID had subsequently "contracted with Wayfinder, which provided its employee Rufus Griffin Johnston and an apparent independent contractor Jacques Covell as the instructors for the subject 'jousting' event."

As a general rule, the court noted that "a principal is not vicariously liable for the independent contractor's negligent acts or omissions, absent appreciable amount of supervision, oversight, and control exercised by the principal over the contractor's performance." Moreover, the court acknowledged that "mere retention of general supervisory powers over an independent contractor is insufficient to impose vicarious liability on the principal." In this particular instance, the court found evidence that the City's "involvement with, and participation at, the Medieval Festival was limited":

> The City granted WHID a facility permit and had several on-sight meetings and walkthroughs with WHID contacts in preparation for the festival. The City also provided pole taps, put up the banners on the light poles and arranged for the recycling services before and during the event. Additionally, the City set up the stage and the bleachers for the musical entertainment. The New York Police Department and the Parks and Recreation enforcement patrol provided security.

More significantly, the court noted that the City "did not take upon itself any tasks involving the provision of entertainment and vending services."

> None of the City's employees undertook participating in or supervising the plays, games and other recreational activities. Nor did the City direct the actions of Rufus Johnston or Jacques Covell of Wayfinder before or during the "jousting" game, at which Grant was unfortunately injured.

Accordingly, the court concluded that "the City did not exercise sufficient control over the recreational activities at the Medieval Festival to raise a triable issue of fact [i.e. unresolved questions warranting a trial] as to whether it was vicariously liable for the acts of the instructors provided by WHID and Wayfinder."

Having found the City owed no legal duty to supervise or provide oversight to this particular event in which Grant was injured, the court ordered and plaintiff's claims be dismissed and summary judgment be entered in favor of the defendants the City of New York and City of New York Parks and Recreation.

PREMISES EXCEPTION

The above described cases illustrate the general non-liability rule for independent contractors providing services such as security and supervision at events. In contrast, as described below, an exception to the general rule exists which may impose landowner liability when the injury arises out of an unsafe condition on the premises of an agency created by the independent contractor.

In the case of *Patton v. Spa Lady, Inc.,* 772 P.2d 1082 (Ak. 4/28/1989), the issue before the Alaska state supreme court was "whether the employer of an independent contractor is vicariously liable to a person who is injured on the employer's business premises by an unsafe condition in the premises as a result of the independent contractor's negligence."

Plaintiff James Patton was visiting a fitness center operated by defendant Spa Lady when he received an electrical shock from an electrical outlet while leaning over a vanity sink to inspect himself in the mirror. The electrical outlet had been installed by two independent contractors, J.D.'s Electric, Inc. (J.D.'s) and Alyeska Electrical, Inc. (Alyeska). The parties all agreed that Spa Lady would be entitled to a summary judgment dismissing Patton's claims if Spa Lady was not vicariously liable for the negligence of J.D.'s and Alyeska.

As noted by the state supreme court, "[t]he general common-law rule, embodied in section 409 of the *Restatement (Second) of Torts* (1965) sometimes called the 'independent contractor rule,' is that an employer is not vicariously liable for the torts of its independent contractor." On the other hand, the court acknowledged that "[t]his rule is subject to a host of exceptions, codified in sections 410-29 of the Restatement." In this particular instance, Patton argued that "the exception set forth in section 422" would "impose liability vicariously on Spa Lady for the negligence of J.D.'s and/or Alyeska."

As cited by the state supreme court, section 422 of the Restatement regarding "Work on Buildings and Other Structures on Land" provided as follows:

> A possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure (a) while the possessor has retained possession of the land during the progress of the work, or (b) after he has resumed possession of the land upon its completion.

According to the state supreme court, "vicarious liability is a doctrine designed to ensure that a financially responsible party is available to compensate the injured victim." In this particular instance, the court found Patton was one of the "others on or outside of the land" to whom Spa Lady is vicariously liable under section 422 of the Restatement. In addition to section 422 of the Restatement, the state supreme court provided the following reasoning for its holding that an "employer of an independent contractor may be held vicariously liable for injuries caused by the negligence of the latter":

> Between an innocent possessor of land and an innocent third party injured because of the negligence of the possessor's independent contractor, the possessor should bear any loss because the possessor is in a better position to know what risks of injury exist and to take steps to guard against them. Spa Lady was also in a better position than was Patton to contract for insurance or indemnification to cover any damages caused by an independent contractor's negligence.

As cited by the state supreme court, "utilizing the rule stated in section 422 of the Restatement comports with decisions from several other states." In particular, the court noted that numerous decisions have held "business owners liable for injuries sustained on their premises by persons other than employees of independent contractors where the injuries were caused by the independent contractors' negligence."

As a result, the state supreme court reversed the summary judgment of the trial court in favor of Spa Lady and remanded (i.e., sent back) the case to the trial court for further proceedings to consider whether Spa Lady was vicariously liabile for the alleged negligence of its independent contractors.

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